



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

March 1, 2013

Ms. Rachel L. Lindsay  
Brown & Hofmeister, L.L.P.  
740 East Campbell Road, Suite 800  
Richardson, Texas 75081

OR2013-03529

Dear Ms. Lindsay:

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# 481439.

The City of Runaway Bay (the "city"), which you represent, received a request for information pertaining to a specified complaint. You claim the requested information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, you indicate some of the submitted information is not responsive to the instant request for information. However, a governmental body must make a good-faith effort to relate a request to information that is within its possession or control. *See* Open Records Decision No. 561 at 8 (1990). As the city has submitted this information for our review and raised exceptions to disclosure of this information, we consider the city to have made a good-faith effort to identify the information that is responsive to the request, and we will address the applicability of the claimed exceptions to it.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses the doctrine of 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. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The types of

information considered intimate and 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. *Id.* at 683.

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. *Id.* 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.* In concluding, 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, 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. *See* Open Records Decision Nos. 438 (1986), 405 (1983), 230 (1979), 219 (1978).

The submitted information pertains to an investigation of alleged sexual harassment and contains an adequate summary of the investigation. Thus, the summary is not confidential. The requestor is one of the alleged victims and has a right of access to her private information within the summary pursuant to section 552.023 of the Government Code. Nevertheless, information within the summary identifying another victim, which we have marked, is confidential under common-law privacy and the city must withhold it pursuant to section 552.101 of the Government Code. *See Ellen*, 840 S.W.2d at 525. The city must withhold the remaining information in the investigation file, which we have also marked, under section 552.101 in conjunction with common-law privacy.<sup>1</sup> *See id.* However, the remaining information in the summary is not confidential under common-law privacy, and the city may not withhold it under section 552.101 on that ground.

Section 552.101 of the Government Code also encompasses the doctrine of constitutional privacy. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type

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<sup>1</sup>As we are able to resolve this matter under section 552.101, we do not address your other argument for exception of this information.

protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common-law doctrine of privacy. The information must concern the "most intimate aspects of human affairs." *Id.* at 5 (quoting *Ramie v. City of Hedwig Village*, 765 F.2d 490 at 492 (5th Cir. 1985)). Upon review, we find the city has failed to demonstrate how any portion of the remaining information in the summary falls within the zones of privacy or implicates an individual's privacy interests for purposes of constitutional privacy. Therefore, the department may not withhold any of the remaining information at issue under section 552.101 on the basis of constitutional privacy.

Section 552.111 of the Government Code excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." This exception encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995).

Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See* ORD 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

You assert the remaining information in the summary consists of advice, opinion, and recommendation pertaining to the evaluation of candidates for a city position. However,

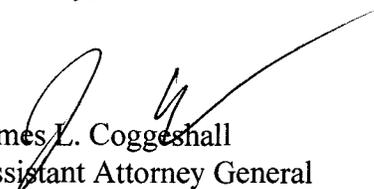
upon review we find the remaining information at issue is related to routine administrative and personnel matters and does not pertain to policymaking of the city. Therefore, you have failed to demonstrate how the deliberative process privilege applies to the information at issue. Consequently, the city may not withhold any of the remaining information at issue under section 552.111 of the Government Code.

To conclude, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Ellen*. The city must release the remaining information to the requestor.<sup>2</sup>

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, toll free, at (888) 672-6787.

Sincerely,



James L. Coggeshall  
Assistant Attorney General  
Open Records Division

JLC/tch

Ref: ID# 481439

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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<sup>2</sup>Because the requestor has a special right of access to a portion of the information being released, the city must again seek a decision from this office if it receives another request for the same information from another requestor.