



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 21, 2016

Mr. Neal Falgoust
Assistant City Attorney
City of Austin
P.O. Box 1088
Austin, Texas 78767-8828

OR2016-28209

Dear Mr. Falgoust:

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# 639961 (PIR#s 29768, 29828, 29868, 29873, 30085).

The City of Austin (the "city") received five requests from four requestors for all information pertaining to a specified investigation report, in addition to all communications from certain city employees pertaining to the specified report. You state the city has released some information to the requestors. We understand the city will withhold some information subject to section 552.117(a)(1) of the Government Code pursuant to section 552.024 of the Government Code.¹ You claim some of the submitted information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information, some of which you state consists of a representative sample.²

¹Section 552.024 authorizes a governmental body to redact from public release a current or former employee's home address and telephone number, emergency contact information, social security number, and family member information excepted from disclosure under section 552.117(a)(1) without the necessity of requesting a decision from this office under the Act, if the employee timely elected to withhold such information. *See* Gov't Code §§ 552.024(a)-(c), .117(a)(1).

²We 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 that those records contain substantially different types of information than that submitted to this office.

Initially, we note the fifth requestor only sought the specified report. Therefore, any additional submitted information is not responsive to the fifth request. The city is not required to release non-responsive information in response to the fifth request.

Next, we note some of the requested information may have been the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2016-15323 (2016). We have no indication the law, facts, or circumstances on which the prior ruling was based have changed. Thus, to the extent the requested information is identical to the information previously requested and ruled upon, the city must continue to rely on Open Records Letter No. 2016-15323 as a previous determination and withhold or release the identical information at issue in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). However, to the extent the requested information is not subject to the previous ruling, we will consider your arguments against disclosure of the information at issue.

Section 552.101 of the Government Code exempts 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). Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). 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, some of the submitted information, which you have marked, pertains to sexual harassment investigations and, thus, is subject to the ruling in *Ellen*. Upon review, we find some of the information at issue includes adequate summaries of these investigations, as well as a statement by the person accused of sexual harassment in one investigation. The summaries 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 summaries and the statement of the accused at issue, the city must withhold the information pertaining to these investigations, which you have marked, under section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Ellen*.³ However, we find the remaining investigation into alleged sexual harassment does not contain an adequate summary of the investigation of the alleged sexual harassment. Because there is no adequate summary of the investigation, the city must generally release any information pertaining to the sexual harassment investigation at issue.

We note, however, the remaining information, as well as the information within the summaries and the accused's statement, contain the identifying information of the victims and witnesses, which is confidential under common-law privacy. *See id.* We further note the third requestor is one of the alleged sexual harassment victims. 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 third requestor has a special right of access to his own information, and the city may not withhold this information in the summary or the accused's statement from the third requestor under section 552.101 in conjunction with common-law privacy. Accordingly, with the exception of the information we have marked for release, the identifying information of the other victims and the witnesses in the summaries, the accused's statement, and the remaining information, which you have marked and we have marked for withholding, must be withheld from the third requestor under section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Ellen*. Further, with the exception of the information we have marked for release, the identifying information of all the victims and the witnesses you have marked and we have marked for withholding within the summaries, the accused's statement, and the remaining information, must be withheld from

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

the remaining requestors under section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Ellen*. However, upon review, we find you have failed to demonstrate the remaining information you have marked is highly intimate or embarrassing and not of legitimate public concern. Therefore, the city may not withhold the remaining information you have marked, which we have marked for release, under section 552.101 of the Government Code on that basis.

Section 552.101 of the Government Code also encompasses information protected by the Family and Medical Leave Act (the "FMLA"). *See* 29 U.S.C. §§ 2601 *et seq.* Section 825.500 of chapter V of title 29 of the Code of Federal Regulations identifies the record-keeping requirements for employers that are subject to the FMLA. Subsection (g) of section 825.500 states:

Records and documents relating to medical certifications, recertifications or medical histories of employees or employees' family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files. . . . If the [Americans with Disabilities Act (the "ADA")], as amended, is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements . . . , except that:

- (1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;
- (2) First aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatment; and
- (3) Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

29 C.F.R. § 825.500(g). Upon review, we find the information you have marked is confidential under section 825.500 of title 29 of the Code of Federal Regulations. Further, we find none of the release provisions of the FMLA apply to this information. Accordingly, the city must withhold the information you have marked under section 552.101 of the Government Code in conjunction with the FMLA.

Section 552.101 of the Government Code also encompasses information protected by section 1703.306 of the Occupations Code, which provides the following:

- (a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of

the person, may not disclose information acquired from a polygraph examination to another person other than:

- (1) the examinee or any other person specifically designated in writing by the examinee;
- (2) the person that requested the examination;
- (3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;
- (4) another polygraph examiner in private consultation; or
- (5) any other person required by due process of law.

(b) The [Texas Department of Licensing and Regulation] or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.

(c) A polygraph examiner to whom information acquired from a polygraph examination is disclosed under Subsection (a)(4) may not disclose the information except as provided by this section.

Occ. Code § 1703.306. Upon review, we find the information you have marked constitutes information acquired from a polygraph examination. However, in this instance, the third requestor is the polygraph examinee. Thus, the city has the discretion to release the polygraph information at issue to the third requestor pursuant to section 1703.306(a)(1) of the Occupations Code. *See* Open Records Decision No. 481 at 9 (1987) (predecessor to section 1703.306 permitted, but did not require, examination results to be disclosed to examinees). Otherwise, the city must withhold from the third requestor the polygraph information you have marked under section 552.101 of the Government Code in conjunction with section 1703.306(a) of the Occupations Code. However, the remaining requestors do not appear to have a right of access to the information under that section. Accordingly, the city must withhold from the remaining requestors the information you have marked under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "to facilitate the rendition of professional legal services" to the client governmental body. TEX. R. EVID.

503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.*, meaning it was “not intended to be disclosed to third persons other than those: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state the information you have marked constitutes communications between city attorneys and employees in their capacity as clients that were made for the purpose of providing professional legal services to the city. You state the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find the information at issue consists of privileged attorney-client communications the city may withhold under section 552.107(1) of the Government Code.

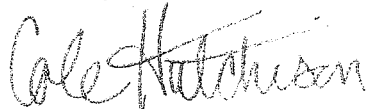
In summary, to the extent the requested information is identical to the information previously requested and ruled upon, the city must continue to rely on Open Records Letter No. 2016-15323 as a previous determination and withhold or release the identical information at issue in accordance with that ruling. With the exception of the summaries and the statement of the accused, the city must withhold the information pertaining to the sexual harassment investigations that you have marked under section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Ellen*. With the exception of the information we have marked for release, the city must withhold from the third requestor the identifying information of the other victims and the witnesses in the summaries, the accused’s statement, and the remaining information, which you have marked and we have marked for withholding, under section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Ellen*. Further, with the exception of the information we have marked for release, the identifying information of all the victims and the witnesses you have marked and we have marked for withholding within the summaries,

the accused's statement, and the remaining information, must be withheld from the remaining requestors under section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Ellen*. The city must withhold the information you have marked under section 552.101 of the Government Code in conjunction with the FMLA. The city has the discretion to release the polygraph information at issue to the third requestor pursuant to section 1703.306(a)(1) of the Occupations Code. Otherwise, the city must withhold from the third requestor the polygraph information you have marked under section 552.101 of the Government Code in conjunction with section 1703.306(a) of the Occupations Code. Further, the city must withhold from the remaining requestors the information you have marked under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code. The city may withhold the information you have marked under section 552.107(1) of the Government Code. The city must release the remaining information; however, the city need not release information to the fifth requestor that is not responsive to his request.

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,



Cole Hutchison
Assistant Attorney General
Open Records Division

CH/sdk

Ref: ID# 639961

Enc. Submitted documents

c: 4 Requestors
(w/o enclosures)

