



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 11, 2017

Ms. Elizabeth Cater
Attorney
Texas Parks & Wildlife Department
4200 Smith School Road
Austin, Texas 78744-3291

OR2017-07618

Dear Ms. Cater:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 654098 (TPWD Nos. 2017-02-R67 and 2017-02-R60).

The Texas Parks & Wildlife Department (the "department") received two requests from different requestors for a specified investigation. You claim portions of the submitted information are excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses the doctrine of common-law privacy, which protects information that (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *Ellen*, 840 S.W.2d at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the public's interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held "the public did not possess a legitimate interest in the

identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released.” *Id.*

Thus, if there is an adequate summary of an investigation of alleged sexual harassment, the investigation summary must be released under *Ellen*, but the identities of the victims and witnesses of the alleged sexual harassment must be redacted, and their detailed statements must be withheld from disclosure. *See* Open Records Decision Nos. 393 (1983), 339 (1982). However, when no adequate summary exists, detailed statements regarding the allegations must be released, but the identities of witnesses and victims must still be redacted from the statements. We note that, because common-law privacy does not protect information about a public employee’s alleged misconduct on the job or complaints made about a public employee’s job performance, the identity of the individual accused of sexual harassment is not protected from public disclosure. *See* Open Records Decision Nos. 438 (1986), 405 (1983), 230 (1979), 219 (1978). We also note supervisors are generally not witnesses for purposes of *Ellen*, except where their statements appear in a non-supervisory context.

In this instance, the submitted information pertains to a sexual harassment investigation and, thus, is subject to the ruling in *Ellen*. Upon review, we find the submitted information consists of an adequate summary of this investigation. The summary is not confidential under section 552.101 in conjunction with common-law privacy. *See Ellen*, 840 S.W.2d at 525. We note, however, information within the summary that identifies the victims and witnesses is generally confidential under common-law privacy. *See id.* In this case, the second requestor is the alleged sexual harassment victim and the first requestor is a witness in the investigation. Section 552.023 of the Government Code states a person has a special right of access to information that relates to the person and that is protected from disclosure by laws intended to protect the person’s privacy interest. *See* Gov’t Code § 552.023(a); Open Records Decision No. 481 at 4 (1987) (governmental body may not deny access to whom information relates or person’s authorized representative on grounds that information is considered confidential by privacy principles). Thus, the requestors have a special right of access to the information you have marked pertaining to themselves, and the department may not withhold this information from the respective requestors. Accordingly, only the identifying information of the witnesses you have marked in the summary, except where we have marked for release, must be withheld from the second requestor under section 552.101 in conjunction with common-law privacy and the holding in *Ellen*. In addition, only the identifying information of the victim and witnesses other than the first requestor you have marked in the summary, except where we have marked for release, must be withheld from the first requestor under section 552.101 in conjunction with common-law privacy and the holding in *Ellen*. We have also marked additional identifying information of a witness that must be withheld from both requestors.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government Code. Gov’t Code § 552.117(a)(1). Whether a particular item of information is protected by

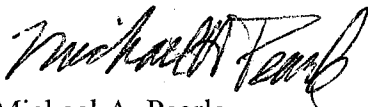
section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. See Open Records Decision No. 530 at 5 (1989). Information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Thus, if the individual whose information we have marked timely requested confidentiality under section 552.024, the department must withhold the information we have marked under section 552.117(a)(1). Conversely, if the individual did not make a timely election under section 552.024, the department may not withhold the marked information under section 552.117(a)(1).

In summary, the identifying information of the witnesses you have marked, except where we have marked for release, must be withheld from the second requestor under section 552.101 in conjunction with common-law privacy and the holding in *Ellen*. In addition, the identifying information of the victim and witnesses other than the first requestor you have marked, except where we have marked for release, must be withheld from the first requestor under section 552.101 in conjunction with common-law privacy and the holding in *Ellen*. The additional identifying information of a witness that we have marked must be withheld from both requestors. If the individual whose information we have marked timely requested confidentiality under section 552.024 of the Government Code, the department must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The department must release the remaining information to the respective requestors.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/eb

Ref: ID# 654098

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)