



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 5, 2011

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

OR2011-04667

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# 413570.

The City of Dallas (the "city") received a request for the following information: (1) an account of events in fire dispatch by a named individual, including documents related to a specified complaint; (2) an account of events in fire dispatch by a second named individual; (3) any documents regarding a specified complaint concerning female employees in fire dispatch; and (4) copies of all fire dispatch Exception Reports through a certain date. You state the city has provided the requestor with some of the responsive information. You ask whether the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception and reviewed the submitted information.

As you acknowledge, the city failed to comply with the procedural requirements of section 552.301 of the Government Code in seeking a ruling from this office. *See* Gov't Code § 552.301 (b), (e). Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the information is public and must be released, unless the governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See* Gov't Code § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797

S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 630 (1994). A compelling reason exists when third-party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). Section 552.101 of the Government Code can provide a compelling reason for non-disclosure; therefore we will consider the applicability of this exception.

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. Section 552.101 encompasses the doctrine of common-law 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 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 established. *Id.* at 681–82. In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the court addressed the applicability of common-law privacy to files involving an investigation of alleged 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 the public’s interest was sufficiently served by the disclosure of such documents. *Id.* The *Ellen* court held “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. We note supervisors are generally not witnesses for purposes of *Ellen*, except where their statements appear in a non-supervisory context. Further, 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 submitted information relates to a complaint and subsequent investigation of sexual harassment. We find the submitted information contains an adequate summary of the investigation. Therefore, pursuant to section 552.101 and the ruling in *Ellen*, the summary is not confidential; however, information within the summary that identifies the alleged

victim and non-supervisory witnesses is confidential under common-law privacy and generally must be withheld under section 552.101 of the Government Code. *See Ellen*, 840 S.W.2d at 525. You claim information concerning the victim and witnesses is not protected by privacy principles because the complainant waived her right to privacy by disclosing the details of the alleged harassment by filing charges with the Equal Employment Opportunity Commission. We understand the alleged victim also spoke to the media about the alleged harassment and filed a lawsuit detailing her complaints. We therefore conclude that because the alleged victim provided details of the allegations to the media and filed a lawsuit, she has waived her own right to privacy. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 496 (1975) (action for invasion of privacy cannot be maintained where information is in public domain); *Star Telegram, Inc. v. Walker*, 834 S.W 2d 54, 57 (Tex. 1992) (law cannot recall information once in public domain). However, upon reviewing the documentation you have submitted, we find that you have failed to demonstrate the privacy rights of witnesses have been waived with respect to the information at issue. Thus, the city must withhold the information we have marked within the summary under section 552.101 in conjunction with common-law privacy and the court's holding in *Ellen*. The remainder of the information that is not within the summary also must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy and the court's holding in *Ellen*.

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 this information be kept confidential under section 552.024.<sup>1</sup> *See 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 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 the information be kept confidential. We have marked information that is subject to section 552.117. To the extent the individual at issue timely requested confidentiality under section 552.024, the city must withhold the personal information we have marked under section 552.117(a)(1) of the Government Code. If the individual whose information is at issue did not make a timely election, then the city may not withhold the information we have marked under section 552.117(a)(1).

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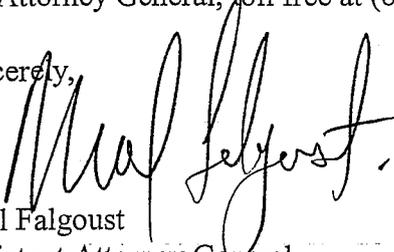
<sup>1</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body but ordinarily will not raise other exceptions. *See Open Records Decision Nos. 481* (1987), 480 (1987), 470 (1987).

In summary, 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 court's ruling in *Ellen*. To the extent the employee whose information is at issue made a timely election under section 552.024, the city must withhold the information we have marked 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](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,



Neal Falgoust  
Assistant Attorney General  
Open Records Division

NF/dls

Ref: ID# 413570

Enc. Submitted documents

c: Requestor  
(w/o enclosures)