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ATTORNEY GENERAL OF TEXAS

July 30, 2015

Ms. Aimee Alcorn
Assistant City Attorney
Legal Department
City of Corpus Christi
P.O. Box 9277
Corpus Christi, Texas 78469-9277

OR2015-15545

Dear Ms. Alcorn:

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# 573560 (City File Numbers 550, 551, 561, 562, and 610).

The City of Corpus Christi (the "city") received five requests for a specified human resources investigation file. The fifth requestor also seeks his personnel file, complaints and grievances filed against him, information regarding his termination, and specified video recordings. You state some of the requested information will be made available to the fifth requestor. You claim that the submitted information is excepted from disclosure pursuant to sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.108(a)(1) of the Government Code excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime[.]" Gov't Code § 552.108(a)(1). A governmental body claiming section 552.108(a)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). We note section 552.108 is generally not applicable to records of an internal affairs investigation that is purely administrative in nature and does not involve the investigation or prosecution of crime. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no pet.); *Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. App.—El Paso 1992, writ denied) (statutory predecessor to section 552.108 not applicable to internal investigation that did not result in

criminal investigation or prosecution). The information at issue pertains to an internal investigation of the city's human resources department regarding a city employee that was purely administrative in nature. Although you state the information relates to a "matter that might constitute a crime," you have not explained how the city's administrative investigation pertains to a pending criminal matter. Consequently, we find you have failed to show the applicability of section 552.108(a)(1) to the submitted information, and the city may not withhold it on that basis.

Section 552.101 of the Government Code excepts "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 *Ellen*, the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment in an employment context. 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 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 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 adequate 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 adequate 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*. We note, however, information within the adequate summary and statement of the accused that identifies the victims and witnesses is confidential under common-law privacy. *See id.* Therefore, the city must generally withhold the information that identifies the victims and witnesses, which we have marked, within the adequate summary and statement of the accused under section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Ellen*. In this instance, four of the requestors are the alleged sexual harassment victims and witnesses. 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, these requestors have a special right of access to their own information, and the city may not withhold these requestors' respective information from them under section 552.101 on the basis of common-law privacy.

We note the remaining information in the accused's statement contains one of the requestor's information that is subject to section 552.117 of the Government Code. Section 552.117(a)(1) of the Government Code applies to records a governmental body holds in an employment capacity and excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. *Gov't Code* § 552.117(a)(1). Whether a particular piece of 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)*. 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. If the employee whose information is at issue timely elected confidentiality under section 552.024, the city must withhold the information we have marked under section 552.117(a)(1) of the Government Code. In this instance, we note section 552.117 protects personal privacy. Therefore, the requestor whose information is at issue has a right of access to his own information under section 552.023 of the Government Code. *See Gov't Code* § 552.023. If the employee did not make a timely election under section 552.024, this information may not be withheld under section 552.117(a)(1) of the Government Code.

In summary, with the exception of the adequate summary of the investigation and the statement of the accused, which we have marked, the city must withhold the submitted

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 the statement of the accused, 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*. To the extent the individual whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, the city must also withhold the information we have marked in the accused's statement under section 552.117(a)(1) of the Government Code. However, pursuant to section 552.023 of the Government Code, each requestor has a right of access to their own private information.

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.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,



Debbie K. Lee
Assistant Attorney General
Open Records Division

DKL/bhf

Ref: ID# 573560

Enc. Submitted documents

c: Requestors
(w/o enclosures)