ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 8, 2012

Mr. Michael W. Dixon
For the City of Bellmead
Haley & Olson P.C.
510 North Valley Mills Drive, Suite 600
Waco, Texas 76710

OR2012-01970

Dear Mr. Dixon:

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# 444779.

The City of Bellmead (the "city"), which you represent, received a request for audio recordings of all investigations conducted by the police chief pertaining to employee complaints made against other employees or city officials between July 1, 2011 and November 1, 2011. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

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 common-law right of privacy, which protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *See id.* at 683. This office has found that some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe

emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps).

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 along with the statement of the accused 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). 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 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).

We find *Ellen* is applicable to the submitted information, which consists of audio recordings pertaining to an investigation of alleged sexual harassment. You state you have previously released a summary of the investigation to the requestor. In addition, we note the submitted information contains recorded audio statements by the individual accused of sexual harassment. Accordingly, we find the city has provided the requestor with an adequate summary of the investigation, and the statements of the accused person are not confidential under common-law privacy. We note the accused individual's statements reveal the identities of the victims and witnesses of the alleged sexual harassment. The city must withhold the information within the accused individual's recorded statements that identifies the victims and witnesses of the alleged sexual harassment under section 552.101 in conjunction with common-law privacy and the court's holding in *Ellen*. Some remaining portions of the accused individual's recorded statements are also otherwise highly intimate and embarrassing and not of legitimate public interest. Therefore, the city must also withhold the information we have indicated in the accused individual's recorded statements pursuant to section 552.101 of the Government Code in conjunction with common-law privacy. However, the remaining portions of the accused individual's recorded statements

are not confidential under common-law privacy and may not be withheld under section 552.101 on that ground. Nevertheless, the city must withhold the remaining submitted audio recordings under section 552.101 of the Government Code in conjunction with common-law privacy and the decision in *Ellen*.

We note remaining portions of the accused individual's recorded statements may be subject to section 552.117(a)(1) of the Government Code.[1] Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a). 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). 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 confidentiality under section 552.024. Thus, to the extent the employees whose information is at issue timely requested confidentiality for their information under section 552.024 of the Government Code, the information we have indicated in the accused individual's recorded statements must be withheld on the basis of section 552.117(a)(1).

In summary, the city must release the accused individual's recorded statements; however, in releasing these statements, the city must withhold (1) the identifying information of the alleged victims and witnesses in the investigation at issue, as well as the additional information we have indicated, under section 552.101 of the Government Code in conjunction with common-law privacy, and (2) the information we have indicated that is subject to section 552.117(a)(1) of the Government Code if the employees whose information is at issue timely requested confidentiality for their information under section 552.024 of the Government Code. The city must withhold the remaining recordings under section 552.101 of the Government Code in conjunction with common-law privacy and the decision in *Ellen*.

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

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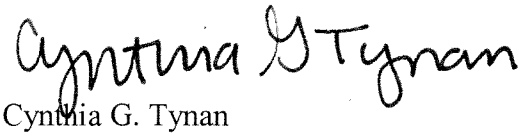
[1]The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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,



Cynthia G. Tynan
Assistant Attorney General
Open Records Division

CGT/em

Ref: ID# 444779

Enc. Submitted documents

c: Requestor
(w/o enclosures)