



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

September 14, 2010

Mr. Warren M. S. Ernst
Chief of the General Counsel Division
Office of the City Attorney
City of Dallas
1500 Marilla Street Room 7BN
Dallas, Texas 75201

OR2010-13923

Dear Mr. Ernst:

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# 393350.

The City of Dallas (the "city") received a request for six categories of information relating to the appointment of municipal judges.¹ You inform us that some of the requested information either has been or will be released. You state that the documents encompassed by item five of the request are judicial records governed by rule 12 of the Rules of Judicial Administration of the Texas Supreme Court.² You claim that the submitted information is

¹You inform us that the city sought and received clarification of this request for information. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing a request).

²We note that although the Act encompasses information "collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business . . . by a governmental body," the Act's definition of "governmental body" "does not include the judiciary." Gov't Code §§ 552.002(a)(1), .003(1)(B). "Information collected, assembled, or maintained by or for the judiciary" is not subject to the Act but instead "is governed by rules adopted by the Supreme Court of Texas or by other applicable laws and rules." *Id.* § 552.0035(a); *see* Open Records Decision No. 131 (1976) (applying statutory predecessor to judiciary exclusion under Gov't Code § 552.003(1)(B) prior to enactment of Gov't Code § 552.0035).

excepted from disclosure under sections 552.101 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the information you submitted.³

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. You claim section 552.101 in conjunction with common-law privacy, which protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. See *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Common-law privacy encompasses the specific types of information that are held to be intimate or embarrassing in *Industrial Foundation*. See *id.* at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has determined that other types of information also are private under section 552.101. See Open Records Decision No. 659 at 4-5 (1999) (summarizing information attorney general has held to be private).

In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the court applied common-law privacy to records of an investigation of alleged sexual harassment. The investigation files at issue in *Ellen* contained third-party witness statements, an affidavit in which the individual accused of the misconduct responded to the allegations, and the conclusions of the board of inquiry that conducted the investigation. See 840 S.W.2d at 525. The court upheld the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the disclosure of such documents sufficiently served the public's interest in the matter. *Id.* The court also held, however, that "the public does 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 victim of and witness to the alleged sexual harassment must be redacted, and their detailed statements must be withheld. See also 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 must ordinarily be released, except for information that would identify the victims and witnesses. In either event, the identity of the individual accused of sexual harassment is not protected from public disclosure. 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. See Open Records Decision Nos. 438 (1986), 405 (1983), 230 (1979), 219 (1978).

³This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the city to withhold any information that is substantially different from the submitted information. See Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

We find that *Morales v. Ellen* is applicable to the information submitted as Exhibit C, which is related to an investigation of alleged sexual harassment. We also find that Exhibit C includes an adequate summary of the investigation and statements by the person accused of the alleged sexual harassment. We therefore conclude that the city must release the investigation summary and the statements by the person accused of the alleged sexual harassment, which we have marked, except for the marked information in those documents that identifies the victim of the alleged sexual harassment and the witness in the investigation. The city must withhold the marked victim and witness information, along with the rest of the information in Exhibit C, under section 552.101 of the Government Code in conjunction with common-law privacy and the decision in *Morales v. Ellen*.⁴

You also claim section 552.107(1) of the Government Code, which protects information that comes 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. *See* 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. *See* 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. *See 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 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. *See* TEX. R. EVID. 503(b)(1)(A)-(E). 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.* 503(b)(1), 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. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no pet.). Moreover, because the client may elect to waive the privilege at any time, a governmental body must

⁴You inform us that the victim of the alleged sexual harassment has filed a charge of employment discrimination with the Texas Workforce Commission (the “TWC”). *See* Labor Code § 21.204. We note that the victim did not waive her right to the privacy of the details of the alleged sexual harassment in filing her charge with the TWC. *See id.* § 21.304 (“An officer or employee of the [TWC] may not disclose to the public information obtained by the [TWC] under Section 21.204 [of the Labor Code] except as necessary to the conduct of a proceeding under this chapter.”).

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).

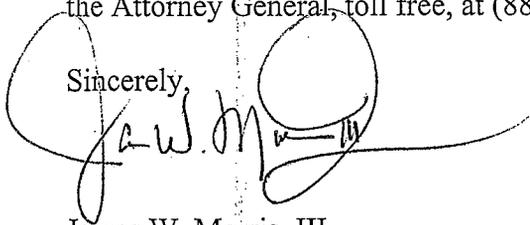
You state that the information submitted as Exhibit B is a communication between an attorney for the city and a member of the Dallas City Council. You contend that Exhibit B constitutes a confidential attorney-client communication that was made for the purpose of rendering professional legal services. You do not indicate that the confidentiality of the communication has been waived. Based on your representations and our review of the information at issue, we conclude that the city may withhold Exhibit B under section 552.107(1) of the Government Code.⁵

In summary: (1) the city must release the marked summary of the investigation of alleged sexual harassment and the statements by the person accused of the alleged sexual harassment in Exhibit C, except for the marked information that identifies the victim and the witness; (2) the city must withhold the marked information that identifies the victim and the witness and the remaining information in Exhibit C under section 552.101 of the Government Code in conjunction with common-law privacy and the decision in *Morales v. Ellen*; and (3) the city may withhold Exhibit B under section 552.107(1) of the Government Code.

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, toll free, at (888) 672-6787.

Sincerely,



James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/em

⁵As we are able to make this determination, we need not address your other claim for Exhibit B.

Ref: ID# 393350

Enc: Submitted documents

c: Requestor
(w/o enclosures)