



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

March 7, 2019

Ms. Jennifer Smith
Assistant District Attorney
Hidalgo County Criminal District Attorney's Office
100 East Cano Street
Edinburg, Texas 78539

OR2019-06420

Dear Ms. Smith:

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# 753736 (Reference No. 2018-0190-DA.SO).

The Hidalgo County Sheriff's Office (the "sheriff's office") received a request for information pertaining to a specified internal affairs investigation. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses section 261.201(a) of the Family Code, which provides as follows:

[T]he following information is confidential, is not subject to public release under [the Act], and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

- (1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and
- (2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). You state the submitted information was used or developed in an investigation of alleged child abuse under chapter 261 of the Family Code. *See id.* §§ 101.003(a) (defining “child” for purposes of section 261.201), 261.001(1), (4) (defining “abuse” for purposes of section 261.201 of Family Code). Upon review, we find some of the information at issue is subject to chapter 261 of the Family Code. The sheriff’s office does not indicate it has adopted a rule that governs the release of this type of information. Accordingly, the sheriff’s office must withhold the information, a representative sample of which we have marked and indicated, under section 552.101 of the Government Code in conjunction with section 261.201 (a) of the Family Code. However, we find the remaining information relates to an internal affairs investigation by the sheriff’s office. You have failed to demonstrate the remaining information at issue is a report of child abuse or neglect, or was used or developed in an investigation under chapter 261. *See id.* § 261.001(1), (4). Therefore, we conclude section 261.201(a) is not applicable to the remaining information, and it may not be withheld under section 552.101 on that basis.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683.

In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the court addressed the applicability of common-law privacy to information relating to an investigation of alleged 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. *See 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 the public’s interest was sufficiently served by the disclosure of such documents. *Id.* 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*, along with the statement of the accused. However, 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)*. We note supervisors are generally not witnesses for purposes of *Ellen*, except where their statements appear in a non-supervisory context. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See Open Records Decision No. 455 (1987)*. Further, this office has held common-law privacy protects the identifying information of juvenile victims of abuse or neglect. *See Open Records Decision No. 394 (1983); cf. Fam. Code § 261.201*. This office has also concluded the public has a legitimate interest in information that relates to public employees and their conduct in the workplace.

See, e.g., Open Records Decision Nos. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs but in fact touches on matters of legitimate public concern), 470 at 4 (1987) (job performance does not generally constitute public employee's private affairs), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of government employees), 405 at 2 (1983) (manner in which public employee's job was performed cannot be said to be of minimal public interest), 392 (1982) (reasons for employee's resignation ordinarily not private). Additionally, we note information relating to domestic violence is generally not protected by common-law privacy. *See* Open Records Decision No. 611 at 1 (1992) (family violence is a crime, not a private matter).

You seek to withhold the submitted information under common-law privacy and the holding in *Ellen*. We note the information at issue does not pertain to a sexual harassment investigation. Therefore, the information at issue may not be withheld under section 552.101 in conjunction with common-law privacy and the holding in *Ellen*. Nevertheless, we find portions of the remaining information satisfy the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the sheriff's office must withhold the information, a representative sample of which we have marked and indicated, under section 552.101 of the Government Code in conjunction with common-law privacy.¹ However, the sheriff's office has failed to demonstrate the remaining information is highly intimate or embarrassing and of no legitimate public interest. Thus, the sheriff's office may not withhold the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.117(a)(2) of the Government Code excepts from disclosure the home address, home telephone number, emergency contact information, social security number, and family member information of a peace officer, regardless of whether the peace officer complies with section 552.024 or section 552.1175 of the Government Code. Gov't Code § 552.117(a)(2). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. We note section 552.117(a)(2) is applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision Nos. 670 at 6 (2001) (Gov't Code § 552.117(a)(2) excepts from disclosure peace officer's cellular telephone number if officer pays for service), 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). We note section 552.117(a) is not applicable to an individual's boyfriend. In this instance, however, it is unclear whether some of the individuals whose information is at issue are currently licensed peace officers as defined by article 2.12. If the individuals at issue are currently licensed peace officers as defined by article 2.12 of the Code of Criminal Procedure, then the sheriff's office must withhold the information, a representative sample of which we have marked, under section 552.117(a)(2) of the Government Code; however, the sheriff's office may only withhold the cellular telephone numbers if a governmental body did not pay for the cellular telephone

¹As our ruling is dispositive, we need not address the remaining argument against disclosure of this information.

service. Conversely, if the individuals at issue are not currently licensed peace officers as defined by article 2.12, the sheriff's office may not withhold the information at issue under section 552.117(a)(2) of the Government Code.

If the individuals whose information is at issue are not currently licensed peace officers, then their personal information may be subject to section 552.117(a)(1) of the Government Code, which excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security number, and family member information of a current or former employee of a governmental body who requests this information be kept confidential under section 552.024. Gov't Code § 552.117(a)(1). As previously mentioned, section 552.117(a) is applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. See ORD 506 at 5-6. Additionally, as noted above, section 552.117(a) is not applicable to an individual's boyfriend. 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). The sheriff's office may only withhold information under section 552.117(a)(1) on behalf of current or former employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Therefore, if the individuals whose information is at issue timely requested confidentiality under section 552.024 of the Government Code and a governmental body does not pay for the cellular telephone service, the sheriff's office must withhold the information, a representative sample of which we have marked, under section 552.117(a)(1) of the Government Code.² Conversely, if the individuals at issue did not timely request confidentiality under section 552.024 or the cellular telephone service is paid for by a governmental body, the sheriff's office may not withhold the information we have marked under section 552.117(a)(1) of the Government Code.

Section 552.101 of the Government Code also encompasses the doctrine of constitutional privacy. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. ORD 455 at 4. The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). After review of the remaining information, we find you have failed to demonstrate any portion of the remaining information falls within the zones of privacy or implicates an individual's privacy interests for purposes of constitutional privacy. Therefore, the sheriff's office may not withhold the remaining information under section 552.101 on the basis of constitutional privacy.

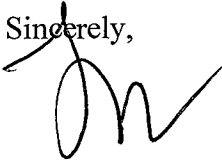
²As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

In summary, the sheriff's office must withhold the information, a representative sample of which we have marked and indicated, under section 552.101 of the Government Code in conjunction with section 261.201 (a) of the Family Code. The sheriff's office must withhold the information, a representative sample of which we have marked and indicated, under section 552.101 in conjunction with common-law privacy. If the individuals at issue are currently licensed peace officers as defined by article 2.12 of the Code of Criminal Procedure, then the sheriff's office must withhold the information, a representative sample of which we have marked, under section 552.117(a)(2) of the Government Code; however, the sheriff's office may only withhold the cellular telephone numbers if a governmental body did not pay for the cellular telephone service. If the individuals whose information is at issue are not currently licensed peace officers and timely requested confidentiality under section 552.024 of the Government Code, the sheriff's office must withhold the information, a representative sample of which we have marked, under section 552.117(a)(1) of the Government Code; however, the sheriff's office may only withhold the cellular telephone numbers if a governmental body did not pay for the cellular telephone service. The sheriff's office must release the remaining information.

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,



Jahanna Ward
Assistant Attorney General
Open Records Division

JW/gw

Ref: ID# 753736

Enc. Submitted documents

c: Requestor
(w/o enclosures)