



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 14, 2014

Ms. Carey Smith
General Counsel
Texas Health and Human Services Commission
P.O. Box 13247
Austin, Texas 78711

OR2014-12098

Dear Ms. Smith:

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# 529005.

The Texas Health and Human Services Commission (the "commission") received a request for the entire case file for a specified investigation involving the requestor. You state the commission is releasing some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.117, and 552.137 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. Section 552.101 of the Government Code encompasses sections 12.003 and 21.012 of the Human Resources Code. Section 12.003 provides in relevant part:

- (a) Except for purposes directly connected with the administration of the [commission's] assistance programs, it is an offense for a person to solicit, disclose, receive, or make use of, or to authorize, knowingly permit,

participate in, or acquiesce in the use of the names of, or any information concerning, persons applying for or receiving assistance if the information is directly or indirectly derived from the records, papers, files, or communications of the [commission] or acquired by employees of the [commission] in the performance of their official duties.

Hum. Res. Code § 12.003(a); *see also id.* § 21.012 (requiring provision of safeguards that restrict use or disclosure of information concerning applicants for or recipients of assistance programs to purposes directly connected with administration of programs). The term “assistance” in sections 12.003 and 21.012 includes “all forms of assistance and services for needy persons authorized by Subtitle C” of title 2 of the Human Resources Code. *Id.* § 11.001(4); *see also id.* § 31.001 *et seq.* (Hum. Res. Code title 2, subtitle C, Assistance Programs).

In Open Records Decision No. 584 (1991), this office concluded that “[t]he inclusion of the words ‘or any information’ juxtaposed with the prohibition on disclosure of the names of [the commission’s] clients clearly expresses a legislative intent to encompass the broadest range of individual client information, and not merely the clients’ names and addresses.” Open Records Decision No. 584 at 3 (1991). Consequently, it is the specific information pertaining to individual clients, and not merely the clients’ identities, that is made confidential under section 12.003. *See also* 42 U.S.C. § 1396a(a)(7) (state plan for medical assistance must provide safeguards that restrict use or disclosure of information concerning applicants and recipients to purposes directly connected with administration of plan); 42 C.F.R. §§ 431.300 *et seq.*; Open Records Decision No. 166 (1977).

You assert some of the submitted information is confidential under section 12.003 of the Human Resources Code. We understand the release of this information in this instance would not be for purposes directly connected with the administration of an assistance program. Upon review, we conclude the commission must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 12.003 of the Human Resources Code.¹ However, we find no portion of the remaining information is confidential under section 12.003 of the Human Resources Code, and the commission may not withhold any of the remaining information 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,

¹As our ruling is dispositive for this information, we need not address your remaining arguments against its disclosure.

both prongs of this test must be demonstrated. *See id.* at 681-82. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). This office has also found personal financial information not relating to a financial transaction between an individual and a governmental body is generally highly intimate or embarrassing. *See* Open Records Decision Nos. 523 (1989) (common-law privacy protects credit reports, financial statements, and other personal financial information), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). 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 (1990), 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees), 444 at 5-6 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (1984).

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 the *Ellen* decision 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 submitted information relates to an investigation into alleged sexual harassment. Upon review, we determine the submitted information does not contain an adequate summary of the alleged sexual harassment. Because there is no adequate summary of the investigation, the commission must generally release any information pertaining to the sexual harassment investigation. However, the information at issue contains the identities of the victim of and

witnesses to the alleged sexual harassment. We note the requestor is the alleged sexual harassment victim. Section 552.023 of the Government Code states an individual has a special right of access to private information concerning herself. *See* Gov't Code § 552.023(a), (b) (individual has special right of access to information that relates to himself and is protected by laws intended to protect his privacy interests, and governmental body may not deny access on ground that information is considered confidential by privacy principles); Open Records Decision No. 481 at 4 (privacy theories not implicated when individual requests information concerning himself). Thus, the requestor has a right of access to information pertaining to herself that would otherwise be confidential. Accordingly, the commission must withhold the identifying information of the witnesses, which we have indicated, under section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Ellen*. *See Ellen*, 840 S.W.2d at 525. Furthermore, we find the additional information we have marked otherwise satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the commission must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find the commission has not demonstrated how any portion of the remaining information at issue is highly intimate or embarrassing and not of legitimate public concern. Thus, the commission may not withhold any of the remaining information at issue under section 552.101 in conjunction with 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[.]"² Gov't Code § 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 Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). Having carefully reviewed the remaining information, we have marked the information that must be withheld under section 552.102(a) of the Government Code.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee or official of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former employee or official who made a request for confidentiality under

²The 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 No. 481 (1987), 480 (1987), 470 (1987).

section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee or official who did not timely request under section 552.024 the information be kept confidential. As noted above, the requestor has a right of access to her own personal information. *See* Gov't Code § 552.023(a). Therefore, to the extent the other individuals whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, the commission must withhold the information we have marked under section 552.117(a)(1) of the Government Code. Conversely, to the extent the individuals whose information is at issue did not timely request confidentiality under section 552.024, the commission may not withhold the information under section 552.117(a)(1).

Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See id.* § 552.137(a)-(c). We note the remaining information includes the requestor's e-mail address, to which she has a right of access pursuant to section 552.137(b). *See id.* § 552.137(b). However, the commission must withhold the remaining e-mail addresses, which we have indicated, under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.

In summary, the commission must withhold (1) the information we have marked under section 552.101 of the Government Code in conjunction with section 12.003 of the Human Resources Code; (2) the information we have marked and indicated under section 552.101 of the Government Code in conjunction with common-law privacy and in conjunction with the holding in *Ellen*; (3) the information we have marked under section 552.102(a) of the Government Code; (4) the information we have marked under section 552.117(a)(1) of the Government Code to the extent the individuals at issue timely requested confidentiality under section 552.024 of the Government Code; and (3) the e-mail addresses we have indicated under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure. 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 responsibilities, please visit our website at http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Wheelus', with a long horizontal flourish extending to the right.

David L. Wheelus
Assistant Attorney General
Open Records Division

DLW/bhf

Ref: ID# 529005

Enc. Submitted documents

c: Requestor
(w/o enclosures)