



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 12, 2012

Ms. Tiffany N. Evans
Assistant City Attorney
City of Houston
P.O. Box 368
Houston, Texas 77001-0368

OR2012-14490

Dear Ms. Evans:

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# 465176 (GC No. 19832).

The City of Houston (the "city") received a request for disciplinary records involving three named city employees. You state some of the requested information either has been or will be released. You claim other responsive information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the information you submitted.

We first note, and you acknowledge, the city did not comply with its deadline under section 552.301(e) of the Government Code in requesting this decision. *See Gov't Code* § 552.301(a), (e). Therefore, pursuant to section 552.302 of the Government Code, the submitted information is presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold any of the information. *See id.* § 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). This statutory presumption can generally be overcome when information is confidential by law or third-party interests are at stake. *See Open Records Decision Nos.* 630 at 3 (1994), 325 at 2 (1982). Thus, because your claims under section 552.101 of the Government Code can provide compelling reasons for non-disclosure, we will consider them.

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 common-law privacy, which protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. *See 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 applied common-law privacy to records of an investigation of alleged sexual harassment in the workplace. The information at issue in *Ellen* included witness statements, an affidavit in which the individual accused of misconduct responded to the allegations, and the conclusions of the board of inquiry that conducted the investigation. *See id.* at 525. The court upheld the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, but concluded “the public does 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.* You contend the information in Exhibit 2 is protected by common-law privacy as applied in *Ellen*. In this instance, however, the victim of the incident to which the information at issue pertains was not an employee of the city. Therefore, *Ellen* is not applicable to the information in Exhibit 2, and it may not be withheld on that basis under section 552.101 of the Government Code and common-law privacy.

Common-law privacy under section 552.101 of the Government Code also encompasses the specific types of information held to be intimate or embarrassing in *Industrial Foundation*. *See* 540 S.W.2d at 683 (information related to sexual assault, pregnancy, mental or physical abuse in workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has concluded information that either identifies or tends to identify a victim of a sexual assault or other sex-related offense is confidential under common-law privacy. *See* Open Records Decision Nos. 393 (1983), 339 (1982). Therefore, as Exhibit 2 involves such an offense, the city must withhold the information we have marked that identifies the alleged victim under section 552.101 of the Government Code in conjunction with common-law privacy.

This office also has concluded a compilation of a private citizen’s criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person, and is generally not of legitimate concern to the public. *Cf. United States Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (when considering prong regarding individual’s privacy interest, court recognized distinction between public records found in courthouse files and local police stations and compiled summary of information and noted that individual has significant privacy interest in compilation of one’s criminal history). You seek to withhold criminal history information in Exhibits 2 and 3 on privacy grounds. In this instance, however, the information at issue is related to city employees who failed to divulge their respective criminal records in applying for employment or a promotion by the city. Moreover, the information reflects the employees did so in violation of city personnel policies. As we have explained on many occasions, information involving public officials and employees and public employment is

generally not protected by common-law privacy because the public has a legitimate interest in such information. *See* Open Records Decision Nos. 562 at 10 (1990) (personnel information does not involve most intimate aspects of human affairs, but in fact touches on matters of legitimate public concern), 473 at 3 (1987) (fact that public employee received less than perfect or even very bad evaluation not private), 470 at 4 (1987) (job performance does not generally constitute public employee's private affairs), 444 at 5 (1986) (public has legitimate interest in knowing reasons for public employee's dismissal, demotion, or promotion), 405 at 2 (1983) (manner in which public employee's job was performed cannot be said to be of minimal public interest), 329 (1982) (reasons for employee's resignation ordinarily not private). Likewise, the public generally has a legitimate interest in the background and qualifications of applicants for public employment. *See* Open Records Decision No. 455 at 8-9 (1987). Thus, we conclude the public has a legitimate interest in the criminal history information in Exhibits 2 and 3. Therefore, the information in question is not protected by common-law privacy and may not be withheld on that basis under section 552.101 of the Government Code.

Lastly, we note Exhibit 2 contains information the city may be required to withhold under section 552.117 of the Government Code.¹ Section 552.117(a)(1) excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former official or employee of a governmental body who timely requests confidentiality for the information under section 552.024 of the Government Code. *See* Gov't Code §§ 552.117(a)(1), .024. 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. Therefore, the city must withhold the information we have marked in Exhibit 2 under section 552.117(a)(1) of the Government Code to the extent the employee concerned timely requested confidentiality for the marked information under section 552.024 of the Government Code.

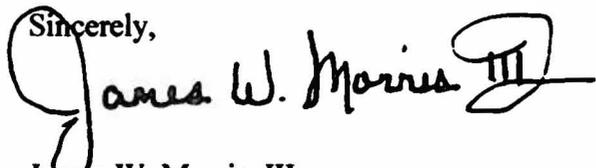
In summary, the city must withhold (1) the information we have marked in Exhibit 2 under section 552.101 of the Government Code in conjunction with common-law privacy and (2) the information we have marked in Exhibit 2 under section 552.117(a)(1) of the Government Code to the extent the employee concerned timely requested confidentiality for the information under section 552.024 of the Government Code. The rest of the submitted information must be released.

¹This office will raise section 552.117 on behalf of a governmental body, as this section is a mandatory exception to disclosure. *See* Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

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 "James W. Morris III". The signature is written in a cursive style with a large initial "J" and a stylized "III" at the end.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/bhf

Ref: ID# 465176

Enc: Submitted documents

c: Requestor
(w/o enclosures)