



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 28, 2011

Mr. Terry Jacobson
Jacobson Law Firm, P.C.
For City of Corsicana
733 West Second Avenue
Corsicana, Texas 75110

OR2011-05855

Dear Mr. Jacobson:

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# 415737.

The City of Corsicana (the "city"), which you represent, received requests from three individuals for information concerning two complaints of sexual harassment. The first requestor seeks ten categories of information concerning the complaints. The second requestor seeks all documents concerning the complaints, including the names of individuals involved in certain meetings, a specified agreement between the city and a named individual concerning the complaints, and certain original documents.¹ The third requestor seeks eleven categories of information similar to the second requestor, and, additionally, certain invoices for legal services, and the State Bar of Texas license number for the city's attorney. You state the city has provided all three requestors with some of the information they seek. You further state that, with the exception of the submitted documents, the city does not maintain

¹ We note the city sought and received clarification regarding the second requestor's initial request. See Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

additional responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed) (governmental body not required to furnish information that did not exist when request for information received). You claim the original documents sought by the second and third requestors are not subject to the Act. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered your arguments and reviewed the submitted information. We have also considered arguments submitted by the second and third requestors. *See Gov't Code* § 552.304 (interested party may submit comments to this office stating why the information at issue should or should not be released).

Initially, we note the third requestor, in correspondence with this office, has withdrawn her request for copies of the written complaints. Accordingly, the submitted complaints are not responsive to her request. Further, Exhibits E and F were created after the city received the requests for information and are therefore not responsive to the requests. This ruling does not address the public availability of information that is not responsive to each of the requests, and the city is not required to release any non-responsive information to the requestors who seek that particular information.

Next, you state the city sought clarification regarding one of the categories of information sought by the third requestor and a similar category sought by the second requestor in his clarified request. *See Gov't Code* § 552.222. We understand neither requestor has responded to the request for clarification. Accordingly, the city has no obligation at this time to release any information that is responsive to the part of the requests for which it has not received clarification. *See City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for public information, the ten business-day deadline to request an attorney general ruling is measured from the date the request is clarified or narrowed). However, if the requestors respond to the clarification request, then the city must again seek a ruling from this office before withholding any information responsive to the clarification.

Next, we address your assertion that the city need not release certain original documents sought by the second and third requestors because original documents are not subject to the Act. The Act is applicable to "public information." *See Gov't Code* § 552.021. Section 552.002 provides that "public information" consists of "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). Section 552.221(a) of the Act provides that "[a]n officer for public information of a governmental body shall promptly produce public information for inspection, duplication, or both on application by any person to the officer." Thus, the fact that the requestor seeks access to an original document does not remove that information from the Act's application, and the city must produce any public information so that the requestor may inspect the

information, copy the information, or both inspect and copy the information, whichever the requestor chooses. *See id.* § 552.221(a); *Moore v. Collins*, 897 S.W.2d 496, 499 (Tex. App.—Houston [1st Dist.] 1995, no writ) (holding section 552.221 required governmental body to respond to request for information either by presenting requestor with the requested information for copying or by informing him it was in active use or storage); Open Records Decision Nos. 682 at 7 (2005) (section 552.221 requires governmental body to either provide information for inspection or duplication or send copies of information by first-class mail.), 512 at 1 (1988) (predecessor provisions of the Act give requestor option to take notes from original documents, to pay for copies of public records, or both). Accordingly, pursuant to section 552.221 of the Government Code, the city must permit the requestor to inspect the information at issue, receive a copy of the information, or both inspect and receive a copy of the information, as the requestor chooses. However, as you acknowledge, the Act does not authorize the removal of an original copy of a public record from the office of a governmental body. Gov't Code § 552.226. As we conclude the information at issue falls within the scope of the Act, we will address your assertion of section 552.101 of the Government Code for this information.

The city and both complainants assert that the submitted written complaints were created pursuant to a city policy that pledged confidentiality. Information is not confidential under the Act simply because the party that submits the information anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot overrule or repeal provisions of the Act through an agreement or contract. *See Attorney General Opinion JM-672* (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the Act] cannot be compromised simply by its decision to enter into a contract.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110). Consequently, unless the information at issue falls within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

Section 552.101 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 the doctrine of common-law 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). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681–82. 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 files involving 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. *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.* 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*, 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). However, when no adequate summary exists, detailed statements regarding the allegations must be released, but the identities of witnesses and victims must still be redacted from the statements. We note supervisors are generally not witnesses for purposes of *Ellen*, except where their statements appear in a non-supervisory context. Further, 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).

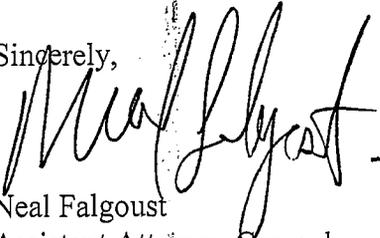
The requested information relates to two complaints of sexual harassment. Upon review, we find the requested information does not contain an adequate summary of the investigation. Therefore, pursuant to section 552.101 and the ruling in *Ellen*, the requested information must be released, with the identities of the victims and witnesses redacted under section 552.101 of the Government Code in conjunction with common-law privacy. *See Ellen*, 840 S.W.2d at 525. We note, however, that both victims of the reported harassment have discussed their complaints with a local newspaper. We therefore conclude that because the alleged victims provided information concerning their allegations to the media, they have waived their 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). Accordingly, the city may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with common-law privacy and the court's ruling in *Ellen*. As the city claims no further exceptions to disclosure, the submitted 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,

A handwritten signature in black ink, appearing to read "Neal Falgoust". The signature is written in a cursive style with a horizontal line underneath.

Neal Falgoust
Assistant Attorney General
Open Records Division

NF/bs

Ref: ID# 415737

Enc. Submitted documents

c: 3 Requestors
(w/o enclosures)