



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 11, 2012

Ms. Cara Leahy White
Taylor Olson Adkins Sralla Elam, L.L.P.
For the City of South Lake
6000 Western Place, Suite 200
Fort Worth, Texas 76107-4654

OR2012-07052

Dear Ms. White:

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# 453540.

The City of Southlake (the "city"), which you represent, received two requests from two different requestors, for information pertaining to (1) internal affairs investigation 2012-0111 involving the second requestor; (2) internal affairs investigation resulting in a three-day suspension involving a named officer; (3) internal affairs investigation resulting in a one-day suspension involving a named officer; and (4) a 2011 internal affairs investigation involving the second requestor. We understand the city will release some information responsive to item one of the request. You state you will redact information under section 552.117(a)(2) of the Government Code pursuant to Open Records Decision No. 670 (2001).¹ You claim that the submitted information is excepted from disclosure under sections 552.101

¹Open Records Decision No. 670 allows a governmental body to withhold home addresses and telephone numbers, personal cellular telephone numbers, personal pager numbers, social security numbers, and family member information of peace officers under section 552.117(a)(2) of the Government Code without the necessity of requesting an attorney general decision under section 552.301 of the Government Code. ORD 670 at 6.

and 552.107 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note you did not submit information responsive to items two through four of the requests. To the extent such information existed and was maintained by the city on the date it received the request for information, we presume the city has released it. If not, the city must do so at this time.³ See Gov't Code §§ 552.301, .302; see also Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to the requested information, it must release the information as soon as possible).

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.

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.*

²Although you raise section 552.101 of the Government Code in conjunction with rule 503 of the Texas Rules of Evidence, this office has concluded section 552.101 does not encompass discovery privileges. See Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). You also claim this information is protected under the attorney-client privilege based on Texas Rule of Evidence 503. In this instance, however, the information is properly addressed here under section 552.107, rather than rule 503. See ORD 676 at 3.

³We note the Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

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 a portion of the submitted information, which consists of an internal affairs investigation regarding allegations of sexual harassment, including audio recordings and corresponding transcriptions of the accused individual and witnesses. Although you state you will release an adequate summary of the investigation and statement of the accused individual, we find none of the submitted documents constitute an adequate summary of the sexual harassment investigation. Accordingly, because there is no adequate summary of the investigation, the city must generally release the information at issue. However, we note that the information at issue contains the identities of the alleged sexual harassment victims and witnesses, including the alleged victim's and witnesses' voices in the recordings, which is considered identifying information. Therefore, the city must withhold the information we have marked in the submitted documents, the entire audio recordings we have marked, and the information we have indicated within the remaining audio recordings, under section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Ellen*.

We note common-law privacy also protects other types of information. 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). Upon review, we find some of the information you have marked would ordinarily be highly intimate or embarrassing and not of legitimate concern. In this instance, however, the individual to whom this information pertains has already been de-identified under section 552.101 of the Government Code. As such, none of this information implicates the privacy rights of an identified individual. Furthermore, we find the remaining information you seek to withhold is not highly intimate or embarrassing information of no legitimate public concern. Accordingly, none of the remaining information at issue may be withheld on that basis.

Section 552.107(1) of the Government Code 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* ORD 676 at 6-7. First, a governmental body must demonstrate 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). 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.*, 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, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain 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 claim portions of the remaining information consist of communications protected by section 552.107(1) of the Government Code. You state the communications are between attorneys representing the city and city employees in their capacities as client representatives for the purpose of rendering professional legal services to the city. You state these communications were intended to be and remain confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Accordingly, the city may withhold the information it has marked under section 552.107(1) of the Government Code.

Section 552.117(a)(2) of the Government Code excepts from public disclosure the home addresses, home telephone numbers, emergency contact information, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with section 552.024 or

section 552.1175 of the Government Code.⁴ Gov't Code § 552.117(a). We note section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). We have marked personal information pertaining to officers currently or formerly employed by the city. It is unclear, however, whether or not the officers at issue are currently licensed peace officers as defined by article 2.12. Thus, if the officers 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, including cellular telephone numbers if the cellular service is not paid for by a governmental body. If, however, the officers at issue are not currently licensed peace officers, their personal information may not be withheld under section 552.117(a)(2) of the Government Code.

If the officers at issue are no longer 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 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. 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). 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. If the individuals whose information is at issue are no longer licensed peace officers and made a timely elections under section 552.024, the city must withhold their personal information, which we have marked, under section 552.117(a)(1), including cellular telephone numbers if the cellular service is not paid for by a governmental body. If these individuals are no longer licensed peace officers and did not make a timely election under section 552.024, their personal information may not be withheld under section 552.117(a)(1) of the Government Code.

In summary, the city must withhold the information we have marked in the submitted documents, the entire audio recordings we have marked, and the information we have indicated within the remaining audio recordings, under section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Ellen*. The city may withhold the information you have marked under section 552.107(1) of the Government Code. If the officers whose information is 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, including cellular telephone numbers if the

⁴"Peace officer" is defined by Article 2.12 of the Texas Code of Criminal Procedure.

cellular service is not paid for by a governmental body. If the officers are no longer licensed peace officers as defined by article 2.12, then to the extent they timely elected confidentiality under section 552.024 of the Government Code, the city must withhold the information we have marked under section 552.117(a)(1) of the Government Code including cellular telephone numbers if the cellular service is not paid for by a governmental body. 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 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,

A handwritten signature in black ink that reads "Cynthia G. Tynan". The signature is written in a cursive, slightly slanted style.

Cynthia G. Tynan
Assistant Attorney General
Open Records Division

CGT/em

Ref: ID# 453540

Enc. Submitted documents

c: Requestors
(w/o enclosures)