



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 5, 2010

Ms. Marivi Gambini
City of Irving
825 West Irving Boulevard
Irving, Texas 75060

OR2010-16836

Dear Ms. Gambini:

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# 399330.

The City of Irving (the "city") received a request for specified categories of information pertaining to a specified investigation. You state you are releasing some of the requested information. You also state the city does not have some of the requested information.¹ You claim some of the requested information is excepted from disclosure under sections 552.101 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of the information you have submitted to us for review is not responsive to the request for information because it was created after the city received the request for information. This ruling does not address the public availability of any information that is not responsive to the request, and the city is not required to release this information, which we have marked, in response to this request.

¹The Act does not require a governmental body to disclose information that did not exist when the request for information was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex.App.—San Antonio 1978, writ dism'd); Open Records Decision No. 452 at 3 (1986).

We also note you inform us some of the requested information was provided by employees to an investigator "with the belief that those comments and statements were not going to be shared to any third party." Information is not confidential under the Act simply because the party submitting the information to a governmental body anticipates or requests that it be kept confidential. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). Thus, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987). Consequently, unless the requested information falls within an exception to disclosure, it must be released, notwithstanding any expectations or agreement specifying otherwise.

We next note the submitted information is a completed investigation subject to section 552.022 of the Government Code. Under section 552.022(a)(1), a completed report, audit, evaluation, or investigation made of, for, or by a governmental body is expressly public unless it either is excepted under section 552.108 of the Government Code or is expressly confidential under other law. Although you assert some of this information is excepted under section 552.111 of the Government Code, this section is a discretionary exception under the Act and does not constitute "other law" for purposes of section 552.022. *See* Open Records Decision Nos. 663 (1999). Accordingly, the city may not withhold the submitted information under section 552.111. However, sections 552.101 and 552.117 of the Government Code constitute other law for purposes of section 552.022.² Therefore, we will consider the applicability of these exceptions to the submitted information.

Section 552.101 excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses the doctrine of common-law privacy, which protects information that (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).

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. *Id.* at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating the public's interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held "the public did

²The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. *See* Open Records Decision Nos. 481 at 2 (1987), 480 at 5 (1987); *see e.g.*, Open Records Decision No. 470 at 2 (1987) (because release of confidential information could impair rights of third parties and because improper release constitutes a misdemeanor, attorney general will raise predecessor statute of section 552.101 on behalf of governmental bodies).

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 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, 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).

The submitted information contains an adequate summary of an investigation into alleged sexual harassment. The information within the summary that identifies victims and witnesses of the alleged sexual harassment is generally confidential under common-law privacy. *See Ellen*, 840 S.W.2d at 525. We have marked the information identifying the victims and witnesses of the alleged sexual harassment in the summary that the city must withhold under section 552.101 in conjunction with common-law privacy and the *Ellen* decision. In addition, the city must withhold the remaining submitted information in the investigation file, which we have marked, under section 552.101 in conjunction with common-law privacy. The remaining information in the summary is either not intimate or embarrassing or it is of legitimate public interest; therefore, none of the remaining information in the summary is confidential under common-law privacy and the city may not withhold any of it under section 552.101 on that ground. *See id.*; Open Records Decision Nos. 470 at 4 (1987) (job performance does not generally constitute public employee's private affairs), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of government employees), 405 at 2 (1983) (manner in which public employee's job was performed cannot be said to be of minimal public interest).

We note the requestor has a right of access to his own information in the summary pursuant to section 552.023 of the Government Code. *See* Gov't Code § 552.023(a) ("a person or a person's authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person's privacy interests."); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individuals request information concerning themselves). The requestor also indicates in his request for information that he requests the information on behalf of four named employees whose identifying information in the submitted documents is confidential pursuant to common-law privacy and the *Ellen* decision. However, we are unable to determine whether the requestor is the authorized representative of these four named employees under section 552.023. Accordingly, pursuant to section 552.023, if the requestor is the authorized representative of any of these four named employees, then the city may not withhold the identifying information of the employee at issue. *See* Gov't Code § 552.023(a).

The remaining information contains a telephone number of an employee. Section 552.117(a)(1) of the Government Code exempts 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 the information be kept confidential under section 552.024 of the Government Code. *Id.* § 552.117(a)(1). Section 552.117 also encompasses a personal cellular telephone number, provided that a governmental body does not pay for the cellular telephone service. *See* Open Records Decision No. 506 at 5-6 (1988) (Government Code section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). 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 be withheld under section 552.117(a)(1) only 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. We have marked a telephone number that the city must withhold under section 552.117(a)(1) of the Government Code if (1) it is the home or cellular telephone number of the employee at issue, (2) the employee timely requested confidentiality for the information under section 552.024 of the Government Code, and (3) the employee personally paid for the cellular telephone service, to the extent the number is a cellular telephone number.

To conclude, 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 *Ellen* decision, unless the requestor has a right of access to this information pursuant to section 552.023 of the Government Code.³ The city must also withhold the telephone number we have marked under section 552.117(a)(1) of the Government Code if (1) it is the home or cellular telephone number of the employee at issue, (2) the employee timely requested confidentiality for the information under section 552.024 of the Government Code, and (3) the employee personally paid for the cellular telephone service, to the extent the number is a cellular telephone number. The city must release the remaining information.

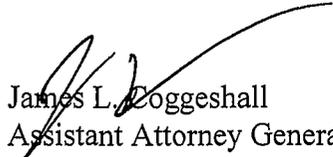
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

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.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

³As our ruling is dispositive, we do not address your other arguments to withhold this information.

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 L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/tp

Ref: ID# 399330

Enc. Submitted documents

c: Requestor
(w/o enclosures)