



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 16, 2009

Mr. Warren M. S. Ernst
Chief General Counsel Division
Office of the City Attorney
City of Dallas
1500 Marilla Room, 7BN
Dallas, Texas 75201

OR2009-16255

Dear Mr. Ernst:

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# 361409.

The City of Dallas (the "city") received a request for a specified independent investigator's report into allegations pertaining to the city's Fire-Rescue Department. You assert that portions of the submitted information are not subject to the Act. You claim that portions of the submitted information are excepted from disclosure under sections 552.101 and 552.117 of the Government Code. We have considered your arguments and reviewed the submitted information.

Initially, you claim that the transcribed "alleged text messages" of a city employee are not subject to the Act. The Act is only applicable to "public information." See Gov't Code § 552.021. Section 552.002(a) defines public information as "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it." *Id.* § 552.002(a). Thus, virtually all information that is in a governmental body's physical possession constitutes public information that is subject to the Act. *Id.* § 552.002(a)(1); see also Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). You explain that the transcribed alleged text messages were copied from the city employee's personal cell phone by another city employee. We understand that the transcript was provided to an investigator in connection with an investigation into allegations of workplace misconduct. Accordingly, we find that the transcript of the alleged text messages was created in connection with the

transaction of official business by the city. Therefore, the transcript of alleged text messages is "public information" as defined by section 552.002(a) and is subject to the Act. Accordingly, we will address your claimed exceptions for this information.

Section 552.101 of the Government Code exempts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section 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). 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). The submitted information consists of numerous reports from an outside investigator related to multiple allegations by the same individual of work place misconduct against named city employees. The allegations detailed in the reports include, among other things, sexual harassment. 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).

You claim that the rights to privacy of the alleged sexual harassment victims and witnesses have been waived because one of the alleged victims filed a lawsuit and a charge of discrimination with the Texas Workforce Commission that detail some of the claims. You also state that the same alleged victim participated in a "televised interview with a local news station." We agree that the alleged victim who participated in the televised interview and filed a lawsuit pertaining to her allegations has waived her own right to privacy. See *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 496 (1975) (action for invasion of privacy cannot be maintained where information is in public domain); *Star Telegram, Inc. v. Walker*, 834 S.W 2d 54, 57 (Tex. 1992) (law cannot recall information once in public domain). However, upon reviewing the documentation you have submitted, we find that you have failed to demonstrate that the privacy rights of the other alleged victims and witnesses have been waived with respect to the particular documents at issue in this request for public information to the city. Further, we find that the submitted reports consist of adequate summaries of the investigation into the sexual harassment allegations. The summary reports are thus not confidential; however, information within the summary identifying the victims and witnesses, other than the alleged victim who waived her right to privacy and the victims' supervisors, is confidential under common-law privacy and must be withheld pursuant to section 552.101 of the Government Code. See *Ellen*, 840 S.W.2d at 525. Thus, the city must release the summary reports, but withhold the information that we have marked, under section 552.101 in conjunction with common-law privacy and the court's holding in *Ellen*.¹

You claim that the information you have highlighted in blue, is also confidential under common-law privacy. Upon review, we find that the blue-highlighted information is highly intimate or embarrassing and of no legitimate public interest. Accordingly, the city must withhold the blue-highlighted information under section 552.101 in conjunction with common-law privacy.

Finally, you claim some of the remaining information is protected under section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the current and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Whether information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. See *Open Records Decision No. 530* at 5 (1989). Pursuant to section 552.117(a)(1), the city must withhold the home address, telephone number, and social security number of a current or former employee of the city who elected, prior to the city's receipt of the request for information, to keep such

¹As our ruling is dispositive for the information we have marked under section 552.101 in conjunction with common-law privacy, we need not address your remaining arguments against the disclosure of portions of this information.

information confidential. You have not informed us whether or not the employees whose information is at issue elected to withhold their personal information prior to the city's receipt of the request for information. Therefore, if the employees timely elected to withhold their personal information, the city must withhold the information we have marked in the remaining information pursuant to section 552.117(a)(1) of the Government Code. If any of the employees did not timely elect to withhold their personal information, then the city may not withhold their marked information under section 552.117(a)(1) of the Government Code.

In summary, the city must withhold the information we have marked, as well as the information you have highlighted in blue, under section 552.101 of the Government Code in conjunction with common-law privacy. If the employees at issue timely elected to withhold their personal information, the city must withhold the information we have marked in the remaining information pursuant to section 552.117(a)(1) 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,



Laura Ream Lemus
Assistant Attorney General
Open Records Division

LRL/eb

Ref: ID# 361409

Enc. Submitted documents

c: Requestor
(w/o enclosures)