



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 19, 2009

Mr. James D. Saint
Assistant City Attorney
City of Arlington
P.O. Box 90231
Arlington, Texas 76004-3231

OR2009-02204

Dear Mr. Saint:

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# 334133.

The City of Arlington (the "city") received a request for the years of service, all complaints and investigations, all disciplinary actions, and the F-5 or F-7 forms for a named former officer.¹ You state you do not have an F-7 form for the named officer.² You state you have released a redacted copy of Exhibit B. You claim portions of the submitted information are excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

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. This section encompasses the common-law right of 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

¹The city sought and received a clarification of the information requested. See Gov't Code 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request); see also Open Records Decision No. 31 (1974) (when presented with broad requests for information rather than for specific records, governmental body may advise requestor of types of information available so that request may be properly narrowed).

²The 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).

the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). This office has found that the public has a legitimate interest in the qualifications and work conduct of employees of governmental bodies. See Open Records Decision Nos. 562 at 10 (1990), 542 at 5 (1990); see also Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow).

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.* at 525. 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*, 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). 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 supervisors are generally not witnesses for purposes of *Ellen*, except where their statements appear in a non-supervisory context.

In this instance, you state the information in Exhibit B relates to a sexual harassment investigation. We find Exhibit B contains a statement by the accused, but not an adequate summary of the investigation. Because there is no adequate summary of the investigation, any requested documents relating to the sexual harassment investigation must generally be released, with the identities of the witnesses and victim redacted pursuant to section 552.101 in conjunction with common-law privacy and the holding in *Ellen*. Accordingly, the department must withhold the identifying information of victims, which you have marked, in the sexual harassment investigation pursuant to section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Ellen*.

Section 552.101 also encompasses section 1701.454 of the Occupations Code which governs the release of F-5 forms. Section 1701.454 provides in relevant part that "[a] report or statement submitted to the [Texas Commission on Law Enforcement, Officer Standards, and Education ("TCLEOSE")] under this subchapter is confidential and is not subject to disclosure under Chapter 552, Government Code, unless the person resigned or was terminated due to substantiated incidents of excessive force or violations of the law other

than traffic offenses.” Occ. Code § 1701.454(a). In this instance, the submitted information indicates the officer at issue was not terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses. Therefore, the city must withhold the submitted F-5 form in Exhibit C, which we have marked, pursuant to section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code. You also seek to withhold the cover sheet of the F-5 form. Section 1701.454, however, only makes confidential a report or statement submitted to TCLEOSE. The cover sheet at issue is not a report or statement submitted to TCLEOSE for the purposes of section 1701.454. Therefore, the cover sheet in Exhibit C may not be withheld under section 1701.454 of the Occupations Code.

Section 552.117(a)(2) of the Government Code excepts from disclosure the home address, home telephone number, social security number, and family member information of a peace officer, as defined by article 2.12 of the Code of Criminal Procedure.³ See Gov’t Code § 552.117(a)(2); Open Records Decision No. 622 (1994). In this instance, the requested information concerns an officer who is no longer employed by the city’s police department. Nevertheless, if the former officer is currently a peace officer as defined by article 2.12, then the city must withhold the information we have marked pursuant to section 552.117(a)(2) of the Government Code.

If the former officer is no longer a peace officer, then the city may be required to withhold his personal information under section 552.117(a)(1). Section 552.117(a)(1) excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former employee of a governmental body who requests that this information be kept confidential under section 552.024. 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 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. 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 that the information be kept confidential. Therefore, the city must withhold the information we have marked under section 552.117(a)(1) to the extent that the former officer timely requested confidentiality for that information under section 552.024.⁴

³The 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).

⁴Regardless of the applicability of section 552.117, 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.

In summary, the city must withhold the identities of the victims in the sexual harassment investigation in Exhibit B pursuant to section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Ellen*. The city must withhold the F-5 form under section 1701.454 of the Occupations Code in conjunction with section 552.101 of the Government Code. The city must withhold the personal information of the former officer, which we have marked, under section 552.117(a)(2) of the Government Code if he is still a peace officer as defined by article 2.12 of the Code of Criminal Procedure. If the former officer is not a peace officer and he timely elected confidentiality, then the city must withhold the marked personal information under section 552.117(a)(1) of the Government Code. The remaining information must be released.

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.oag.state.tx.us/open/index_orl.php, 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 must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Olivia A. Maceo
Assistant Attorney General
Open Records Division

OM/eeg

Ref: ID# 334133

Enc. Submitted documents

c: Requestor
(w/o enclosures)