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ATTORNEY GENERAL OF TEXAS

August 7, 2019

Ms. Anelisa Benavides
Assistant City Attorney
City of El Paso
P. O. Box 1890
El Paso, Texas 79950-1890

OR2019-21755

Dear Ms. Ferris:

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# 779222 (19-1043-524).

The City of El Paso (the "city") received a request for investigations, reprimands, and suspensions pertaining to a named individual during a specified time period.¹ You claim the requested 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 the submitted information consists of a completed investigation made by or for the city, which is subject to section 552.022(a)(1) of the Government Code. Pursuant to section 552.022(a)(1), completed investigations, reports, and evaluations are expressly public unless they are either excepted under section 552.108 of the Government Code or confidential under the Act or other law. Gov't Code § 552.022(a)(1). Although you raise

¹We note the city 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).

section 552.103 of the Government Code, section 552.103 is a discretionary exception to disclosure and does not make information confidential under the Act. *See id.* § 552.007; *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 section 552.103); Open Records Decision Nos. 665 at 2 n.5 (discretionary exceptions generally), 663 (1999) (governmental body may waive section 552.103). As such, section 552.103 does not make information confidential for the purposes of section 552.022. Therefore, the city may not withhold the submitted information under section 552.103 of the Government Code. However, because sections 552.101 and 552.117 of the Government Code make information confidential for purposes of section 552.022, we will consider the applicability of these exceptions to the submitted information.²

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.

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,

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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.

You contend, and we agree, the submitted information pertains to a sexual harassment investigation and is subject to the ruling in *Ellen*. Upon review, we find the investigation includes an adequate summary, 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; however, information within the summary and accused's statement that identifies the 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. Thus, this identifying information, which we have marked, is confidential under common-law privacy and must be withheld pursuant to section 552.101 of the Government Code. *See id.* Further, the city must withhold the additional records of this sexual harassment investigation, which we have marked, under section 552.101 in conjunction with common-law privacy and the court's holding in *Ellen*. The city has failed to demonstrate, however, the remaining information is highly intimate or embarrassing and not of legitimate public interest. Therefore, the city may not withhold any portion of the remaining information under section 552.101 in conjunction with common-law privacy.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, social security numbers, emergency contact information, and family member information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a); Open Records Decision No. 622 (1994). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) 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. We have marked the personal information of a city employee. If the employee whose personal information is at issue timely elected to keep his information confidential pursuant to section 552.024, the city must withhold the information we have marked under section 552.117(a)(1). The city may not withhold this information under section 552.117(a)(1) if the employee did not timely elect to keep his information confidential pursuant to section 552.024.

Section 552.101 of the Government Code also encompasses the doctrine of constitutional privacy. Constitutional privacy consists of two interrelated types of privacy: (1) the right

to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). Upon review, we find the city has failed to demonstrate any of the remaining information falls within the zones of privacy or implicates an individual's privacy interests for purposes of constitutional privacy. Consequently, the city may not withhold the remaining information under section 552.101 in conjunction with constitutional privacy.

In summary, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Ellen*. If the employee whose personal information is at issue timely elected to keep his information confidential pursuant to section 552.024 of the Government Code, the city must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The city 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,



Jennifer Copeland
Assistant Attorney General
Open Records Division

JC/jxd

Ref: ID# 779222

Enc. Submitted documents

c: Requestor
(w/o enclosures)