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ATTORNEY GENERAL OF TEXAS

March 27, 2019

Mr. Brent Norbraten
Open Records Attorney
Texas Health and Human Services
P.O. Box 149030
Austin, Texas 78714-9030

OR2019-08419

Dear Mr. Norbraten:

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# 756557 (Ref. No. 20180921-17339).

The Texas Health and Human Services Commission (the "commission") received a request for information pertaining to a specified investigation involving the requestor.¹ You claim the submitted information is excepted from disclosure under sections 552.101 and 552.137 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses the common-law right of privacy, which protects information that is 1) highly intimate or embarrassing, such that its release 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 (Tex. 1976).

¹We understand the commission sought and received clarification of the information requested. *See* Gov't Code §552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

²Although the commission does not cite to section 552.137 of the Government Code in its brief, we understand the commission to raise this exception based on the substance of its argument.

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.

The submitted information relates to an investigation into alleged sexual harassment. Upon review, we determine the submitted information contains an adequate summary of the alleged sexual harassment, as well as statements by the person accused of sexual harassment. The summary and statements are not confidential under section 552.101 in conjunction with common-law privacy; however, information within this information identifying 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. Therefore, pursuant to section 552.101 in conjunction with common-law privacy and the holding in *Ellen*, the commission must withhold the identifying information of the victims and witnesses, which we have indicated, within the adequate summary and statements of the accused. Although you seek to withhold the information you have marked in one of the statements of the accused, because the person to which this information pertains has been de-identified, this information does not implicate the privacy rights of this individual and it may not be withheld under section 552.101 of the Government Code in conjunction with common-law privacy. Nevertheless, because there are statements of the accused and an adequate summary, the commission must withhold the remaining information under section 552.101 in conjunction with common-law privacy and the holding in *Ellen*.³

³As our ruling is dispositive for this information, we need not address your remaining arguments against its disclosure.

In summary, with the exception of the adequate summary and the statements of the accused, the commission must withhold the submitted information 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 statements of the accused, the commission must withhold the identifying information of the victims and witnesses, which we have indicated, under section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Ellen*.

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,



Michelle Garza
Assistant Attorney General
Open Records Division

MG/gw

Ref: ID# 756557

Enc. Submitted documents

c: Requestor
(w/o enclosures)