



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 3, 2019

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

OR2019-18267

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# 774003 (ORR# D009034-032719).

The Dallas Police Department (the "department") received a request for information pertaining to sexual harassment investigations conducted during a specified time period.¹ You claim the submitted information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of the submitted information consists of officers' body worn camera recordings. Body worn cameras are subject to chapter 1701 of the Occupations Code. Chapter 1701 provides the procedures a requestor must follow when seeking a body worn camera recording. Section 1701.661(a) provides:

¹We note the department asked for and received clarification regarding this request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); *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 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).

A member of the public is required to provide the following information when submitting a written request to a law enforcement agency for information recorded by a body worn camera:

- (1) the date and approximate time of the recording;
- (2) the specific location where the recording occurred; and
- (3) the name of one or more persons known to be a subject of the recording.

Occ. Code § 1701.661(a). In this instance, the requestor does not give the requisite information under section 1701.661(a). As the requestor did not properly request the body worn camera recordings at issue pursuant to chapter 1701, our ruling does not reach this information and it need not be released.² However, pursuant to section 1701.661(b), a “failure to provide all the information required by Subsection (a) to be part of a request for recorded information does not preclude the requestor from making a future request for the same recorded information.” *Id.* § 1701.661(b).

Second, you note, and we acknowledge, some of the requested information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2019-16771 (2019). As we have no indication the law, facts, and circumstances on which the prior ruling was based have changed, the department must continue to rely on Open Records Letter No. 2019-16771 as a previous determination and withhold or release the identical information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

Next, we note portions 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:

²As we are able to make this determination, we need not address the arguments against disclosure of this information.

(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 remaining 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) may be withheld under section 552.103. However, because sections 552.101, 552.117, and 552.130 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 552.022.³ Additionally, we will also consider your argument under section 552.103 for the information not subject to section 552.022 of the Government Code, which we have indicated.

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

³The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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 information not subject to section 552.022(a)(1), which we indicated, 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 we indicated under section 552.103 of the Government Code.⁴

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. The third court of appeals has concluded public citizens’ dates of birth are protected by

⁴As our ruling is dispositive, we need not address your remaining argument against the disclosure of this information.

common-law privacy pursuant to section 552.101. See *Paxton v. City of Dallas*, No. 03-13-00546-CV, 2015 WL 3394061, at *3 (Tex. App.—Austin May 22, 2015, pet. denied) (mem. op.).

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.

Generally, only highly intimate information that implicates the privacy of an individual is withheld. However, in certain instances, where it is demonstrated that the requestor knows the identity of the individual at issue and the nature of the incident, the entire report must be withheld to protect the individual's privacy. In this instance, although you seek to withhold the remaining information in its entirety, you have not demonstrated, nor does it otherwise appear, that this is a situation where the entirety of the remaining information must be withheld on the basis of common-law privacy.

You seek to withhold the remaining information under common-law privacy and the ruling in *Ellen*. *Ellen*, 840 S.W.2d 519. We note the ruling in *Ellen* was applicable to investigations involving sexual harassment in the workplace. We find the information we have indicated does not constitute sexual harassment investigations in the employment context for purposes of *Ellen*. Accordingly, we conclude the ruling in *Ellen* is not applicable

to the information we have indicated, and the department may not withhold this information under section 552.101 of the Government Code on the basis of the ruling in *Ellen*. However, upon review, we find portions of the information at issue satisfy the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the department must withhold the types of information we marked and the public citizens' dates of birth under section 552.101 of the Government Code in conjunction with common-law privacy. We find you have failed to demonstrate any of the remaining information at issue is highly intimate or embarrassing and of no legitimate public interest. Therefore, the department may not withhold any the remaining information we have indicated under section 552.101 in conjunction with common-law privacy.

We note the remaining information consists of sexual harassment investigations and is 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 id.* at 525. Therefore, with the exception of the adequate summaries and the statements of the accused, a representative sample of 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*. We note, however, information within the summary and statements of the accused that identifies the victims and witnesses is generally confidential under common-law privacy. *See id.* Accordingly, the department must withhold the information we marked within the summaries and statements of the accused 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 individuals whose information is at issue are currently licensed peace officers as defined by article 2.12 of the Code of Criminal Procedure. Accordingly, to the extent the individuals whose information is at issue are currently licensed peace officers as defined by article 2.12, the department must withhold the types of information we marked under section 552.117(a)(2) of the Government Code. Conversely, to the extent the individuals whose information is at issue are not currently licensed peace officers 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 individuals who are not currently licensed peace officers, 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 individuals at issue are not currently licensed peace officers as defined by article 2.12 and to the extent the individuals timely requested confidentiality under section 552.024 of the Government Code, the department must withhold the types of information we marked under section 552.117(a)(1) of the Government Code. Conversely, to the extent the individuals at issue are not currently licensed peace officers 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 552.130 of the Government Code excepts from disclosure information that relates to a motor vehicle operator's license or driver's license or a motor vehicle title or registration issued by a Texas agency, or an agency of another state or country. *See* Gov't Code § 552.130(a)(1)-(2). Upon review, we find the department must withhold the types of motor vehicle record information we marked under section 552.130 of the Government Code.

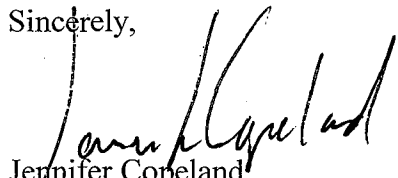
In summary, as the requestor did not properly request the body worn camera recordings at issue pursuant to chapter 1701, our ruling does not reach this information and it need not be released. The department must continue to rely on Open Records Letter No. 2019-16771 as a previous determination and withhold or release the identical information in accordance with that ruling. in accordance with that ruling. The department may withhold the information we indicated under section 552.103 of the Government Code. The department must withhold the types of information we marked and the public citizens' dates of birth under section 552.101 of the Government Code in conjunction with common-law privacy. With the exception of the adequate summaries and the statements of the accused, a representative sample of which we marked, the department must withhold the sexual harassment investigations 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 under section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Ellen*. To the extent the individuals whose information is at issue are currently licensed

peace officers as defined by article 2.12 of the Code of Criminal Procedure, the department must withhold the types of information we marked under section 552.117(a)(2) of the Government Code. To the extent the individuals at issue are not currently licensed peace officers as defined by article 2.12 and to the extent the individuals timely requested confidentiality under section 552.024 of the Government Code, the department must withhold the types of information we marked under section 552.117(a)(1) of the Government Code. The department must withhold the types of motor vehicle record information we marked under section 552.130 of the Government Code. The department must release the remaining information.⁵

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,



Jennifer Copeland
Assistant Attorney General
Open Records Division

JC/mo

Ref: ID# 774003

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁵We note the remaining information contains social security numbers. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. *See* Gov't Code § 552.147(b).