



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 9, 2010

Mr. David Daugherty
Assistant County Attorney
Harris County
1019 Congress, 15th Floor
Houston, Texas 77002

OR2010-05047

Dear Mr. Daugherty:

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# 375309 (File No. 10GEN0216).

The Harris County Sheriff's Office (the "sheriff") received a request for all personnel records pertaining to a named deputy. You state the sheriff has provided some of the requested information to the requestor. You claim the submitted internal affairs investigation reports are excepted from disclosure under sections 552.101 and 552.108 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 section encompasses information that other statutes make confidential. You contend section 157.904(h) of the Local Government Code prohibits the disclosure of the submitted personnel records, unless the subject employee consents to the disclosure. Section 157.904 applies to the personnel records of a sheriff's department in a county with a population of 3.3 million or more. Local Gov't Code § 157.904(a). Section 157.904(h) provides as follows:

The sheriff or the sheriff's designee may not release an employee record or other information contained in an employee's permanent personnel file

without first obtaining the employee's written permission, *unless the release of the record or information is required by law.*

Id. § 157.904(h) (emphasis added). Section 157.904(h) does not make information contained in personnel files confidential for purposes of the Act. *See* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality provision must be express, and confidentiality requirement will not be implied from statutory structure), 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Section 157.904(h) merely requires the consent of the subject employee be obtained when disclosure of information in the employee's personnel file is not required by law. Because the submitted personnel records are subject to required public disclosure under the Act, the sheriff may not withhold the records under section 552.101 of the Government Code in conjunction with section 157.904 of the Local Government Code.

You assert all of the submitted personnel records are protected by section 552.108(b)(2) of the Government Code, and the records submitted as Exhibits B-2 and B-3 are also protected by section 552.108(a)(2) of the Government Code. These sections provide:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

...

(2) it is information that the deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication;

...

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure] if:

...

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication[.]

Gov't Code §§ 552.108(a)(2), (b)(2). Sections 552.108(a)(2) and 552.108(b)(2) are applicable only if the information at issue relates to a concluded criminal case that did not

result in a conviction or a deferred adjudication. Generally, a governmental body claiming section 552.108 must reasonably explain how and why this exception is applicable to the information the governmental body seeks to withhold. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state the submitted records pertain to internal affairs investigations conducted by the sheriff concerning alleged misconduct by the named deputy. You further state the internal investigations have concluded and no disciplinary or other punitive action was taken against the named deputy involved. Section 552.108 is generally not applicable to information relating to an administrative investigation that did not result in a criminal investigation or prosecution. *See Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.—El Paso 1992, writ denied) (statutory predecessor to section 552.108 not applicable to internal investigation that did not result in criminal investigation or prosecution); *see also* Open Records Decision No. 350 at 3-4 (1982). You have not explained, and the reports do not reflect, the internal administrative investigations resulted in criminal investigations or prosecutions. Consequently, we find you have failed to demonstrate the applicability of either section 552.108(a)(2) or section 552.108(b)(2) of the Government Code to the information at issue, and the information may not be withheld on those bases.

Section 552.101 also encompasses section 1703.306 of the Occupations Code, which provides:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

- (1) the examinee or any other person specifically designated in writing by the examinee;
- (2) the person that requested the examination;
- (3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;
- (4) another polygraph examiner in private consultation; or
- (5) any other person required by due process of law.

(b) The [Polygraph Examiners] Board or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.

(c) A polygraph examiner to whom information acquired from a polygraph examination is disclosed under Subsection (a)(4) may not disclose the information except as provided by this section.

Occ. Code § 1703.306. You claim the information you have highlighted in Exhibits B-4 and B-7 is excepted under section 1703.306. Upon review, we agree the information we have marked in Exhibits B-4 and B-7 is within the scope of section 1703.306. You state the requestor does not fall into any of the categories of individuals who are authorized to receive the polygraph information under section 1703.306(a). Accordingly, the sheriff must withhold the marked polygraph information in Exhibits B-4 and B-7 under section 552.101 in conjunction with section 1703.306 of the Occupations Code. You have not explained, however, nor can we discern, any of the remaining highlighted information was acquired from a polygraph examination. Therefore, the sheriff has not demonstrated the applicability of section 1703.306(a) of the Occupations Code to the remaining highlighted information, and none of that information may be withheld under section 552.101 of the Government Code.

We note the reports submitted as Exhibits B-1 and B-5 pertain to investigations of alleged sexual harassment. Section 552.101 also encompasses the common-law right of privacy, which protects information if it (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). 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 along with the statement of the accused 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 be released, with the exception of information that would identify the victims and witnesses. We note supervisors are generally not witnesses for purposes of *Ellen*, except where their statements appear in a

non-supervisory context. 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* Open Records Decision Nos. 438 (1986), 405 (1983), 230 (1979), 219 (1978).

Exhibits B-1 and B-5 pertain to investigations of alleged sexual harassment and consist of only synopses of the alleged victim's, witnesses', and accused's statements, fact finding, and disposition notes stating the information was submitted to the appropriate review board. You have not informed us adequate summaries of these investigations exist or have been provided to the requestor. Consequently, pursuant to section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Ellen*, the information submitted in Exhibits B-1 and B-5 must generally be released, but the sheriff must withhold the alleged victim's and witnesses' identifying information we have marked.

Some of the remaining information is subject to section 552.117 of the Government Code.¹ Section 552.117(a)(2) excepts from public disclosure the home addresses, 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 have marked several peace officers' family member information, which must be withheld under section 552.117(a)(2) of the Government Code.

The remaining information in Exhibit B-2 contains a Texas driver's license number and Texas license plate numbers. Section 552.130 of the Government Code provides information relating to a motor vehicle operator's or driver's license, title, or registration issued by a Texas agency is excepted from public release. *Id.* § 552.130(a)(1), (2). Thus, the sheriff must withhold the driver's license and license plate numbers we have marked in Exhibit B-2 under section 552.130 of the Government Code.³

In summary, the sheriff must withhold the marked polygraph information in Exhibits B-4 and B-7 under section 552.101 in conjunction with section 1703.306 of the Occupations Code; the marked alleged victim's and witnesses' identifying information in Exhibits B-1 and B-5

¹The Office of the Attorney General will raise mandatory exceptions 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.

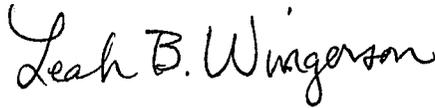
³We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including Texas driver's license and license plate numbers under section 552.130 of the Government Code, without the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

under section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Ellen*; the marked peace officers' family member information under section 552.117(a)(2) of the Government Code; and the marked driver's license and license plate numbers in Exhibit B-2 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,



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/dls

Ref: ID# 375309

Enc. Submitted documents

c: Requestor
(w/o enclosures)