



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 15, 2013

Ms. Cheryl K. Byles
Assistant City Attorney
City of Fort Worth
1000 Throckmorton Street
Fort Worth, Texas 76102

OR2013-00908

Dear Ms. Byles:

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# 476167 (Fort Worth PIR# W021063).

The City of Fort Worth (the "city") received a request for human resource records concerning a specified sexual harassment complaint. You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.117 of the Government Code and privileged under rule 503 of the Texas Rules of Evidence.¹ We have considered your arguments and reviewed the submitted information.

Initially, you inform us the submitted information is part of a completed sexual harassment investigation, which is subject to section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) provides for required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body [,]" unless the information is made confidential under the Act or other law or is excepted from disclosure under section 552.108 of the Government Code. Gov't Code § 552.022(a)(1). Although you

¹Although you do not state section 552.117 of the Government Code as an exception, we understand you to raise it based on your markings in the submitted information. Additionally, although you cite to rule 192.5 of the Texas Rules of Civil Procedure, you make no arguments to support this exception as required by section 552.301. See Gov't Code §§ 552.301(e)(1)(A), .302. Accordingly, this ruling does not address rule 192.5.

assert the submitted information is excepted from disclosure under section 552.107 of the Government Code, this section is discretionary and does not make information confidential under the Act. *See* Open Records Decision Nos. 676 at 6 (2002) (section 552.107 is not other law for purposes of section 552.022), 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the city may not withhold any of the submitted information under section 552.107 of the Government Code. However, the Texas Supreme Court has held the Texas Rules of Evidence and Texas Rules of Civil Procedure are “other law” that make information confidential for the purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will consider your assertion of the attorney-client privilege under rule 503 of the Texas Rules of Evidence. Further, sections 552.101 and 552.117 of the Government Code make information confidential under the Act. Therefore, we will also consider their applicability to 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 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 the common-law privacy doctrine to the files of a sexual harassment investigation. 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. 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.* 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 may not be withheld 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.

The submitted information contains an adequate summary of the investigation, which you have marked. Therefore, the remaining information you have submitted is confidential and must be withheld in accordance with *Ellen*. See *Ellen*, 840 S.W.2d at 525. Furthermore, the identities of the victims and witnesses to the alleged sexual harassment within the summary, which you have marked, are protected by common-law privacy and must be withheld under section 552.101 of the Government Code. *Id.*

You seek, however, to withhold a portion of the summary under the attorney-client privilege. You assert, and we agree, this information was the subject of two previous requests for information, as a result of which this office issued Open Records Letter Nos. 2012-09779(2012) and 2012-12717 (2012). In those rulings, we determined the city may withhold the information at issue under rule 503 of the Texas Rules of Evidence. Accordingly, we conclude the city may continue to rely on Open Records Letter Nos. 2012-09779 and 2012-12717 as previous determinations and withhold the information you have marked within the summary in accordance with those rulings.² See Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

In summary, with the exception of the summary you have marked, the city must withhold the submitted information under section 552.101 of the Government Code in conjunction with common-law privacy and the ruling in *Ellen*. The city must withhold the identities of the individuals you have marked within the summary under section 552.101 of the Government Code in conjunction with common-law privacy. The city may rely on Open Records Letter Nos. 2012-09779 and 2012-12717 as previous determinations and withhold the information you have marked within the summary in accordance with that ruling. The remainder of the summary must be released.

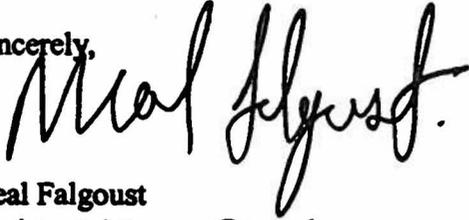
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

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, 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

²As our ruling is dispositive, we do not address your arguments for this information.

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, appearing to read "Neal Falgoust". The signature is written in a cursive, flowing style.

Neal Falgoust
Assistant Attorney General
Open Records Division

NF/ag

Ref: ID# 476167

Enc. Submitted documents

c: Requestor
(w/o enclosures)