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ATTORNEY GENERAL OF TEXAS

May 19, 2017

Mr. Leonard V. Schneider
Counsel for the City of Huntsville
Liles Parker, PLLC
2261 Northpark Drive, Suite 445
Kingwood, Texas 77339

OR2017-10941

Dear Mr. Schneider:

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# 658433.

The Huntsville Police Department (the "department"), which you represent, received two separate requests from the same requestor for (1) the video pertaining to a specific incident; (2) a specified internal affairs investigation; (3) documentation pertaining to a specific meeting involving the requestor and two named individuals; and (4) the personnel file of the requestor. The department states it has released the requestor's personnel file to the requestor. The department claims some of the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.117 of the Government Code.¹ We have considered the exceptions the department claims and reviewed the submitted information.

Initially, we note the requestor only seeks (1) the video pertaining to a specific incident; (2) a specified internal affairs investigation; (3) documentation pertaining to a specific meeting involving the requestor and two named individuals; and (4) the personnel file of the requestor. We note the submitted information contains information beyond the specifically

¹Although the department also raises section 552.1175 of the Government Code, we note section 552.117 is the correct exception to raise for information the department holds in its capacity as an employer.

requested information. Accordingly, the information we have marked and indicated is not responsive to the instant request. This ruling does not address the public availability of non-responsive information, and the department is not required to release such information in response to this request.

Next, we note the department has not submitted documentation pertaining to the specific meeting as sought by the requestor. Thus, to the extent any additional responsive information existed when the present requests were received, we assume it has been released. If such information has not been released, then it must be released at this time. *See* Gov't Code §§ 552.301(a), .302; *see also* 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).

Next, we note most of the responsive information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he 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). The responsive information includes a completed investigation that is subject to section 552.022(a)(1). The department must release the completed investigation pursuant to section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or are made confidential under the Act or other law. *See id.* The department seeks to withhold the information subject to section 552.022(a)(1) under section 552.103 of the Government Code. However, section 552.103 is discretionary in nature 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 Gov't Code § 552.103); *see also* Open Records Decision Nos. 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 552.103 of the Government Code. However, as sections 552.101 and 552.117 of the Government Code make information confidential under the Act, we will consider the applicability of these sections to the information subject to section 552.022(a)(1).

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. 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.

In this instance, the information subject to section 552.022(a)(1) pertains to an investigation of alleged sexual harassment and thus, is subject to the ruling in *Ellen*. Upon review, we find the information at issue includes an adequate summary, as well as a statement by the person accused of sexual harassment, which we have marked. Thus, 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 adequate summary and the statement of the accused, which we have marked for release, the department must withhold the remaining information in the investigation file, which we have marked and indicated, under section 552.101 in conjunction with common-law privacy and

the holding in *Ellen*.² The requestor is the alleged victim and has a right of access to her private information within the summary and statement of the accused pursuant to section 552.023 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 protection that person's privacy interests); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individuals request information concerning themselves). Accordingly, the information within the summary and the accused's statement is not confidential under common-law privacy and the holding in *Ellen*, and may not be withheld under section 552.101 on that basis.

Section 552.101 of the Government Code also encompasses the Medical Practice Act ("MPA"), subtitle B of title 3 of the Occupations Code, which governs release of medical records. Section 159.002 of the MPA provides, in relevant part:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(a)-(c). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004. This office has concluded the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Upon review, we find the information we have marked is confidential under the MPA. Accordingly, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the MPA.

²As our ruling is dispositive, we need not address the department's remaining argument against disclosure of this information.

In summary, with the exception of the adequate summary and the statement of the accused, which we have marked for release, the department must withhold the information we have marked and indicated under section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Ellen*. The department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the MPA. The department must release the remaining responsive 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,



Rahat Huq
Assistant Attorney General
Open Records Division

RSH/som

Ref: ID# 658433

Enc. Submitted documents

c: Requestor
(w/o enclosures)

³We note the requestor has a right of access to some information being released pursuant to section 552.023 of the Government Code. See Gov't Code § 552.023(a); ORD 481 at 4.