



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 11, 2022

Mr. Jorge L. Trevino, Jr.
Assistant Civil Legal Division Attorney
Webb County Civil Legal Division
1000 Houston Street, 2nd Floor
Laredo, Texas 78040

OR2022-19804

Dear Mr. Trevino:

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# 958598 (ORR# 2757).

The Webb County Sheriff's Office (the "sheriff's office") received a request for employment rosters for a specified time period, records related to internal affairs and disciplinary actions during specified time periods, and information related to officers whose employment with the sheriff's office ended during a specified time period. You state you will release some information to the requestor. You state you do not have information responsive to certain categories of the request.¹ You claim some of the submitted information is not subject to the Act. You further claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, and 552.152 of the Government Code.² In addition, you state release of the submitted information may implicate the interests the Combined Law Enforcement Agencies of Texas ("CLEAT").

¹ The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

² We note you also raise section 552.352 of the Government Code as an exception to disclosure. Section 552.352 states in relevant part that "[a] person commits an offense if the person distributes information considered confidential under the terms of [chapter 552]." Gov't Code § 552.352(a). Thus, section 552.352 is not an exception to disclosure under the Act. Rather, section 552.352 is a procedural provision that sets forth criminal penalties for the distribution of confidential information. Further, although you also raise section 552.024 of the Government Code, we note this section is not an exception to disclosure. Rather, this section permits a current or former official or employee of a governmental body to choose whether to allow public access to certain information relating to the current or former official or employee that is held by the employing governmental body. *See id.* § 552.024.

Accordingly, you state you notified CLEAT of the request for information and of its right to submit arguments to this office. *See* Gov't Code §§ 552.304, .305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have considered your arguments and reviewed the submitted information.

Initially, you state the information at issue contains peace officers' Texas Commission on Law Enforcement ("TCOLE") identification numbers. Section 552.002(a) of the Government Code defines "public information" as information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body;
- (2) for a governmental body and the governmental body:
 - (A) owns the information;
 - (B) has a right of access to the information; or
 - (C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information;
or
- (3) by an individual officer or employee of a governmental body in the officer's or employee's official capacity and the information pertains to official business of the governmental body.

Gov't Code § 552.002(a). In Open Records Decision No. 581 (1990), this office determined certain computer information, such as source codes, documentation information, and other computer programming, that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property is not the kind of information made public under section 552.021 of the Government Code. We understand an officer's TCOLE identification number is a unique computer-generated number assigned to peace officers for identification in TCOLE's electronic database and may be used as an access device number on the TCOLE website. Thus, we find the TCOLE identification numbers in the information at issue do not constitute public information under section 552.002 of the Government Code. Accordingly, the TCOLE identification numbers at issue are not subject to the Act and need not be released to the requestor.³

Next, we note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See id.* § 552.305(d)(2)(B). As of the date of this letter, we have not received

³ As we are able to make this determination, we need not address your remaining arguments against disclosure of this information.

comments from CLEAT explaining why the submitted information should not be released. Therefore, we have no basis to conclude CLEAT has a protected proprietary interest in the submitted information. *See, e.g., id.* § 552.110 (requiring the provision of specific factual evidence demonstrating the applicability of the exception). Accordingly, the sheriff's office may not withhold the submitted information on the basis of any proprietary interest CLEAT may have in the information.

Next, we note some of the remaining information is subject to section 552.022 of the Government Code, which provides, in relevant part, as follows:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Id. § 552.022(a)(1). The remaining information includes completed investigations subject to section 552.022(a)(1). This information must be released unless it is excepted from disclosure under section 552.108 of the Government Code or is made confidential under the Act or other law. *See id.* Although you assert the information at issue is excepted from disclosure under section 552.103 of the Government Code, this section is discretionary and does not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); ORD 542 at 4 (statutory predecessor to section 552.103 may be waived); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the information subject to section 552.022 may not be withheld under section 552.103. However, as sections 552.101 and 552.102 of the Government Code make information confidential under the Act, we will consider the applicability of these exceptions to the information at issue.

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. This section encompasses information made confidential by section 1701.454 of the Occupations Code, which governs the public availability of information submitted to TCOLE under subchapter J of chapter 1701 of the Occupations Code. Section 1701.454 provides:

(a) All information submitted to the commission under this subchapter is confidential and is not subject to disclosure under Chapter 552, Government Code, unless the person resigned or was terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses.

(b) Except as provided by this subchapter, a commission member or other person may not release information submitted under this subchapter.

Occ. Code § 1701.454. We understand you to claim portions of Exhibit 4 are subject to section 1701.454 of the Occupations Code. Upon review, we find you have failed to demonstrate any of the information at issue was submitted to TCOLE pursuant to subchapter J of chapter 1701 of the Occupations Code. Therefore, the sheriff's office may not withhold any of the remaining information under section 552.101 in conjunction with section 1701.454 of the Occupations Code.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate and 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). However, we note the public generally has a legitimate interest in information that relates to public employment and public employees. *See* Open Records Decisions 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), 542, 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees). 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.

In this instance, portions of Exhibit 4 pertain to sexual harassment investigations and, thus, are subject to the ruling in *Ellen*. Upon review, we find the information at issue does not include an adequate summary of these investigations. Because there is no adequate summary of the investigations, the sheriff's office must generally release the information at issue. However, the information at issue contains the identities of alleged sexual

harassment victims and witnesses. Accordingly, the sheriff's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy and *Ellen*.⁴ See *Ellen*, 840 S.W.2d at 525. Further, we conclude some of the remaining information not pertaining to the sexual harassment investigation meets the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the sheriff's office must withhold the additional information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.⁵ However, we find no portion of the remaining information is highly intimate or embarrassing and of no legitimate public concern, and the sheriff's office may not withhold any portion of the remaining information under section 552.101 of the Government Code on the basis of common-law privacy.

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." Gov't Code § 552.102(a). We understand you to assert the privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101 of the Government Code, which is discussed above. See *Indus. Found.*, 540 S.W.2d at 685. In *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court of appeals ruled the privacy test under section 552.102(a) is the same as the *Industrial Foundation* privacy test. However, the Texas Supreme Court has expressly disagreed with *Hubert's* interpretation of section 552.102(a) and held the privacy standard under section 552.102(a) differs from the *Industrial Foundation* test under section 552.101. See *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). The supreme court also considered the applicability of section 552.102(a) and held it excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. See *id.* at 348. Upon review, we find no portion of the remaining information consists of dates of birth of sheriff's office employees. Therefore, the sheriff's office may not withhold any of the remaining information under section 552.102 of the Government Code.

Section 552.152 of the Government Code provides:

Information in the custody of a governmental body that relates to an employee or officer of the governmental body is excepted from [required public disclosure] if, under the specific circumstances pertaining to the employee or officer, disclosure of the information would subject the employee or officer to a substantial threat of physical harm.

Gov't Code § 552.152. We understand you to claim portions of Exhibit 6 relate to undercover officers. However, you have not marked or otherwise indicated which, if any, of the officers are undercover, nor does the information at issue give any indication of the officers' status. Thus, we must rule conditionally. To the extent the officers at issue in Exhibit 6 are undercover officers, the sheriff's office must withhold the information we

⁴ As our ruling is dispositive, we need not consider your remaining argument against disclosure of this information.

⁵ As our ruling is dispositive, we need not consider your remaining argument against disclosure of this information.

have marked relating to these officers under section 552.152 of the Government Code. To the extent the officers at issue in Exhibit 6 are not undercover officers, we find you have failed to demonstrate the release of the information at issue would subject a sheriff's office employee to a substantial risk of physical harm, and the sheriff's office may not withhold the information at issue relating to these officers under section 552.152 of the Government Code. Furthermore, we find you have failed to demonstrate the release of the remaining information in Exhibit 6 would subject an employee to a substantial risk of physical harm. Accordingly, the sheriff's office may not withhold any of the remaining information under section 552.152 of the Government Code.

In summary, the TCOLE identification numbers at issue are not subject to the Act and need not be released to the requestor. The sheriff's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy and *Ellen*. The sheriff's office must withhold the additional information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. To the extent the officers at issue in Exhibit 6 are undercover officers, the sheriff's office must withhold the information we have marked relating to these officers under section 552.152 of the Government Code. 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 <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,

Tim Neal
Assistant Attorney General
Open Records Division

TN/be

Ref: ID# 958598

Enc. Submitted documents

c: Requestor
(w/o enclosures)