



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 1, 2009

Ms. Michelle T. Rangel
Assistant County Attorney
Fort Bend County
301 Jackson Street, Suite 728
Richmond, Texas 77469

OR2009-12351

Dear Ms. Rangel:

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# 354185.

The Fort Bend County Constable's Office (the "constable") received a request for information pertaining to two named officers. You claim that the requested information is excepted from disclosure under sections 552.101, 552.108, 552.117, 552.130, 552.137, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially we will address your claim under section 552.108(a)(2) of the Government Code for Exhibit D. Section 552.108(a)(2) excepts from disclosure information concerning an investigation that concluded in a result other than conviction or deferred adjudication. Gov't Code § 552.108(a)(2). A governmental body claiming section 552.108(a)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. *See id.* § 552.301(e) (governmental body must provide comments explaining why exceptions raised should apply to information requested). You state Exhibit D relates to a concluded case that did not result in a conviction or deferred adjudication. Based on your representations, we conclude section 552.108(a)(2) is generally applicable to Exhibit D.

Section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. *Id.* § 552.108(c). Basic information refers to the information held to be public in *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). See Open Records Decision No. 127 (1976) (summarizing types of information made public by *Houston Chronicle*). Thus, with the exception of basic information the constable may withhold Exhibit D pursuant to section 552.108(a)(2) of the Government Code. We note you seek to withhold a portion of the basic information in Exhibit D under section 552.101 of the Government Code in conjunction with common-law privacy. Accordingly, we will address this claim with your other claims against disclosure under section 552.101 in conjunction with common-law privacy.

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 the doctrine of common-law privacy. Common-law privacy 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, 685 (Tex. 1976). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. This office has also found that personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from disclosure under common-law privacy. See Open Records Decision No. 600 (1992) (public employee’s withholding allowance certificate, designation of beneficiary of employee’s retirement benefits, direct deposit authorization, and employee’s decisions regarding voluntary benefits programs, among others, protected under common-law privacy).

Upon review, we find that the constable must withhold the identifying information of the alleged sexual assault victim in Exhibit D under section 552.101 of the Government Code in conjunction with common-law privacy. In addition, we find that Exhibit F constitutes personal financial information that is highly intimate or embarrassing and not of legitimate public concern. Therefore, the constable must also withhold Exhibit F pursuant to section 552.101 in conjunction with common-law privacy.

We will now address your arguments under common-law privacy for Exhibit C. 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 that "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, 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). If no adequate summary of the investigation exists, then all of the information relating to the investigation ordinarily must be released, with the exception of information that would identify the victims and witnesses. We note that, since 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).

Exhibit C relates to an investigation into alleged sexual harassment. Upon review, we determine Exhibit C contains an adequate summary of the alleged sexual harassment. The summary is not confidential under section 552.101 in conjunction with common-law privacy; however, information within the summary identifying the victim 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. Therefore, pursuant to section 552.101 and the ruling in *Ellen*, the marked summary is not confidential, but the remaining information we have marked in Exhibit C and the identifying information of the victim and witnesses in the summary, which we have marked, must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.101 of the Government Code also encompasses section 6103(a) of title 26 of the United States Code. This office has held that 26 U.S.C. 6103(a) renders tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision No. 600 (1992) (W-4 forms). Section 6103(b) defines the term "return information" as a taxpayer's "identity, the nature, source, or amount of . . . income." *See* 26 U.S.C. § 6103(b)(2)(A). Federal courts have construed the term "return information" expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. *See Mallas v. Kolak*, 721 F. Supp. 748, 754 (M.D.N.C. 1989), *aff'd in part*, 993 F.2d 1111 (4th Cir. 1993). Consequently, the constable must withhold the submitted W-4 forms contained in Exhibit E pursuant to section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code.

You assert that Exhibit B is excepted from disclosure pursuant to section 552.101 in conjunction with the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides in part:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(a)-(c). This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487(1987), 370 (1983), 343 (1982). Upon review, we find that the information in Exhibit B does not constitute medical records and it may not be withheld under section 552.101 in conjunction with section 159.002 of the Occupations Code.

Section 552.101 also encompasses section 1701.454 of the Occupations Code. Section 1701.454 of the Occupations Code governs the release of reports or statements submitted to the Texas Commission on Law Enforcement Officer Standards and Education ("TCLEOSE") and provides as follows:

(a) A report or statement submitted to the [TCLEOSE] 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 section, a [TCLEOSE] member or other person may not release the contents of a report or statement submitted under this subchapter. The report or statement may be released only by the [TCLEOSE] employee having the responsibility to maintain the report or statement and only if:

(1) the head of a law enforcement agency or the agency head's designee makes a written request on the agency's letterhead for the report or statement accompanied by the agency head's or designee's signature; and

(2) the person who is the subject of the report or statement authorizes the release by providing a sworn statement on a form supplied by the commission that includes the person's waiver of liability regarding an agency head who is responsible for or who takes action based on the report or statement.

Occ. Code § 1701.454. You assert that Exhibit I is confidential under section 1701.454. We note, however, that this statute is applicable only to a report or statement submitted to the commission under subchapter J of chapter 1701 of the Occupations Code. *See* Occ. Code § 1701.454(a). The information in Exhibit I does not constitute reports or statements that are required to be filed with TCLEOSE pursuant to subchapter J of chapter 1701. Therefore, the constable may not withhold Exhibit I under section 552.101 on the basis of section 1701.454.

Section 552.117(a)(2) of the Government Code exempts from disclosure the current and former home addresses and telephone numbers, social security numbers, and family member information regarding a peace officer regardless of whether the officer requested confidentiality under section 552.024 or 552.1175 of the Government Code.¹ Gov't Code § 552.117(a)(2). We note that an individual's personal post office box number is not a "home address" and therefore may not be withheld under section 552.117. *See* Gov't Code § 552.117; Open Records Decision No. 622 at 4 (1994) (legislative history makes clear that purpose of section 552.117 is to protect public employees from being harassed at home) (citing House Committee on State Affairs, Bill Analysis, H.B. 1979, 69th Leg. (1985)) (emphasis added). Accordingly, the constable must withhold the information we have marked in Exhibits B, C, G, and H pursuant to section 552.117(a)(2).

Section 552.130 of the Government Code exempts from disclosure "information [that] relates to . . . a motor vehicle operator's or driver's license or permit issued by an agency of this state [or] a motor vehicle title or registration issued by an agency of this state." Gov't Code § 552.130(a). The constable must withhold the Texas motor vehicle record information we have marked in Exhibits C, G, H, and I under section 552.130 of the Government Code.

In summary, with the exception of basic information, the constable may withhold Exhibit D under section 552.108(a)(2) of the Government Code. In releasing basic information, the constable must withhold the identifying information of the alleged sexual assault victim in Exhibit D under section 552.101 of the Government Code in conjunction with common-law privacy. The constable must withhold Exhibit F and the information we have marked in

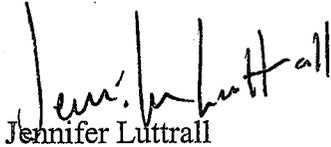
¹"Peace officer" is defined by Article 2.12 of the Texas Code of Criminal Procedure.

Exhibit C under section 552.101 in conjunction with common-law privacy. The constable must withhold Exhibit E pursuant to section 552.101 in conjunction with section 6103(a) of title 26 of the United States Code. The constable must withhold the information we have marked in Exhibits B, C, G, and H pursuant to section 552.117(a)(2) of the Government Code. The constable must withhold the Texas motor vehicle record information we have marked in Exhibits C, G, H, and I under section 552.130 of the Government Code. The remaining information must be released.

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.oag.state.tx.us/open/index_orl.php, 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 must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/dls

Ref: ID# 354185

Enc. Submitted documents

c: Requestor
(w/o enclosures)