



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 20, 2019

Ms. Michelle Buendia
Assistant City Attorney
City of Dallas
1400 South Lamar, 6 Floor. 6W
Dallas, Texas 75215

OR2019-16771

Dear Ms. Buendia:

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# 771636 (DPD ORR Nos D009622-040219, D009623-040219, D009624-040219, D009628-040319, D009629-040319, and D009630-040319).

The Dallas Police Department (the "department") received six requests from the same requestor for information pertaining to named department employees and information pertaining to three specified investigations. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.117, and 552.136 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note parts of the submitted information are 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:

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

(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 submitted information includes completed investigations subject to section 552.022(a)(1). The department must release the information at issue pursuant to section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or expressly made confidential under the Act or other law. Although you raise section 552.103 of the Government Code for the information at issue, this section is a discretionary exception to disclosure 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); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, none of the information subject to section 552.022(a)(1), which we marked, may be withheld under section 552.103. However, because sections 552.101, 552.117, and 552.136 of the Government Code make information confidential for purposes of section 552.022, we will consider the applicability of these exceptions to the information subject to section 552.022. Additionally, we will also consider your arguments under section 552.103 for the information not subject to section 552.022 of the Government Code.

Section 552.103 of the Government Code provides, in part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding);

Heard v. Houston Post Co., 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

Whether litigation is reasonably anticipated must be determined on a case-by-case basis. See Open Records Decision No. 452 at 4 (1986). To establish litigation is reasonably anticipated, a governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *Id.* This office has stated a pending complaint with the Equal Employment Opportunity Commission (the “EEOC”) indicates litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982).

You state, and provide documentation showing, prior to the department’s receipt of the instant request for information, the requestor filed discrimination claims against the department with the EEOC. You state the submitted information is directly related to the anticipated litigation. Based on your representations and our review of the information at issue, we find the department reasonably anticipated litigation on the date this request was received. Therefore, the department may withhold the information not subject to section 552.022(a)(1) of the Government Code under section 552.103 of the Government Code.²

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing parties in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

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 if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is 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.

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

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.

We note parts of the information subject to section 552.022(a)(1) of the Government Code pertain to sexual harassment investigations and are subject to the ruling in *Ellen*. Upon review, we find the investigations include adequate summaries, as well as statements by the individuals accused of sexual harassment. Thus, the summaries and statements 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 summaries and the statements of the accused, which we marked, the department must withhold the remaining portions of these investigations under section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Ellen*.³ We note, however, information within the summary and statements of the accused that identifies the victim and witnesses is generally confidential under common-law privacy. *See id.* In this case, the requestor is the alleged sexual harassment victim of the first investigation, 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

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

access to records that contain information relating to the person that are protected from public disclosure by laws intended to protect that person's privacy interests); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individuals request information concerning themselves). Therefore, the department may not withhold the requestor's identifying information under section 552.101 in conjunction with common-law privacy. Accordingly, with the exception of the requestor's identifying information, the department must withhold the information we marked within the summaries and statements of the accused from the requestor under section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Ellen*.

Section 552.117(a)(2) of the Government Code excepts from public disclosure the home address, home telephone number, emergency contact information, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with sections 552.024 and 552.1175 of the Government Code. *See* Gov't Code § 552.117(a)(2). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. The information we marked under section 552.117 consists of personal information of a peace officer who was employed by the department that is held by the department in an employment context. In this instance, however, it is unclear whether the individual whose information is at issue is currently a licensed peace officer as defined by article 2.12 of the Code of Criminal Procedure. Accordingly, to the extent the individual whose information is at issue is currently a licensed peace officer as defined by article 2.12, the department must withhold the information we marked under section 552.117(a)(2) of the Government Code. Conversely, to the extent the individual whose information is at issue is no longer a licensed peace officer as defined by article 2.12, then the department may not withhold the marked information under section 552.117(a)(2).

If the information we marked under section 552.117 pertains to an individual who is no longer a licensed peace officer, then the marked information may be subject to section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) 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 of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See id.* § 552.117(a)(1). Whether a particular item of information is 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 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 who did not timely request under section 552.024 the information be kept confidential. Therefore, to the extent the individual at issue is no longer a licensed peace officer as defined by article 2.12 and to the extent the individual timely requested confidentiality under section 552.024

of the Government Code, the department must withhold the information we marked under section 552.117(a)(1) of the Government Code. Conversely, to the extent the individual at issue is no longer a licensed peace officer as defined by article 2.12 and did not timely request confidentiality under section 552.024, the department may not withhold the marked information under section 552.117(a)(1).

Section 552.136 of the Government Code provides, “[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). We understand the employee identification numbers you marked are used in conjunction with one additional digit to access City of Dallas credit union bank accounts. We therefore conclude the department must withhold the employee identification numbers you marked under section 552.136 of the Government Code.

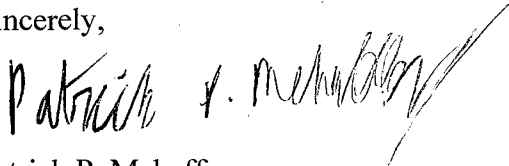
In summary, the department may withhold the information not subject to section 552.022(a)(1) of the Government Code under section 552.103 of the Government Code. With the exception of the adequate summaries and the statements of the accused we marked, the department must withhold the sexual harassment investigations we 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 marked within the summaries and statements of the accused from the requestor under section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Ellen*. To the extent the individual whose information is at issue is currently a licensed peace officer as defined by article 2.12 of the Code of Criminal Procedure, the department must withhold the information we marked under section 552.117(a)(2) of the Government Code. To the extent the individual at issue is no longer a licensed peace officer as defined by article 2.12 and to the extent the individual timely requested confidentiality under section 552.024 of the Government Code, the department must withhold the information we marked under section 552.117(a)(1) of the Government Code. The department must withhold the employee identification numbers you marked under section 552.136 of the Government Code. The department must release the remaining information.⁴

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.

⁴We note the requestor has a right of access to some of the information being released. *See* Gov’t Code § 552.023(a); ORD 481 at 4. Thus, the department must again seek a decision from this office if it receives another request for the same information from another requestor.

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,



Patrick P. Mehaffy
Assistant Attorney General
Open Records Division

PPM/eb

Ref: ID# 771636

Enc. Submitted documents

c: Requestor
(w/o enclosures)