



KEN PAXTON  
ATTORNEY GENERAL OF TEXAS

April 24, 2019

Mr. John W. Peeler  
Counsel for Harris County Emergency Services District No. 48  
Coveler & Peeler, PC  
820 Gessner, Suite 1710  
Houston, Texas 77024-4298

OR2019-10862

Dear Mr. Peeler:

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# 760848.

The Harris County Emergency Services District No. 48 (the "district"), which you represent, received a request for 1) documents pertaining to a specified topic, including documents referencing a named individual; 2) documents pertaining to complaints; 3) documents pertaining to the firing of a named individual; and 4) documents pertaining to a specified job opening. You state the district does not have information responsive to some categories of the request.<sup>1</sup> You state you will release some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, you state the district sought clarification from the requestor for a portion of the request for information. *See* Gov't Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas*

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<sup>1</sup>The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

*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 over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed). You state the district has not received a response from the requestor for this portion of the request. Thus, for the portion of the request for which you have sought but not received clarification, we find the district is not required to release information in response to this portion of the request. However, if the requestor clarifies this portion of the request for information, the district must seek a ruling from this office before withholding any responsive information from the requestor. See Gov't Code 552.222; *City of Dallas*, 304 S.W.3d at 387. We note a governmental body has a duty to make a good-faith effort to relate a request for information to information the governmental body holds. Open Records Decision No. 561 (1990).

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. See Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate 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 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.* 503(b)(1), 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. See *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 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 Exhibit B consists of communications between attorneys for the district and district employees that were made for the purpose of providing legal services to the district. You state the communications were intended to be confidential and have remained confidential. Based on your representations and our review, we find Exhibit B consists of privileged attorney-client communications. Therefore, the district may withhold Exhibit B under section 552.107(1) of the Government Code.<sup>2</sup>

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 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 demonstrated. *See id.* at 681-82.

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 the *Ellen* decision 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.

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<sup>2</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

Exhibit C relates to an investigation into an alleged sexual harassment. Upon review, we find Exhibit C contains an adequate summary of the investigation of alleged sexual harassment and the statement of the accused. The summary and statement of the accused are not confidential under section 552.101 in conjunction with common-law privacy; however, information within the summary and statement that identifies 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 district must withhold the identifying information of the victims and witnesses within the summary and the statement of the accused, which we have marked. Because there is an adequate summary, the district must also withhold the remaining information in Exhibit C under section 552.101 in conjunction with common-law privacy and the holding in *Ellen*.<sup>3</sup>

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). We understand you to assert the privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101 of the Government Code, which is discussed above. *See Indus. Found.*, 540 S.W.2d at 685. In *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref’d n.r.e.), the court of appeals ruled the privacy test under section 552.102(a) is the same as the *Industrial Foundation* privacy test. However, the Texas Supreme Court has expressly disagreed with *Hubert*’s interpretation of section 552.102(a), and held the privacy standard under section 552.102(a) differs from the *Industrial Foundation* test under section 552.101. *See Tex. Comptroller of Pub. Accounts*, 354 S.W.3d 336. The supreme court also considered the applicability of section 552.102(a) and held it excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *See id.* at 348. Upon review, 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 may withhold Exhibit B under section 552.107(1) of the Government Code. With the exception of the adequate summary and the statement of the accused, which must be released, the district must withhold Exhibit C under section 552.101 in conjunction with common-law privacy and the holding in *Ellen*. In releasing the adequate summary and the statement of the accused, the district must withhold the information we have marked under section 552.101 in conjunction with common-law privacy and the holding in *Ellen*.

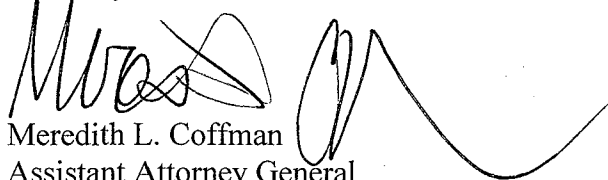
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<sup>3</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

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](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,

A handwritten signature in black ink, appearing to read 'Meredith L. Coffman', with a long, sweeping underline that extends to the right.

Meredith L. Coffman  
Assistant Attorney General  
Open Records Division

MLC/mo

Ref: ID# 760848

Enc. Submitted documents

c: Requestor  
(w/o enclosures)