



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 10, 2019

Ms. Mercedes Salinas Espinosa
Counsel for the Hidalgo County Civil Service Commission
Espinosa Law Firm, P.L.L.C.
4300 North McColl Road
McAllen, Texas 78504

OR2019-34650

Dear Ms. Espinosa:

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# 803401.

The Hidalgo County Civil Service Commission (the "commission"), which you represent, received a request for specified information during a specified time period. You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.117, and 552.130 of the Government Code. We have considered the claimed exceptions and reviewed the submitted representative sample of information.¹

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses information protected by section 261.201 of the Family Code, which provides, in relevant part:

(a) [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

¹ We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

[chapter 261 of the Family Code] 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 [chapter 261 of the Family Code] or in providing services as a result of an investigation.

Fam. Code § 261.201(a). You contend Exhibit B is confidential under section 261.201. *See id.* § 261.001(1), (4) (defining “abuse” and “neglect” for purposes of chapter 261 of the Family Code); *see also id.* § 101.003(a) (defining “child” for purposes of section 261.201 as a person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes). However, upon review, we find the information at issue relates to an internal affairs investigation by the commission. You failed to establish this information consists of a report of child abuse or neglect for the purposes of section 261.201(a)(1) of the Family Code. Further, we find you failed to establish any of the remaining information was used or developed in an investigation of alleged or suspected child abuse under chapter 261 of the Family Code. Therefore, the information in Exhibit B is not confidential under section 261.201 of the Family Code and it may not be withheld under section 552.101 of the Government Code 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. 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 found that common-law privacy generally protects the identifying information of juvenile victims of abuse or neglect. *See* Open Records Decision No. 394 (1983); *cf.* Fam. Code § 261.201.

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 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*, 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). However, when no adequate summary exists, detailed statements regarding the allegations must be released, but the identities of victims and witnesses must still be redacted from the statements. In either case, the identity of the individual accused of sexual harassment is not protected from public disclosure. We also note supervisors are generally not witnesses for purposes of *Ellen*, except where their statements appear in a non-supervisory context.

The information in Exhibit C and Exhibit E relates to investigations into alleged sexual harassment. Upon review, we determine the investigations in Exhibit C and Exhibit E contain adequate summaries of the alleged sexual harassment, as well as statements by the persons accused of sexual harassment. The summaries and statements are not confidential under section 552.101 in conjunction with common-law privacy; however, information within the summaries identifying victims and witnesses must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy. *See Ellen*, 840 S.W.2d at 525. Accordingly, pursuant to section 552.101 in conjunction with common-law privacy and the holding in *Ellen*, the commission must withhold the identifying information of the victims and witnesses, which we marked, within the adequate summaries and statements of the accused.² Because there are adequate summaries, the commission must also withhold the remaining information in Exhibit C and Exhibit E under section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Ellen*.

Further, upon review, we conclude the additional information we marked meets the standard articulated by the Texas Supreme Court in *Industrial Foundation*. We note some of the information at issue pertains to individuals who will be de-identified and whose privacy interests are, thus, protected. Accordingly, the commission must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy.³ However, we find no portion of the remaining information is highly intimate or embarrassing and of no legitimate public concern, and the commission may not withhold any of the remaining information under section 552.101 of the Government Code on the basis of common-law privacy.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *See* Gov't Code § 552.107(1). When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "to facilitate the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not

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

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apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.*, meaning it was “not intended to be disclosed to third persons other than those: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state Exhibit G consists of communications between counsel for the commission and commission employees that were made for the purpose of providing legal services to the commission. Additionally, you state the communications were intended to be confidential and have remained confidential. Based upon your representations and our review, we find the information at issue consists of privileged attorney-client communications. Therefore, the commission may generally withhold Exhibit G under section 552.107(1) of the Government Code. However, we note one of these otherwise privileged e-mail strings includes an e-mail sent from a non-privileged party. Furthermore, if this e-mail is removed from the otherwise privileged e-mail string and stands alone, it is responsive to the instant request. Accordingly, if the commission maintains the non-privileged e-mail, which we marked, separate and apart from the otherwise privileged e-mail string in which it appears, then this non-privileged e-mail is not excepted under section 552.107(1) of the Government Code, and the commission may not withhold it on that basis. In that case, the commission must release the non-privileged e-mail.

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. *See* 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 (quoting *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). After review of the information at issue, we find the commission has 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 commission may not withhold any of the remaining information under section 552.101 of the Government Code on the basis of constitutional privacy.

Section 552.101 of the Government Code also encompasses section 411.083 of the Government Code, which pertains to criminal history record information (“CHRI”). CHRI generated by the National Crime Information Center or by the Texas Crime Information Center is confidential under federal and state law. CHRI means “information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions.” Gov’t Code § 411.082(2). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI obtained from the federal government or other states. *See* Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual laws with respect to CHRI it generates. *See id.* Section 411.083 of the Government Code deems confidential CHRI the Texas Department of Public Safety (“DPS”) maintains, except DPS may disseminate this information as provided in chapter 411, subchapter F or subchapter E-1, of the Government Code. *See* Gov’t Code § 411.083(a). Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090-127. Thus, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 in conjunction with chapter 411, subchapter F, of the Government Code. We note section 411.083 does not apply to active warrant information or other information relating to one’s current involvement with the criminal justice system. *See id.* § 411.081(b) (police department allowed to disclose information pertaining to person’s current involvement in the criminal justice system). We also note records relating to routine traffic violations are not considered criminal history information. *Cf. id.* § 411.082(2)(B) (criminal history record information does not include driving record information). Upon review, we find some of the information at issue consists of CHRI that is confidential under section 411.083. Accordingly, the commission must withhold the CHRI we marked under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code.

Section 552.102(a) of the Government Code excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.”⁴ *Id.* § 552.102(a). The Texas Supreme Court held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the

⁴The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). Thus, under *Texas Comptroller*, section 552.102(a) is applicable to the birth date of an employee of a governmental body in a record maintained by his or her employer in an employment context. Accordingly, the commission must withhold all employees' dates of birth under section 552.102(a) of the Government Code.

Section 552.117(a)(2) of the Government Code applies to records a governmental body holds in an employment capacity and excepts from public disclosure the current and former home addresses and telephone numbers, emergency contact information, social security number, and family member information of a peace officer, regardless of whether the peace officer made an election under section 552.024 or section 552.1175 of the Government Code. *See* 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 encompasses a personal cellular telephone number, provided a governmental body does not pay for the cellular telephone service. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). In this instance, however, it is unclear whether the individuals whose information is at issue are currently-licensed peace officers as defined by article 2.12 of the Code of Criminal Procedure. Accordingly, to the extent the individuals whose information is at issue are currently-licensed peace officers as defined by article 2.12, the commission must withhold the information we marked under section 552.117(a)(2) of the Government Code; however, the commission may only withhold the marked cellular telephone numbers if the cellular telephone service is not paid for by a governmental body. Conversely, if the individuals whose information is at issue are not currently-licensed peace officers as defined by article 2.12, the marked information may not be withheld 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 the marked 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 numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the commission may only withhold information under section 552.117 on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Accordingly, to the extent the individuals whose information we marked timely requested confidentiality under section 552.024 of the Government Code, the commission must withhold the information we marked under section 552.117(a)(1) of the Government Code; however, the commission may only withhold the marked cellular telephone numbers if the cellular telephone service is not paid for by a governmental body. Conversely, to the extent the individuals at issue did not timely request

confidentiality under section 552.024, the commission may not withhold the marked information under section 552.117(a)(1).⁵

Section 552.130 of the Government Code exempts from public disclosure information relating to a motor vehicle operator's or driver's license, motor vehicle title or registration, or personal identification document issued by an agency of this state or another state or country. *See* Gov't Code § 552.130. Accordingly, we find the commission must withhold the motor vehicle record information we marked under section 552.130 of the Government Code.

In summary, with the exception of the adequate summaries and the statements of the accused, the commission must withhold the information in Exhibit C and Exhibit E under section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Ellen*; however, in releasing the adequate summaries and the statements of the accused, the commission must withhold the identifying information of the victims and witnesses we marked under section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Ellen*. The commission must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. The commission may withhold Exhibit G under section 552.107(1) of the Government Code; however, the commission must release the non-privileged e-mail we marked if the commission maintains it separate and apart from the otherwise privileged communications. The commission must withhold the CHRI we marked under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code. The commission must withhold all employees' dates of birth under section 552.102(a) of the Government Code. To the extent the individuals whose information is at issue are currently-licensed peace officers as defined by article 2.12 of the Code of Criminal Procedure, the commission must withhold the information we marked under section 552.117(a)(2) of the Government Code; however, the commission may only withhold the marked cellular telephone numbers if the cellular telephone service is not paid for by a governmental body. To the extent the individuals whose information we marked are not currently-licensed peace officers, but timely requested confidentiality under section 552.024 of the Government Code, the commission must withhold the information we marked under section 552.117(a)(1) of the Government Code; however, the commission may only withhold the marked cellular telephone numbers if the cellular telephone service is not paid for by a governmental body. The commission must withhold the motor vehicle record information we marked under section 552.130 of the Government Code. The commission must release the remaining information.

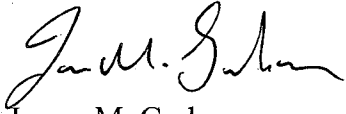
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

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

⁵ Regardless of the applicability of section 552.117 of the Government Code, we note section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office. *See* Gov't Code § 552.147(b).

responsibilities, please visit our website at <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,



James M. Graham
Assistant Attorney General
Open Records Division

JMG/be

Ref: ID# 803401

Enc. Submitted documents

c: Requestor
(w/o enclosures)