



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 2, 2015

Mr. William S. Helfand
Counsel for MHMR of Tarrant County
Chamberlain, Hrdlicka, White, Williams & Aughtry, L.L.P.
1200 Smith Street, Suite 1400
Houston, Texas 77002-44967

OR2015-20701

Dear Mr. Helfand:

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# 582287.

MHMR of Tarrant County ("MHMR"), which you represent, received a request for information pertaining to the demotion of the requestor, as well as the requestor's personnel file, the HR policy handbook, and information pertaining to similar disciplinary actions taken in the previous five years. MHMR claims the requested information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code.¹ We have considered the claimed exceptions and reviewed the submitted information.

Initially, we note MHMR submitted responsive information pertaining to the requestor's demotion, but did not submit the requestor's personnel file, the requested policy handbook, or information pertaining to similar disciplinary actions taken in the previous five years. Thus, we find the submitted information is not representative of the other types of information to which the requestor seeks access. Please be advised, this open records letter ruling applies only to the type of information you have submitted for our review. This ruling does not authorize MHMR to withhold any information that is substantially different from the type of information you submitted to this office. *See Gov't Code* § 552.302. Accordingly, to the extent any information responsive to the remainder of the request for information existed in the possession of MHMR when it received the request, we assume

¹Although MHMR raises section 552.101 of the Government Code in conjunction with section 552.103 of the Government Code, we note this office has concluded section 552.101 does not encompass other exceptions found in the Act. *See Open Records Decision No. 676 at 1-2 (2002).*

MHMR has released that information to the requestor. *See* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible). If MHMR has not released any such information, it must do so at this time. *See* Gov't Code §§ 552.301(a), .302.

We next note the submitted information is part of a completed investigation that is subject to section 552.022(a)(1) of the Government Code, which reads as follows:

Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). MHMR asserts this information is excepted from release under section 552.103 of the Government Code. However, section 552.103 is discretionary and does not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, MHMR may not withhold the submitted information under section 552.103. However, sections 552.101 and 552.117 of the Government Code make information confidential under the Act.² Accordingly, we will consider the applicability of these sections to the information subject to section 552.022.

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 the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person and (2) 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 satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *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

²The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. *See* Open Records Decision Nos. 481 at 2 (1987), 480 at 5 (1987).

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 is an investigation into alleged sexual harassment, and it contains an adequate summary of that investigation. Thus, the summary is not confidential. However, the summary contains identifying information of victims, which we have marked. This information is confidential under common-law privacy, and MHMR must withhold it under section 552.101 of the Government Code on that ground. *See Ellen*, 840 S.W.2d at 525. MHMR must withhold the remaining information in the investigation file, which we also have marked, under section 552.101 in conjunction with common-law privacy. *See id.*

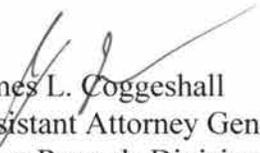
Section 552.117(a)(1) of the Government Code may be applicable to some of the remaining information. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials 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 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). Therefore, MHMR may only withhold information under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Such information may not be withheld for an individual who did not make a timely election. The requestor has a right of access to her own personal information pursuant to section 552.023 of the Government Code. *See* Gov't Code § 552.023(a); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individuals request information concerning themselves). However, MHMR must withhold the information pertaining to another employee we have marked under section 552.117(a)(1) if the employee at issue timely elected to withhold that information.

To conclude, MHMR must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. MHMR must also withhold the information we have marked under section 552.117(a)(1) of the Government Code if the employee at issue timely elected to withhold that information. MHMR must release the remaining information.³

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,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/cbz

Ref: ID# 582287

Enc. Submitted documents

c: Requestor
(w/o enclosures)

³Section 552.024(c)(2) of the Government Code authorizes a governmental body to redact information protected by section 552.117(a)(1) of the Government Code without the necessity of requesting a decision under the Act if the current or former employee or official to whom the information pertains timely chooses not to allow public access to the information. See Gov't Code § 552.024(c)(2). Thus, if MHMR receives another request for this information, section 552.024(c) authorizes MHMR to withhold the requestor's personal information if the requestor has timely elected to withhold this information without seeking another ruling from this office.