



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 29, 2007

Ms. Cathy Cunningham  
Senior City Attorney  
City of Irving  
825 West Irving Blvd.  
Irving, Texas 75060

OR2007-00976

Dear Ms. Cunningham:

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#270171.

The City of Irving (the "city") received a request for "all disciplinary documents, Gauges from February 2001, August 2001, August 2002-2006" and "all written complaints" regarding three named individuals. You state that some of the responsive information will be released to the requestor. However, you claim that 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. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note that the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides for the required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body," unless the information is expressly confidential under other law or excepted from disclosure under section 552.108 of the Government Code. Gov't Code § 552.022(a)(1). In this instance, the submitted information constitutes a completed investigation made for the city. Therefore, the submitted information must be released under section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 or confidential under other law. Although you seek to withhold the submitted information under section 552.103 of the Government Code, that section is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *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 No 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the city may not withhold any of the submitted information under section 552.103 of the Government Code. Because

section 552.101 of the Government Code constitutes other law for purposes of section 552.022, we will address the applicability of this exception to the information.

Section 552.101 of the Government Code excepts “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses information made confidential by other statutes. Section 552.101 of the Government Code encompasses the doctrine of common-law privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976).

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 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.*

When there is an adequate summary of a sexual harassment investigation, the summary must be released along with the statement of the accused, but the identities of the victims and witnesses must be redacted and their detailed statements must be withheld from disclosure. However, when no adequate summary exists, detailed statements regarding the allegations must be released, but the identities of witnesses and victims 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 note that, because supervisors are not witnesses for purposes of *Ellen*, supervisors’ identities may not generally be withheld under section 552.101 in conjunction with common-law privacy and the holding in *Ellen*.

The submitted information includes an adequate summary of a sexual harassment investigation. In accordance with the holding in *Ellen*, the city must release the summary redacting information that identifies the alleged victims and witnesses. Accordingly, we have marked the identifying information in the summary that must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy and *Ellen*.<sup>1</sup> The city may not withhold the remaining information in the summary under

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<sup>1</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

section 552.101 of the Government Code. As to the remaining portions of the investigation, the city must withhold this information under section 552.101 of the Government Code in conjunction with common-law privacy and *Ellen*.

We note that a portion of the summary being released may be excepted from public disclosure under section 552.117 of the Government Code.<sup>2</sup> Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. *See Gov't Code* § 552.117(a)(1). However, information subject to section 552.117(a)(1) may not be withheld from disclosure if the current or former employee made the request for confidentiality under section 552.024 after the request for information at issue was received by the governmental body. Whether a particular piece of information is public must be determined at the time the request for it is made. *See Open Records Decision No. 530 at 5 (1989)*. In this case, you do not inform us nor provide documentation showing that the employee whose information is at issue timely elected confidentiality under section 552.024. Thus, if the employee timely elected to keep her personal information confidential, you must withhold this information, which we have marked, under section 552.117(a)(1) of the Government Code. The city may not withhold this information under section 552.117(a)(1) if the employee at issue did not make a timely election.

To conclude, with the exception of the summary, the city must withhold the remaining investigation documents under section 552.101 of the Government Code in conjunction with common-law privacy and *Ellen*. We have marked the information in the summary that must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy and *Ellen*. In addition, we have marked certain personal information in the summary that must be withheld under section 552.117(a)(1) of the Government Code if the employee timely elected to keep her personal information confidential. The remaining information in the summary must be released.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. *Gov't Code* § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by

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<sup>2</sup>The Office of the Attorney General will raise a mandatory exception like section 552.117 on behalf of a governmental body, but ordinarily will not raise other exceptions. *Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987)*.

filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Holly R. Davis  
Assistant Attorney General  
Open Records Division

HRD/trl

Ref: ID# 270171

Enc. Submitted documents

c: Mr. Raymond Jake Bethany, Jr.  
3008 Longleaf Lane  
McKinney, Texas 75070  
(w/o enclosures)