



January 28, 2015

Mr. Guillermo Trevino
Assistant City Attorney
City of Fort Worth
1000 Throckmorton Street, 3rd Floor
Fort Worth, Texas 76102

OR2015-01655

Dear Mr. Trevino:

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# 551986 (COFW PIR No. W038215).

The City of Fort Worth (the "city") received a request for the city's complete file pertaining to a specified case. You state the city has released most of the requested information. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code and privileged under Texas Rule of Evidence 503. We have considered your arguments and reviewed the submitted representative sample of information.¹

Initially, we note the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a)(1) provides for the required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[.]" unless it is excepted by section 552.108 of the Government Code or "made confidential under [the Act] or other law[.]" Gov't Code § 552.022(a)(1). The submitted information pertains to a completed sexual harassment investigation. This information is subject to section 552.022(a)(1) and must be released unless it is either excepted under section 552.108

¹We assume 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 those records contain substantially different types of information than that submitted to this office.

of the Government Code or is confidential under the Act or other law. You seek to withhold the some of information subject to subsection 552.022(a)(1) under section 552.107 of the Government Code. However, section 552.107 is a discretionary exception and does not make information confidential under the Act. *See* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the information subject to section 552.022(a)(1) may not be withheld under section 552.107 of the Government Code. However, the Texas Supreme Court has held the Texas Rules of Evidence are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). We will therefore consider your assertion of the attorney-client privilege under rule 503 of the Texas Rules of Evidence. Further, as sections 552.101 and 552.117 of the Government Code can make information confidential we will consider the applicability of these sections to the information at issue.²

Texas Rule of Evidence 503 enacts the attorney-client privilege. Rule 503(b)(1) provides as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if it is not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5).

Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show the communication is confidential by explaining it was not intended to be disclosed to third persons and it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You state the information submitted as Exhibit C-6 consist of communications between the city's attorneys and city employees and officers in their capacities as clients. You state the communications at issue were made for the purpose of the rendition of legal services to the city. You inform us the communications at issue have not been, and were not intended to be, disclosed to third parties. Based on your representations and our review of the information at issue, we find the city has established the information at issue constitutes attorney-client communications under rule 503. Thus, the city may withhold Exhibit C-6 pursuant to rule 503 of the Texas Rules of Evidence.

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 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 (Tex. 1976). 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 "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 that, 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* Open Records Decision Nos. 438 (1986), 405 (1983), 230 (1979), 219 (1978). We also note supervisors are generally not witnesses for purposes of *Ellen*, except where their statements appear in a non-supervisory context.

In this instance, the submitted information pertains to a sexual harassment investigation and, thus, is subject to the ruling in *Ellen*. Upon review, we find the submitted information includes an adequate summary of the investigation, as well as a statement by the person accused of sexual harassment. The summary and statement of the accused are not confidential under section 552.101 in conjunction with common-law privacy. *See Ellen*, 840 S.W.2d at 525. Therefore, with the exception of the summary and the statement of the accused, the city must withhold the remaining information under section 552.101 in conjunction with common-law privacy and the holding in *Ellen*.³ We note, however, information within the accused's statement that identifies the victim and witnesses is confidential under common-law privacy. *See Ellen*, 840 S.W.2d at 525. In this instance, the requestor is the alleged sexual harassment victim. Section 552.023 of the Government Code states a person has a special right of access to information that relates to the person and that is protected from disclosure by laws intended to protect the person's privacy interest. *See* Gov't Code § 552.023(a); Open Records Decision No. 481 at 4 (1987) (governmental body may not deny access to whom information relates or person's authorized representative on grounds that information is considered confidential by privacy principles). Thus, the requestor has a special right of access to her own information, and the city may not withhold this information in the adequate summary and statements of the accused from the requestor under section 552.101 on the basis of common-law privacy. Accordingly, only the identifying information of witnesses in the adequate summary and statements of the accused is confidential under common-law privacy.

As noted above, section 552.101 of the Government Code encompasses the doctrine of common-law privacy. The types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). Upon review, we find some of the information at issue satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the city must withhold the information we have marked within the adequate summary and statements of the accused under section 552.101 of the

³As our ruling is dispositive, we need not consider your remaining argument against disclosure of this information.

Government Code in conjunction with common-law privacy. However, we find you have not demonstrated how the remaining information you have marked is highly intimate or embarrassing and not of legitimate public concern. Thus, the remaining information may not be withheld under section 552.101 in conjunction with common-law privacy.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee or official of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See* 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 employee or official 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. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee or official who did not timely request under section 552.024 the information be kept confidential. Therefore, if the individuals whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, then the city must withhold the information we have marked under section 552.117(a)(1) of the Government Code. Conversely, if the individuals at issue did not timely request confidentiality under section 552.024, then the city may not withhold the marked information under section 552.117(a)(1).

In summary, the city may withhold Exhibit C-6 under Texas Rule of Evidence 503. With the exception of the adequate summary and the statements of the accused, both of which we have marked, the city must withhold the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Ellen*. In releasing the adequate summary and statements of the accused, the city must withhold (1) the identifying information of witnesses under section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Ellen*; (2) the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy; and (3) the information we have marked under section 552.117(a)(1) of the Government Code, if the individuals at issue timely requested confidentiality under section 552.024 of the Government Code.⁴

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.

⁴We note the information being released in this instance includes information that may be confidential with respect to the general public. *See* Gov't Code § 552.023(a); ORD 481 at 4. Therefore, if the city receives another request for this information from a different requestor, the city must again seek a ruling from this office.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Nicholas A. Ybarra
Assistant Attorney General
Open Records Division

NAY/cbz

Ref: ID# 551986

Enc. Submitted documents

c: Requestor
(w/o enclosures)