



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 28, 2009

Ms. Holly C. Lytle
Assistant County Attorney
El Paso County
500 East San Antonio, Room 503
El Paso, Texas 79901

OR2009-18193

Dear Ms. Lytle:

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# 365334 (El Paso County request no. 09-491).

The El Paso County Sheriff's Office (the "sheriff") received a request for grievances or complaints against any member of the sheriff's office filed by a named sergeant, internal affairs reports, citizen complaints, or disciplinary reports regarding the named sergeant, and commendations and awards received by the named sergeant. You state the sheriff will release some of the requested information, including the basic information from the report submitted in Attachment F. *See* Gov't Code § 552.108(c) (basic information about an arrested person, and arrest, or a crime is not excepted under section 552.108); *see also* Open Records Decision No. 127 (1976) (summarizing types of information considered to be basic information). You claim the submitted information is excepted from disclosure under sections 552.101, 552.108, and 552.130 of the Government Code. We have considered the exceptions 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. This exception encompasses information other statutes make confidential, such as section 560.003 of the Government Code. Section 560.003 provides "[a] biometric identifier in the possession of a governmental body is exempt from disclosure under [the Act]." *Id.* § 560.003; *see id.* § 560.001(1) ("biometric identifier" means retina or iris scan,

fingerprint, voiceprint, or record of hand or face geometry). You seek to withhold the fingerprints in Attachment B under section 560.003. There is no indication the requestor has a right of access to the fingerprints under section 560.002. *See id.* § 560.002(1)(A) (governmental body may not sell, lease, or otherwise disclose individual's biometric identifier to another person unless the individual consents to disclosure). Therefore, the sheriff must withhold the fingerprints in Attachment B under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code.

Section 552.101 also encompasses section 550.065(b) of the Transportation Code, which states except as provided by subsection (c) or subsection (e), accident reports are privileged and confidential. *See* Transp. Code § 550.065(b). Section 550.065(c)(4) provides for the release of an accident report to a person who provides two of the following three items of information: (1) the date of the accident; (2) the name of any person involved in the accident; and (3) the specific location of the accident. *Id.* § 550.065(c)(4). Under this provision, the Texas Department of Transportation or another governmental entity is required to release a copy of an accident report to a person who provides the agency with two or more of the items of information specified by the statute. *Id.* In this instance, the requestor has not provided the sheriff with any of the three items of information specified by section 550.065(c)(4). Therefore, the sheriff must withhold the ST-3 officer's accident report submitted in Attachment C pursuant to section 552.101 of the Government Code in conjunction with section 550.065(b) of the Transportation Code.

You next claim the documents submitted as Attachment D consist of medical records made confidential under the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. *See* Occ. Code § 151.001. Section 552.101 encompasses section 159.002 of the MPA, which 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.

Id. § 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). In addition, because hospital treatment is routinely conducted under the supervision of physicians, documents relating to diagnosis and treatment during a hospital stay also constitute protected medical records. See Open Decision Nos. 598 (1991), 546 (1990). All the records in Attachment D relate to diagnosis and treatment during a hospital stay, and therefore consists of medical records for purposes of the MPA. Therefore, the records in Attachment D must be withheld under section 552.101 in conjunction with the MPA.

Section 552.101 also encompasses common-law privacy, which excepts from disclosure private facts about an individual. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). Information is excepted from required public disclosure by a common-law right of privacy if the information (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Id.*

The information in Attachment E pertains to an internal affairs investigation of sexual harassment pertaining to sheriff 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. *Id.* 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*, 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 generally be released, with the exception of information that would identify the victims and witnesses. 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 840 S.W.2d at 525; Open Records Decision Nos. 438 (1986), 405 (1983), 230 (1979), 219 (1978).

You do not indicate the sheriff has completed and released an adequate summary of the sexual harassment investigation. Because there is no adequate summary of the investigation,

any requested documents relating to the sexual harassment investigation must generally be released, with the identities of victims and witnesses redacted pursuant to section 552.101 in conjunction with common-law privacy and the holding in *Ellen*. We note supervisors are not witnesses for purposes of *Ellen*, and thus, supervisors' identities generally may not be withheld under section 552.101 of the Government Code in conjunction with common-law privacy. After reviewing the documents in Attachment E, we have marked the information identifying the victim and witness of alleged sexual harassment that must be withheld in accordance with *Ellen*. The department must withhold this information under section 552.101 of the Government Code.

This office has also found some kinds of medical information or information indicating disabilities or specific illnesses to be excepted from required public disclosure under common-law privacy. See Open Records Decision No. 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Upon review, we marked the information in Attachment E revealing a disability or a specific illness. We conclude this is highly intimate or embarrassing information of no legitimate public interest. Accordingly, the information we marked is confidential and must be withheld under section 552.101 in conjunction with common-law privacy.

The complaint report in Attachment E contains home address and family member information of a peace officer, which is subject to section 552.117 of the Government Code.¹ Section 552.117(a)(2) excepts from public disclosure the home address, home telephone numbers, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with sections 552.024 and 552.1175 of the Government Code.² Gov't Code § 552.117(a)(2). We marked the information in Attachment E that reveals an officer's home address and family member information. The sheriff must withhold the information we marked under section 552.117(a)(2).

You next claim the documents submitted in Attachment F are subject to section 552.108 of the Government Code. Section 552.108(a)(1) excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime." Gov't Code § 552.108(a)(1). A governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. See *id.* § 552.301(e)(1)(A); see also *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state the documents in Attachment F are part

¹The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

²"Peace officer" is defined by Article 2.12 of the Texas Code of Criminal Procedure.

of an investigation of a crime that is currently pending prosecution. Based on your representations and our review, we determine release of the information in Attachment F would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ'g 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) (court delineates law enforcement interests that are present in active cases). Accordingly, with the exception of the basic information you state will be released, the sheriff may withhold the information in Attachment F under section 552.108(a)(1).

Finally, Attachment B contains a Texas driver's license number that is subject to section 552.130 of the Government Code. Section 552.130 excepts from disclosure information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by a Texas agency. Gov't Code § 552.130(a)(1), (2). The Texas driver's license number we marked in Attachment B must be redacted under section 552.130.

In summary, the sheriff must withhold the fingerprints in Attachment B under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code, the ST-3 officer's accident report in Attachment C pursuant to section 552.101 of the Government Code in conjunction with section 550.065(b) of the Transportation Code, the medical records in Attachment D under section 552.101 in conjunction with the MPA, the information we marked in Attachment E under section 552.101 in conjunction with common-law privacy, and the family member and address information we marked in Attachment E under section 552.117(a)(2) of the Government Code. With the exception of the basic information you state will be released, the documents in Attachment F may be withheld under section 552.108(a)(1) of the Government Code. Lastly, the sheriff must withhold the driver's license number we marked in Attachment B under section 552.130 of the Government Code. The remaining information must be released.³

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,

³We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including a fingerprint under section 552.101 in conjunction with section 560.003 of the Government Code and a Texas driver's license number under section 552.130 of the Government Code, without the necessity of requesting an attorney general decision.

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,

A handwritten signature in black ink, appearing to read "Bob Davis", with a long horizontal flourish extending to the right.

Bob Davis
Assistant Attorney General
Open Records Division

RSD/cc

Ref: ID# 365334

Enc. Submitted documents

cc: Requestor
(w/o enclosures)