



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 22, 2010

Mr. Ronald J. Bounds
Assistant City Attorney
Legal Department
City of Corpus Christi
P.O. Box 9277
Corpus Christi, Texas 78469

OR2010-05749

Dear Mr. Bounds:

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# 376763.

The City of Corpus Christi (the "city") received a request for the requestor's file regarding sexual harassment and retaliation. You state the city will provide the requestor with some of the requested information. You claim portions of the submitted information are excepted from disclosure under section 552.101 of the Government Code. We have considered the exception 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 common-law privacy, which protects information that: (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. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Information pertaining to the work conduct and job performance of public employees is subject to a legitimate public interest and is, therefore, generally not protected from disclosure under common-law privacy. *See Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute employee's private affairs), 455 (1987) (public employee's job performance or abilities generally not protected by*

privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employee), 423 at 2 (1984) (scope of public employee privacy is narrow).

The submitted report relates to an investigation into allegations of sexual harassment. 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 *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.* 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 sexual harassment, the summary must be released along with the statement of the person accused of sexual harassment, but the identities of the victims and witnesses must generally 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 detailed statements regarding the allegations must be released, but the identities of victims and witnesses must be redacted from the statements. 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 *Ellen*, 840 S.W.2d at 525; Open Records Decision Nos. 438 (1986), 405 (1983), 230 (1979), 219 (1978). We note that supervisors are generally not witnesses for purposes of *Ellen*, except where their statements appear in a non-supervisory context.

Upon review, we find that the submitted report constitutes an adequate summary of the alleged sexual harassment. The summary is not confidential under section 552.101 in conjunction with common-law privacy and the holding in *Ellen*. However, information within the summary that identifies the alleged victim and witnesses is confidential under common-law privacy and generally must be withheld pursuant to section 552.101 of the Government Code. See *Ellen*, 840 S.W.2d at 525. We note that the requestor is the alleged victim in this instance. Section 552.023 of the Government Code gives a person a special right of access to information that is excepted from public disclosure under laws intended to protect that person's privacy interest as the subject of the information. See Gov't Code § 552.023. Thus, the requestor has a special right of access to her own information, and the city may not withhold that information under section 552.101 in conjunction with common-law privacy and the holding in *Ellen*. Therefore, the identifying information of the

witnesses, which we have marked, must be withheld under section 552.101 in conjunction with common-law privacy and the holding in *Ellen*.¹

This office has found some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under 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 marked the information in the remaining portions of the summary that reveals specific illnesses or disabilities pertaining to identified individuals. We find this information is highly intimate or embarrassing and of no legitimate public interest. Accordingly, the information we marked must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

Portions of the remaining information may be subject to section 552.117 of the Government Code.² This section excepts from public disclosure the present 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 timely request that such information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). The city may only withhold information under section 552.117(a)(1) on behalf of officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Accordingly, if the employees whose information we marked timely elected to keep their family member information confidential pursuant to section 552.024, the city must withhold this information under section 552.117(a)(1). However, if the employees at issue did not timely elect under section 552.024, the family member information we marked must be released.

In summary, the city must withhold the witness information we marked under section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Ellen*, and the personal medical information we marked under section 552.101 in conjunction with common-law privacy. If the employees whose information we marked timely elected to keep their family member information confidential pursuant to section 552.024, the city must also withhold this information under section 552.117(a)(1) of the Government Code. The remaining information must be released.

¹Because the requestor in this instance has a right of access to some information that otherwise would be protected by exceptions and laws enacted to protect a person's right to privacy, if the city receives another request for this particular information from a different requestor, the city should again seek a decision from this office.

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 Nos. 481 (1987), 480 (1987), 470 (1987).

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,

A handwritten signature in black ink, appearing to read "Bob Davis", with a long horizontal flourish extending to the right.

Bob Davis
Assistant Attorney General
Open Records Division

RSD/cc

Ref: ID# 376763

Enc. Submitted documents

cc: Requestor
(w/o enclosures)