



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 1, 2009

Ms. YuShan Chang  
Assistant City Attorney  
City of Houston Legal Department  
P.O. Box 368  
Houston, Texas 77001-0368

OR2009-12367

Dear Ms. Chang:

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# 354011.

The City of Houston (the "city") received a request for all employer responses drafted by the city's legal department to initial claims involving certain named departments during a specified time period and all appeals to the grievance process issued by the legal department during that same period.<sup>1</sup> You claim that the requested information is excepted from disclosure under sections 552.101, 552.130, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.<sup>2</sup>

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 encompasses information protected by other statutes,

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<sup>1</sup>We note the city sought and received clarification regarding the first portion of the request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

<sup>2</sup>We 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.

including section 143.1214 of the Local Government Code. The City of Houston is a civil service city under chapter 143 of the Local Government Code. Section 143.1214 of the Local Government Code provides in relevant part:

(b) The department shall maintain an investigatory file that relates to a disciplinary action against a fire fighter or police officer that was overturned on appeal, or any document in the possession of the department that relates to a charge of misconduct against a fire fighter or police officer, regardless of whether the charge is sustained, only in a file created by the department for the department's use. The department may only release information in those investigatory files or documents relating to a charge of misconduct:

- (1) to another law enforcement agency or fire department;
- (2) to the office of a district or United States attorney; or
- (3) in accordance with Subsection (c).

(c) The department head or the department head's designee may forward a document that relates to disciplinary action against a fire fighter or police officer to the director or the director's designee for inclusion in the fire fighter's or police officer's personnel file maintained under Sections 143.089(a)-(f) only if:

- (1) disciplinary action was actually taken against the fire fighter or police officer;
- (2) the document shows the disciplinary action taken; and
- (3) the document includes at least a brief summary of the facts on which the disciplinary action was based.

Local Gov't Code § 143.1214(b)-(c). You state that Exhibit 3 consists of an internal investigation of alleged misconduct by a Houston police officer and that disciplinary action was taken against the officer. You also state that the information is maintained in the city police department's investigatory files and that the requestor is not another law enforcement agency or fire department or the office of a district or United States attorney. Further, you state that the information does not contain any documents that meet the requirements of section 143.1214(c) for inclusion in the police officer's civil service personnel file. *See id.* § 143.1214(c); *see also id.* § 143.089(a)-(g). However, we note that a portion of Exhibit 3 consists of an Employer Response to Initial Claim created by the city's legal department. This information is maintained elsewhere than a police officer's personnel file and the city may not engraft the confidentiality afforded to records under section 143.1214 to other records that exist independently of the city's police departmental personnel files.

Accordingly, we conclude that the Employer Response to Initial Claim, which we have marked, may not be withheld under this 552.101 in conjunction with 143.1214. However, the remaining information in Exhibit 3 is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 143.1214 of the Local Government Code.

Medical records are confidential under the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. ~~See Occ. Code § 151.001. 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.

*Id.* § 159.002(a)-(c). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004; Open Records Decision No. 598 (1991). This office has concluded 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). Medical records must be released on the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. *See* Occ. Code §§ 159.004, .005. Any subsequent release of medical records must be consistent with the purposes for which the governmental body obtained the records. *See id.* § 159.002(c); Open Records Decision No. 565 at 7 (1990). You inform us that some of the information in Exhibit 2 was taken directly from medical records. We have marked the information that is confidential under the MPA. This information may only be released in accordance with the MPA. *See* ORD 598.

Section 552.101 also encompasses section 261.201(a) of the Family Code, which provides:

- (a) Except as provided by Section 261.203, the following information is confidential, is not subject to public release under Chapter 552, Government

Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Act of April 10, 1995, 74<sup>th</sup> Leg., R.S., ch. 20 § 1. Sec. 261.201, 1995 Tex. Gen. Laws 113, 262, amended by Act of June 1, 2009, 81<sup>st</sup> Leg., R.S., ch. 779, § 1, found at <http://www.legis.state.tx.us/tlodocs/81R/billtext/html/SB01050F.htm>. You contend Exhibit 4 is confidential under section 261.201. However, we note that a portion of Exhibit 4 consists of an Employer Response to Initial Claim drafted by the city's legal department. This Employer Response to Initial Claim was not used or developed in an investigation of alleged child abuse or neglect; rather, it was created in response to an employment claim made against the city. Therefore, the Employer Response to Initial Claim may not be withheld under section 261.201. However, we find that the remaining information in Exhibit 4 is within the scope of section 261.201 of the Family Code. *See id.* § 261.001 (defining "abuse" and "neglect" for purposes of Fam. Code ch. 261); *see also id.* § 101.003(a) (defining "child" for purposes of this section as person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes). You have not indicated the city has adopted a rule that governs the release of this type of information; therefore, we assume no such regulation exists. Given that assumption, with the exception of the Employer Response to Initial Claim, the city must withhold Exhibit 4 under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code.

Section 552.101 also encompasses the doctrine of common-law privacy, which protects information if (1) the information 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. *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 demonstrated. *Id.* at 681-82. This office has found that the public has a legitimate interest in the qualifications and work conduct of employees of governmental bodies. *See* Open Records Decision Nos. 562 at 10 (1990), 542 at 5 (1990); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). You seek to withhold Exhibit 5, which concerns an investigation of sexual harassment, under common-law privacy.

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 supervisors are not witnesses for purposes of *Ellen*, and thus, supervisors' identities may generally not be withheld under section 552.101 and common-law privacy. In addition, 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 5 contains an adequate summary of the investigation into a sexual harassment allegation. The summary is not confidential under section 552.101 in conjunction with common-law privacy. However, information within the summary that identifies the alleged victim, other than the victim's supervisors, is confidential under common-law privacy and must generally be withheld pursuant to section 552.101 of the Government Code. *See Ellen*, 840 S.W.2d at 525. Therefore, pursuant to section 552.101 and the ruling in *Ellen*, the summary and the statement of the accused contained in Exhibit 5 are not confidential, but the identifying information of the victim within the summary and statement, which we have marked, must be withheld under section 552.101 in conjunction with common-law privacy. The remaining information in Exhibit 5 must be withheld under section 552.101 in conjunction with common-law privacy.

We note common-law privacy also protects other types of information. The types of information considered intimate or 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. *Industrial*, 540 S.W.2d at 683. In addition,

this office has found that some kinds of medical information or information indicating disabilities or specific illnesses is protected by common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Upon review, we conclude the information we have marked in the Employer Response to Initial Claim in Exhibit 4 is highly intimate or embarrassing and of no legitimate interest to the public. Therefore, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, none of the remaining information is highly intimate or embarrassing or of public interest. Accordingly, none of the remaining information may be withheld under common-law privacy.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that the information be kept confidential under section 552.024 of the Government Code.<sup>3</sup> 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 official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. The Employer Response to Initial Claim in Exhibit 4 contains personal information pertaining to a former city employee. Accordingly, to the extent the employee timely elected under section 552.024 of the Government Code, the city must withhold the information we have marked under section 552.117(a)(1) confidential.

You claim the highlighted social security numbers are excepted from disclosure under section 552.147 of the Government Code.<sup>4</sup> This section provides "[t]he social security number of a living person is excepted from" required public disclosure under the Act. Gov't Code § 552.147. Therefore, the city may withhold the social security numbers you have highlighted under section 552.147 of the Government Code.<sup>5</sup>

In summary, with the exception of the Employer Response to Initial Claim, you must withhold Exhibit 3 under section 552.101 of the Government Code in conjunction with section 143.1214 of the Local Government Code. You may only release the medical

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<sup>3</sup> The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

<sup>4</sup> We note that section 552.147 of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

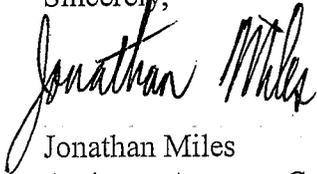
<sup>5</sup> As our ruling is dispositive, we need not address your remaining argument for this information.

information we have marked in accordance with the MPA. With the exception of the Employer Response to Initial Claim, you must withhold Exhibit 4 under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. The city must also withhold from the Employer Response to Initial Claim in Exhibit 4 the information we have marked under common-law privacy and the information we have marked under section 552.117(a)(2) of the Government Code. Pursuant to section 552.101 and the ruling in *Ellen*, the marked summary and statement of the accused in Exhibit 5 are not confidential, but the remaining information and the identifying information of the victim in Exhibit 5, which we have marked, must be withheld. The city may withhold the social security numbers you have highlighted under section 552.147 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](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 at (512) 475-2497.

Sincerely,



Jonathan Miles  
Assistant Attorney General  
Open Records Division

JM/cc

Ref: ID# 354011

Enc. Submitted documents

c: Requestor  
(w/o enclosures)