



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 4, 2013

Ms. Amy L. Sims
Assistant City Attorney
City of Lubbock
P.O. Box 2000
Lubbock, Texas 79457

OR2013-03634

Dear Ms. Sims:

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# 480231.

The City of Lubbock (the "city") received a request for a report pertaining to a specified investigation. You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.102, and 552.117 of the Government Code. We have considered the exceptions 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 common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) 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 satisfied. *Id.* at 681-82. The type of information considered intimate or 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. *Id.* at 683. You cite *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), in your argument against disclosure based on section 552.101 in conjunction with

common-law privacy. In *Ellen*, the court addressed the applicability of the common-law privacy doctrine to files of an investigation of sexual harassment. 840 S.W.2d 519. 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. *Id.* 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 sexual harassment, the summary must be released along with the statement of the person accused of sexual harassment, but the identities of the victims and witnesses must be redacted and their detailed statements must be withheld from disclosure. If no adequate summary of the investigation exists, then detailed statements regarding the allegations must be released, but the identities of victims and witnesses must be redacted from the statements. In either event, the identity of the individual accused of sexual harassment is not protected from public disclosure. *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), 470 at 4 (job performance does not generally constitute public employee's private affairs), 444 at 3 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (1984) (scope of public employee privacy is narrow), 405 at 2-3 (1983) (public has interest in manner in which public employee performs job), 329 at 2 (1982) (information relating to complaints against public employees and discipline resulting therefrom is not protected under former section 552.101), 208 at 2 (1978) (information relating to complaint against public employee and disposition of the complaint is not protected under common-law right of privacy). 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 into alleged sexual harassment. Therefore, the city must withhold the documents in the investigation file except for the summary, pursuant to *Ellen*, 840 S.W.2d at 525. However, the identities of the victim and witnesses to the alleged sexual harassment are protected by the common-law privacy doctrine and must be withheld. *Id.* Contrarily, the public interest in the identity of the alleged harasser outweighs any privacy interest the alleged harasser may have in that information; therefore, the city may not withhold this information under section 552.101. The public has no legitimate interest in the details of the victim's and witnesses' personal statements, and they may not be disclosed. *Id.* Therefore, pursuant to section 552.101 in conjunction with common-law privacy and the holding in *Ellen*, the city must withhold the identifying information of the victims and witnesses, which we have marked, within the adequate summary. However, we find you have not demonstrated how the remaining

information you have marked within the summary identifies the victim or witnesses. Accordingly, the remainder of the information in the summary is not confidential, and may not be withheld on that basis. However, because there is an adequate summary, the city must also withhold the remaining submitted information in the sexual harassment investigation, which we have marked, under section 552.101 in conjunction with common-law privacy and the holding in *Ellen*.¹

We note common-law privacy protects other types of information. In addition to the information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation*, this office also 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 (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), 343 (1982) (references in emergency medical records to drug overdoses, acute alcohol intoxication, obstetrical or gynecological operations or illnesses, convulsions or seizures, and emotional or mental distress). You state portions of the remaining sexual harassment investigation summary are subject to common-law privacy. However, we find the remaining information is either not highly intimate and embarrassing or is of legitimate public interest. Accordingly, none of the remaining information in the summary may be withheld under section 552.101 on the basis of common-law privacy.

In summary, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy and the holding *Ellen*. The city must release the remaining information.²

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.

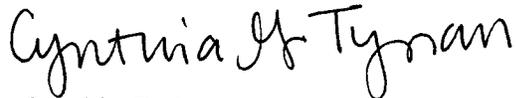
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and

¹As our ruling for this information is dispositive, we need not address your remaining arguments against its disclosure.

²We note the information being released contains information to which the requestor has a right of access under section 552.023 of the Government Code. See Gov't Code § 552.023; see also Open Records Decision No. 481 at 4. However, we note section 552.024(c) of the Government Code authorizes a governmental body to redact information protected by section 552.117(a)(1) of the Government Code without the necessity of requesting a decision under the Act if the current or former employee to whom the information pertains timely chooses not to allow public access to the information. See Gov't Code § 552.024(c)(2). Thus, if the city receives another request for the submitted information from a different requestor, section 552.024(c) authorizes the city to withhold the requestor's personal information if he has timely chosen not to allow access to the information.

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, flowing style.

Cynthia G. Tynan
Assistant Attorney General
Open Records Division

CGT/akg

Ref: ID# 480231

Enc. Submitted documents

c: Requestor
(w/o enclosures)