



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 1, 2015

Mr. Steve Smeltzer
Assistant General Counsel
Office of the General Counsel
Texas Department of Criminal Justice
P.O. Box 4004
Huntsville, Texas 77342-4004

OR2015-25042

Dear Mr. Smeltzer:

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# 589144.

The Texas Department of Criminal Justice (the "department") received a request for specified disciplinary reports, e-mails between named individuals regarding the requestor, all notes in the possession of four named individuals for a specified time period, and information pertaining to specified Equal Employment Opportunity complaints. You state the department will release some of the requested information upon receipt of payment. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code.¹ We have considered the exception you claim and reviewed the submitted representative sample of information.²

¹You acknowledge, and we agree, the department did not comply with the requirements of section 552.301 of the Government Code. *See* Gov't Code § 552.301(b), (e). Nevertheless, section 552.101 of the Government Code is a mandatory exception that can provide a compelling reason to overcome the presumption of openness caused by a failure to comply with section 552.301. *See id.* §§ 552.007, .302. Thus, we will consider the department's claim under that section.

²We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Initially, we note some of the submitted information, which we have marked, is not responsive to the instant request for information because it was created after the department received the request. This ruling does not address the public availability of non-responsive information, and the department need not release non-responsive information in response to the request.

Section 552.101 of the Government Code excepts “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 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, 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).

In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the court addressed the applicability of common-law privacy to information relating to an investigation of alleged 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. *See* 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.* 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 victim 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.

In this instance, the submitted responsive information is related to a sexual harassment investigation and does not include an adequate summary. Therefore, the department must generally release the responsive information pertaining to the investigation. However, this information contains the identities of the alleged sexual harassment victim and witnesses. Therefore, the department must withhold the identifying information of the alleged victim

and witnesses, which we have marked, under section 552.101 of the Government Code in conjunction with common-law privacy and *Ellen*. See 840 S.W.2d at 525. Furthermore, we find the additional information we have marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the department must withhold the additional information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find the department has not demonstrated any portion of the remaining responsive information identifies a victim or witness of sexual harassment and has not demonstrated the remaining information is highly intimate or embarrassing and not of legitimate public interest. Therefore, none of the remaining responsive information may be withheld under section 552.101 in conjunction with common-law privacy and *Ellen*.

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[.]”³ 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). Upon review, we find the department must withhold the date of birth we have marked under section 552.102(a) of the Government Code.

Section 552.117(a)(3) of the Government Code excepts from public disclosure the home address and telephone number, emergency contact information, social security number, and family member information of current or former employees of the department or any division of the department, regardless of whether the current or former employee complies with section 552.1175 of the Government Code. Gov’t Code § 552.117(a)(3). Upon review, we find the department must withhold the information we have marked pursuant to section 552.117(a)(3) of the Government Code.

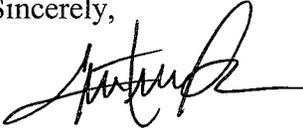
In summary, the department must withhold the identifying information of the alleged victim and witnesses, which we have marked, under section 552.101 of the Government Code in conjunction with common-law privacy and *Ellen*. The department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The department must withhold the date of birth we have marked under section 552.102(a) of the Government Code. The department must withhold the information we have marked pursuant to section 552.117(a)(3) of the Government Code. The department must release the remaining responsive 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.

³The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. Open Records Decision No. 481 (1987), 480 (1987), 470 (1987).

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 'Cristian Rosas-Grillet', written in a cursive style.

Cristian Rosas-Grillet
Assistant Attorney General
Open Records Division

CRG/akg

Ref: ID# 589144

Enc. Submitted documents

c: Requestor
(w/o enclosures)