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ATTORNEY GENERAL OF TEXAS

December 15, 2017

Mr. Steven J. Blanco
Counsel for the Lower Valley Water District
Blanco Ordoñez Mata & Wallace, P.C.
5715 Cromo Drive
El Paso, Texas 79912

OR2017-28509

Dear Mr. Blanco:

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# 688260.

The Lower Valley Water District (the "district"), which you represent, received a request for information pertaining to specified legal settlements during a certain time period and information pertaining to a named employee. You state the district will release some of the requested information. You claim some of the submitted information is excepted from disclosure under sections 552.101 and 552.102 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

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 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. 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 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*, along with the statement of the accused. However, 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 victims and witnesses must still be redacted from the statements. In either case, the identity of the individual accused of sexual harassment is not protected from public disclosure. 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 pertains to an investigation into alleged sexual harassment and thus, is subject to the ruling in *Ellen*. Upon review, we determine the information at issue does not contain an adequate summary of the alleged sexual harassment. Because there is no adequate summary of the investigation, the district must generally release any information pertaining to the sexual harassment investigation. However, the information at issue contains identifying information of the victim of the alleged sexual harassment. Accordingly, the district must withhold such information, which we marked, under section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Ellen*.¹ See *Ellen*, 840 S.W.2d at 525. However, we find the district has failed to demonstrate the remaining information is highly intimate or embarrassing to an identified individual and of no legitimate public interest. Thus, the district may not withhold the remaining information under section 552.101 in conjunction with common-law privacy.

Section 552.102(a) of the Government Code excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Gov't Code § 552.102(a). The Texas Supreme Court held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts*

¹As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

v. Attorney Gen. of Tex., 354 S.W.3d 336 (Tex. 2010). We note, dates of birth pertaining to individuals who have been de-identified are not protected as the de-identified individuals' privacy rights are, thus, protected. Upon review, we find, the district must withhold the public employee's date of birth we marked under section 552.102(a) of the Government Code. However, we find no portion of the remaining information is subject to section 552.102(a) of the Government Code, and the district may not withhold any of the remaining information on that basis.

In summary, the district must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Ellen*. The district must withhold the date of birth we marked under section 552.102 of the Government Code. The district must release the remaining 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,



Emily Kunst
Assistant Attorney General
Open Records Division

EK/tdw

Ref: ID# 688260

Enc. Submitted documents

c: Requestor
(w/o enclosures)