



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 22, 2016

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

OR2016-09080

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# 606775 (City PIR No. W049052).

The City of Fort Worth (the "city") received a request for investigations, statements, and correspondence regarding the requestor's employment and termination. You state you have released some information to the requestor. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. This section encompasses the doctrine of common-law privacy. Common-law privacy 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 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 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). We note supervisors are generally not witnesses for purposes of *Ellen*, except where their statements appear in a non-supervisory context.

You contend, and we agree, the submitted information pertains to a sexual harassment investigation and is subject to the ruling in *Ellen*. Upon review, we find the investigation includes an adequate summary, 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; however, information within the summary and accused's statement that identifies the victims and witnesses must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy. *See Ellen*, 840 S.W.2d at 525. Thus, the city must withhold the information you have marked, and the additional information we have marked, within the summary and statement of the accused under section 552.101 of the Government Code in conjunction with common-law privacy. *See id.* The city must release the remaining portions of the summary and statement of the accused, which we have marked. Further, the city must withhold the remaining information under section 552.101 in conjunction with common-law privacy and the court's holding in *Ellen*.

Section 552.117(a)(2) of the Government Code excepts from public disclosure the home address, home telephone number, emergency contact information, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with sections 552.024

and 552.1175 of the Government Code.¹ See Gov't Code § 552.117(a)(2). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. We have indicated information under section 552.117 that consists of the personal information of a peace officer who was employed by the city and the information is held in the employment context. In this instance, however, it is unclear whether the individual whose information is at issue is currently a licensed peace officer as defined by article 2.12 of the Code of Criminal Procedure. Accordingly, to the extent the individual whose information we have indicated is currently a licensed peace officer as defined by article 2.12, the city must withhold the information we have indicated under section 552.117(a)(2) of the Government Code. Conversely, to the extent the individual whose information is at issue is no longer a licensed peace officer as defined by article 2.12, the city may not withhold the indicated information under section 552.117(a)(2).

If the information we have indicated under section 552.117 pertains to an individual who is no longer a licensed peace officer, then the indicated information may be subject to section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) 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 of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. See *id.* § 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). Therefore, to the extent the individual at issue is no longer a peace officer as defined by article 2.12, and made a timely election pursuant to section 552.024, the city must withhold the information we have indicated under section 552.117(a)(1) of the Government Code.

In summary, with the exception of the summary and statement of the accused, which we have marked for release, the city must withhold the submitted information under section 552.101 of the Government Code in conjunction with common-law privacy and the court's holding in *Ellen*. The city must withhold the information you have marked, and the additional information we have marked for withholding, within the summary and statement of the accused under section 552.101 of the Government Code in conjunction with common-law privacy. To the extent the individual whose information we have indicated is currently a licensed peace officer as defined by article 2.12, the city must withhold the information we have indicated under section 552.117(a)(2) of the Government Code. To the extent the individual at issue is no longer a peace officer as defined by article 2.12, and made a timely election pursuant to section 552.024, the city must withhold the information we have

¹The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

indicated under section 552.117(a)(1) of the Government Code. The city must release the remaining information in the summary and statement of the accused.²

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,



Tim Neal
Assistant Attorney General
Open Records Division

TN/bhf

Ref: ID# 606775

Enc. Submitted documents

c: Requestor
(w/o enclosures)

²We note the requestor has a right of access to her personal information that might otherwise be excepted from disclosure under section 552.117 of the Government Code. *See* Gov't Code § 552.023(a) (person or person's authorized representative has a special right of access to records that contain information relating to the person that are protected from public disclosure by laws intended to protect that person's privacy interests).