



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 16, 2009

Mr. Jesús Toscano, Jr.  
Assistant City Attorney  
City of Dallas  
1500 Marilla Street, Room 7BN  
Dallas, Texas 75201

OR2009-09864

Dear Mr. Toscano:

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# 349060.

The City of Dallas (the "city") received a request for the number of internal affairs investigations of the Dallas Fire-Rescue Department during a specified time period and several categories of information pertaining to harassment investigations by the department. You state that the city is releasing information responsive to three of the categories of the request. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.117, 552.136, and 552.137 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted information.<sup>2</sup>

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<sup>1</sup>Although you also raise the attorney-client privilege under rule 503 of the Texas Rules of Evidence, we note section 552.107 is the proper exception to raise for your attorney-client privilege claim in this instance. See Open Records Decision No. 676 (1988).

<sup>2</sup>We assume that the representative sample of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach and, therefore, does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Section 552.101 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 information protected by other statutes. You raise both section 773.091 of the Health and Safety Code and the Medical Practices Act (the "MPA"), subtitle B of title 3 of the Occupation Code for the information you have marked in Exhibit C. Section 552.101 of the Government Code encompasses both section 773.091 and the MPA. Section 773.091 of the Health and Safety Code governs access to EMS records. *See* Open Records Decision No. 598 (1991). Section 773.091 provides in part:

(b) Records of the identity, evaluation, or treatment of a patient by emergency medical services personnel or by a physician providing medical supervision that are created by the emergency medical services personnel or physician or maintained by an emergency medical services provider are confidential and privileged and may not be disclosed except as provided by this chapter.

...

(g) The privilege of confidentiality under this section does not extend to information regarding the presence, nature of injury or illness, age, sex, occupation, and city of residence of a patient who is receiving emergency medical services.

Health & Safety Code § 773.091(b), (g). The information you have marked consists of a witness statement of an EMS driver pertaining to the actions of another EMS personnel during a call. Upon review, we find that the information you have marked in Exhibit C does not constitute an EMS record of the identity, evaluation, or treatment of a patient for the purposes of section 773.091. Therefore, the city may not withhold the marked information in Exhibit C under section 552.101 of the Government Code in conjunction with section, 773.091 of the Health and Safety Code.

Section 159.002 of the Occupations Code provides in pertinent part:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(b), (c). This office has concluded the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487(1987), 370 (1983), 343 (1982). Upon review, we find that the marked information in Exhibit C does not constitute medical records and it may not be withheld under section 552.101 based on the MPA. As no further exceptions to the disclosure of the marked information in Exhibit C are raised, it must be released to the requestor.

Section 552.101 also encompasses section 1703.306 of the Occupations Code, which provides as follows:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

(1) the examinee or any other person specifically designated in writing by the examinee;

(2) the person that requested the examination;

(3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;

(4) another polygraph examiner in private consultation; or

(5) any other person required by due process of law.

(b) The [Polygraph Examiners B]oard or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.

(c) A polygraph examiner to whom information acquired from a polygraph examination is disclosed under Subsection (a)(4) may not disclose the information except as provided by this section.

Occ. Code § 1703.306. You contend that the information you have marked in Exhibit D is confidential polygraph information. The requestor does not fall within any of the enumerated categories; therefore, the city must withhold the polygraph information you have marked in Exhibit D under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code.

Section 552.101 also encompasses the Family Medical Leave Act (the "FMLA"), section 2654 of title 29 of the United States Code. You assert that the information you have highlighted in Exhibit E is confidential under the FMLA. Section 825.500 of chapter V of title 29 of the Code of Federal Regulations identifies the record-keeping requirements for employers that are subject to the FMLA. Subsection (g) of section 825.500 states that

[r]ecords and documents relating to medical certifications, recertifications or medical histories of employees or employees' family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files, and if ADA is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements[], except that:

- (1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;
- (2) First aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatment; and
- (3) Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

29 C.F.R. § 825.500(g). Upon review of the information at issue, we find that you have failed to demonstrate that any of the information you have marked in Exhibit E constitutes medical certifications, recertifications, or medical histories of employees for purposes of the FMLA. Consequently, no portion of the marked information in Exhibit E may be withheld pursuant to section 552.101 of the Government Code on this basis.

Section 552.101 also encompasses the doctrine of common-law privacy, which 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). To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *Id.* at 681-82. 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). You seek to withhold the two reports in Exhibit B, one concerning racial discrimination and the other concerning sexual harassment, based on common-law privacy. Upon review, we find that the racial discrimination report is not intimate or embarrassing and

is of legitimate public interest. Accordingly, that report may not be withheld under section 552.101 in conjunction with common-law privacy.

However, 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.*

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 supervisors are not witnesses for purposes of *Ellen*, and thus, supervisors' identities may generally not be withheld under section 552.101 and common-law privacy. In addition, 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).

The remaining report in Exhibit B consists of an adequate summary of the investigation into a sexual harassment allegation. The summary is not confidential under section 552.101 in conjunction with common-law privacy. However, information within the summary that identifies the alleged victim and witnesses, other than the victim's supervisors, is confidential under common-law privacy and must generally be withheld pursuant to section 552.101 of the Government Code. *See Ellen*, 840 S.W.2d at 525. Therefore, pursuant to section 552.101 and the ruling in *Ellen*, the remaining report in Exhibit B is not confidential, but the identifying information of the victim and the witnesses, which we have marked, must be withheld under section 552.101 in conjunction with common-law privacy.

Next, you claim Exhibit F is excepted under section 552.107(1) of the Government Code, which protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary

facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.*, meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5).

Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state that Exhibit F consists of a communication between the city’s attorney and a client of the city’s attorney. You represent that this communication was made for the purpose of facilitating the rendition of professional legal services. You also represent that the confidentiality of this communication has been maintained. Based on your representations and our review, we conclude that section 552.107 is applicable to a portion of Exhibit F, which we have marked, under section 552.107. Accordingly, the city may withhold the marked information in Exhibit F under section 552.107 of the Government Code. However, we find that you have failed to demonstrate that the remaining information in Exhibit F consists of an attorney-client communication for the purposes of section 552.107, and it may not be withheld on that basis. As you raise no further exceptions against its disclosure, the remaining information in Exhibit F must be released to the requestor.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 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 only be withheld under section 552.117(a)(1) on behalf of a current or former official or 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 official or employee who did not timely request under section 552.024 that the information be kept confidential. You do not inform us, and the submitted information does not reflect, whether the city employees at issue elected to keep their information confidential pursuant to section 552.024 of the Government Code prior to the city receiving the request at issue. If the city employees made timely elections under section 552.024, the city must withhold the information we have marked in Exhibits E and G under section 552.117(a)(1). If the employees at issue did not make timely elections under section 552.024, the marked information in Exhibits E and G may not be withheld under section 552.117(a)(1).

Section 552.136 of the Government Code provides that "[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"). You inform us that the city's employee identification numbers are used in conjunction with one additional digit in order to access city credit union accounts. The city must withhold the identification number we have marked in Exhibit G under section 552.136 of the Government Code.

Next, you contend the e-mail address in Exhibit I is subject to section 552.137 of the Government Code. Section 552.137 states that "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its public disclosure. *Id.* § 552.137(a)-(b). The types of e-mail addresses listed in section 552.137(c) may not be withheld under this exception. *See id.* § 552.137(c). The e-mail address at issue is not of a type specifically excluded by section 552.137(c). Accordingly, we agree that the city must withhold the e-mail address you have marked under section 552.137 of the Government Code, unless the owner of the e-mail address consents to its release.

In summary, the city must withhold the information you have marked in Exhibit D under section 552.101 of the Government Code in conjunction with section 1703.306 of the Occupations Code. The city must also withhold the information we have marked in Exhibit B under section 552.101 of the Government Code in conjunction with common-law privacy.

The city may withhold the information we have marked in Exhibit F under section 552.107 of the Government Code. If the city employees made timely elections under section 552.024 of the Government Code, the city must withhold the information we have marked in Exhibits E and G under section 552.117(a)(1) of the Government Code. The city must withhold the information we have marked in Exhibit G under section 552.136 of the Government Code and the e-mail address you have marked in Exhibit I under section 552.137 of the Government Code, unless the owner of the e-mail address consents to its release. The remaining information must be released to the requestor.

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](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,



Laura E. Ream  
Assistant Attorney General  
Open Records Division

LER/sdk

Ref: ID# 349060

Enc. Submitted documents

c: Requestor  
(w/o enclosures)