



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 14, 2013

Ms. Holly C. Lytle  
Assistant County Attorney  
County of El Paso  
500 East San Antonio, Room 503  
El Paso, Texas 79901

OR2013-19814

Dear Ms. Lytle:

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# 505591.

The County of El Paso (the "county") received a request for specified e-mails, the requestor's personnel file, and information pertaining to a specified investigation involving the requestor. You state you have released some of the responsive information. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note a portion of the submitted information, which we have marked, is not responsive to the instant request because it was created after the request was received by the county. This ruling does not address the public availability of the information that is not responsive to the request, and the county is not required to release this information in response to this request.

Next, we note, and you acknowledge, the responsive information is part of a completed harassment/discrimination investigation. Section 522.022(a)(1) of the Government Code provides for the required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[,]" unless it is excepted from disclosure under section 552.108 of the Government Code or is expressly made confidential

under the Act or other law. See Gov't Code § 552.022(a)(1). Thus, the responsive information, which is part of a completed investigation, is subject to section 552.022(a)(1). Although you raise section 552.111 of the Government Code for this information, section 552.111 is discretionary in nature and does not make information confidential under the Act. See Open Records Decision Nos. 663 at 5 (1999) (governmental body may waive section 552.111), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, the county may not withhold any of the responsive information under section 552.111. However, section 552.101 of the Government Code protects information made confidential under law. Therefore, we will consider the applicability of this exception to the responsive 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. This section encompasses the doctrine of common-law privacy, which protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. See *Indus. Found. v. Texas 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 types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. See Open Records Decision No. 455 (1987).

In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the court addressed the applicability of common-law privacy to information relating to an investigation of alleged 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. See 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.* 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.*

Although you argue the submitted information should be withheld under the court ruling in *Ellen*, we note the responsive information pertains to a harassment/discrimination investigation and, therefore, does not constitute a sexual harassment investigation for the purposes of *Ellen*. Accordingly, the responsive information may not be withheld under section 552.101 in conjunction with common-law privacy and *Ellen*. However, upon review, we find some of the responsive information satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Thus, the county must withhold the information

we have marked under section 552.101 in conjunction with common-law privacy. We note some of the remaining information pertains to the requestor. The requestor has a special right of access to information that would ordinarily be withheld to protect her common-law privacy, and such information cannot be withheld from her on that basis. *See* Gov't Code § 552.023(b) (governmental body may not deny access to person to whom information relates or person's agent on grounds that information is considered confidential by privacy principles). Further, the county has failed to demonstrate any of the remaining information at issue is highly intimate or embarrassing and a matter of no legitimate public interest. Therefore, no portion of the remaining information may be withheld under section 552.101 in conjunction with common-law privacy. As you raise no other exceptions to disclosure, the remaining responsive information 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.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml), 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Michelle R. Garza  
Assistant Attorney General  
Open Records Division

MRG/som

Ref: ID# 505591

Enc. Submitted documents

c: Requestor  
(w/o enclosures)