ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 8, 2011

Mr. Matthew C.G. Boyle
Boyle & Lowry, L.L.P.
4201 Wingren, Suite 108
Irving, Texas 75062-2763

OR2011-16443

Dear Mr. Boyle:

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# 435613.

The City of Colleyville (the "city"), which you represent, received a request for "all witness records, interviews, photos, documents, videos, narratives and supplements gathered by [a named individual] and/or his associates involving the Colleyville Police Department" during a specified time period. You state the city will release some of the responsive information. You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.130 of the Government Code.[1] We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released.)

Initially, you claim that some of the submitted information was the subject of previous requests for information, in response to which this office issued Open Records Letter Nos. 2009-01548 (2009) and 2009-03356 (2009). In Open Records Letter No. 2009-01548,

[1]We note the city did not raise section 552.130 of the Government Code as an exception to disclosure within ten business days of the date the city received the request. *See* Gov't Code §§ 552.301(b), .302. However, because section 552.130 is a mandatory exception that can provide a compelling reason to withhold information from disclosure, we will consider your claim under section 552.130, notwithstanding the city's violation of section 552.301(b) in raising that exception. *See id.* § 552.302.

we concluded the city's police department must release a sexual harassment investigation summary, redacting only the information that identifies the victim, under section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied). We note the requestor in Open Records Letter No. 2009-01548 was the accused; therefore, he had a special right of access to his own information. However, we note the present request involves a different requestor with no special right of access to any of the information. Thus, we find that the circumstances have changed, and the city may not rely on Open Records Letter No. 2009-01548 as a previous determination in this instance. In Open Records Letter No. 2009-03356, we concluded, in part, that the submitted information did not contain an adequate summary of a sexual harassment investigation. Therefore, documents pertaining to the sexual harassment investigation generally had to be released, with the identities of the witnesses and victims redacted under section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Morales v. Ellen*. You claim the submitted information includes an adequate summary. Upon review, we find the circumstances on which Open Records Letter No. 2009-03356 was based have changed, and the city may not rely on this ruling as a previous determination in this instance. We note section 552.007 provides if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law. *See id.*; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision Nos. 490 (1988), 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). However, the city argues that the information at issue is confidential under section 552.101 of the Government Code. Thus, regardless of whether the city previously released any of the information at issue in this request, we must address whether the information is made confidential by law and must now be withheld pursuant to section 552.101 of the Government Code.

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 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 (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. *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 "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 that 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). We note supervisors are generally not witnesses for purposes of *Ellen*, except where their statements appear in a non-supervisory context.

The submitted information contains adequate summaries of two investigations into alleged sexual harassment, and a statement of an accused individual. Thus, these summaries, as well as the statement, are not confidential under common-law privacy. However, the portions of information within the summaries and the statement that identify the victims of and witnesses to the alleged sexual harassment, which we have marked, are confidential under common-law privacy and must be withheld pursuant to section 552.101 of the Government Code. *See Ellen*, 840 S.W.2d at 525. The city generally must release the remaining portions of information in the summaries and the statement to the requestor. The city must withhold the remaining information in these investigations, which we have also marked, under section 552.101 in conjunction with common-law privacy and the holding in *Ellen*. However, we find you have failed to demonstrate the remaining information pertains to a sexual harassment investigation. Accordingly, the city may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy and the ruling in *Ellen*.

We note portions of the remaining information may be subject to section 552.117 of the Government Code.[2] Section 552.117(a)(2) of the Government Code excepts from disclosure the home address, home telephone number, emergency contact information, social security number, and family member information of a peace officer, regardless of whether the peace officer complies with sections 552.024 or 552.1175 of the Government Code. Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 2 (to be codified as an amendment to Gov't Code § 552.117(a)(2)). Section 552.117(a)(2) adopts the definition of peace officer found

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[2]The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

at article 2.12 of the Code of Criminal Procedure. However, we are unable to determine from the information provided whether the individuals whose information is at issue are currently licensed peace officers. To the extent the individuals at issue are currently licensed peace officers as defined by article 2.12, the city must withhold the information we have marked under section 552.117(a)(2) of the Government Code.

If the employees are not currently licensed peace officers, then their personal information may be subject to section 552.117(a)(1) of the Government Code, which excepts from disclosure the home addresses and telephone numbers, emergency contact information, 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. Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 2 (to be codified as an amendment to Gov't Code § 552.117(a)(1)). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). The city may only withhold the information at issue under section 552.117(a)(1) if the individuals in question elected confidentiality under section 552.024 prior to the date on which the request for this information was made. If the individuals made a timely election under section 552.024, the city must withhold the information we have marked under section 552.117(a)(1). If the employees did not make a timely election under section 552.024, the information at issue may not be withheld under section 552.117(a)(1) of the Government Code.

Next, section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body," unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). Gov't Code § 552.137(a)-(c). Section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. The address we have marked does not appear to be of a type specifically excluded by section 552.137(c). Accordingly, the city must withhold the marked e-mail address under section 552.137, unless the owner of the address affirmatively consents to its release.[3] *See id.* § 552.137(b).

In summary, the city must withhold the identifying information of the victims and the witnesses we have marked in the sexual harassment investigation summaries and the statement of an accused individual under section 552.101 of the Government Code in conjunction with common-law privacy and the ruling in *Ellen*. Further, with the exception of the remaining information in these summaries and the statement, the city must withhold

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[3]We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including a personal e-mail address under section 552.137 of the Government Code; without the necessity of requesting an attorney general decision.

the remaining information in these investigations, which we have marked, under section 552.101 of the Government Code in conjunction with common-law privacy and the ruling in *Ellen*. The city must also withhold the information we have marked under section 552.117 of the Government Code if the individuals at issue are currently licensed peace officers or have made timely elections under section 552.024 of the Government Code. The city must also withhold the information we have marked under section 552.137 of the Government Code, unless the owner of the e-mail address affirmatively consents to its release. The city must release the remaining information.[4]

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,

Tamara H Holland

Tamara H. Holland
Assistant Attorney General
Open Records Division

THH/ag

Ref: ID# 435613

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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[4]As our ruling is dispositive, we need not address your remaining argument.