



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 6, 2018

Ms. Sue Jana
Assistant Criminal District Attorney - Civil Section
Bexar County
101 West Nueva, 7th Floor
San Antonio, Texas 78205

OR2018-02634

Dear Ms. Jana:

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# 693994 (DA File Nos. 6124, 6163).

Bexar County (the "county") received two requests from different requestors for information pertaining to a specified investigation. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code and privileged under Texas Rule of Evidence 503 and rule 1.05 of the Disciplinary Rules of Professional Conduct. We have considered the submitted arguments and reviewed the submitted information. We have also received and considered comments submitted by the first requestor. *See* Gov't Code § 552.304 (providing that interested party may submit written comments regarding why information should or should not be released).

Initially, we note the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides in part:

- (a) 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[.]

Id. § 552.022(a)(1). The submitted information is part of a completed investigation subject to section 552.022(a)(1). Although you seek to withhold portions of this information under section 552.107 of the Government Code, this section is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See* Open Records Decision No. 676 at 6 (2002) (attorney-client privilege under section 552.107 may be waived); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Thus, the county may not withhold this information under section 552.107 of the Government Code. Further, the Texas Disciplinary Rules of Professional Conduct are not considered "other law" for purposes of section 552.022. Consequently, we do not address your argument under rule 1.05 of the Disciplinary Rules of Professional Conduct and the county may not withhold any of the submitted information on this basis. *See* ORD 676 at 3-4. The Texas Supreme Court has held, however, the Texas Rules of Evidence are "other law" that make information expressly confidential for the purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will consider your assertion of the attorney-client privilege under Texas Rule of Evidence 503. Further, as sections 552.101 and 552.117 of the Government Code make information confidential, we will consider the applicability of these exceptions to the information at issue.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. 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

¹The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision No. 481 (1987), 480 (1987), 470 (1987).

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, 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 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, the submitted information pertains to a sexual harassment investigation and, thus, is subject to the ruling in *Ellen*. Upon review, we find the submitted information includes an adequate summary of this investigation, 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. *See Ellen*, 840 S.W.2d at 525. Therefore, with the exception of the summary and the statement of the accused at issue, the county must withhold the submitted information under section 552.101 in conjunction with common-law privacy and the holding in *Ellen*.² We note, however, information within the summary and accused’s statement that identifies the victim is generally confidential under common-law privacy. *See id.* However, the second requestor is the alleged victim and has a right of access to her private information 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). Thus, the county may not withhold this information from the second requestor under section 552.101 on the basis of common-law privacy. However, the identifying information of the victim we marked within the summary and accused’s statement must be withheld from the first requestor under section 552.101 in conjunction with common-law privacy and the holding in *Ellen*.

Section 552.117(a)(1) of the Government Code 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 or official of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See* Gov’t Code § 552.117(a)(1). Whether a particular item of information is

²As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

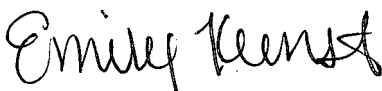
protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former employee or official who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee or official who did not timely request under section 552.024 the information be kept confidential. Therefore, to the extent the employee at issue timely requested confidentiality under section 552.024 of the Government Code, the county must withhold the information we marked under section 552.117(a)(1) of the Government Code. Conversely, to the extent the employee at issue did not timely request confidentiality under section 552.024, the county may not withhold the information under section 552.117(a)(1).

In summary, with the exception of the adequate summary and the accused's statement, the county must withhold the submitted information from both requestors under section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Ellen*. In releasing the adequate summary and the accused's statement to the first requestor, the county must withhold the identifying information of the victim, which we marked, under section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Ellen*. If the individual whose information we marked timely requested confidentiality under section 552.024 of the Government Code, the county must withhold the information we marked under section 552.117(a)(1) of the Government Code. The county 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# 693994

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)