



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

August 24, 1994

Mr. Rex McEntire
Attorney for the City
of North Richland Hills
P.O. Box 820609
North Richland Hills, Texas 76182-0609

OR94-499

Dear Mr. McEntire:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 27775.

The City of North Richland Hills (the "city") received a request, dated April 7, 1994, for "all records . . . concerning criminal and/or internal investigations of all personnel of the North Richland Hills Water and Sewer System from 1990 to present. This request specifically includes, but is not limited to these records pertaining to Mr. John Moody. Further, this request also includes all records concerning efforts by managerial or administrative personnel in the City of North Richland Hills to maintain silence or secrecy in connection with such investigation." The city received a second request, dated June 22, 1994, from another individual for essentially the same information.

In response to those requests, you sought an open records ruling from this office. You submitted copies of information relating to allegations of sexual harassment made against an employee of the water and sewer system, and you claimed that the documents were confidential pursuant to sections 552.101, 552.102, and 552.103 of the Government Code. In Open Records Letter No. 94-367 (1994) we concluded that the city failed to demonstrate that section 552.103 applied and therefore that section 552.103 did not authorize the city to withhold the requested information. Additionally, upon consideration of section 552.101, we concluded that, with the exception of the names of the complainant and witnesses and information tending to identify the complainant and witnesses, the city must release the information to the requestors.

You now ask that we reconsider our conclusion in Open Records Letter No. 94-367. We decline to do so. To the extent that the city has not waived the protection of section 552.103 by failing to demonstrate its applicability in connection with the city's original request to this office, the city has not presented in its request for reconsideration any additional information indicating that criminal litigation of the sexual harassment claims is possible. Furthermore, we reaffirm our conclusion under section 552.101 that, with the exception of the names of the complainant and witnesses to the sexual harassment and information tending to identify the complainant and witnesses, the city must release to the requestors copies of the information relating to the sexual harassment charges. Our office marked the submitted documents to designate the information that the city must withhold.

You also have submitted additional information relating to an investigation that is not connected to the sexual harassment investigation, and you apparently seek to withhold this information. You did not submit this information in connection with your previous request for an open records decision. You are in essence seeking a new open records decision on information requested on April 7, 1994, and June 22, 1994, that you failed to submit in connection with your previous request. The date of your request is well beyond the ten-day deadline articulated in section 552.301(a) of the Government Code, which provides that "[a] governmental body that receives a written request for information that it considers to be within one of the exceptions [to required public disclosure] must ask for a decision from the attorney general . . . not later than the 10th calendar day after the date of receiving the written request."

Failure to timely request the attorney general's decision results in a presumption that the requested information is public, Gov't Code § 552.302, and a governmental body may overcome this presumption only by showing that the information is confidential or that an exception designed to protect the interest of a third party applies. *See* Open Records Decision No. 552 (1990) at 1. You claim that the newly submitted information is confidential. We will, therefore, proceed to consider your request for an open records decision.

As a threshold matter, we note that the dates on the newly submitted information range from April 1, 1994, to July 12, 1994. Thus, some of the information was created after the city received one or both of the request letters. A governmental body need not treat a request as embracing information prepared after the request was made. Open Records Decision No. 452 (1986) at 3. Consequently, the city need not release to the first requestor information created after April 7, 1994. Likewise, the city need not release to the second requestor information created after June 22, 1994.

Regarding the information created prior to June 22, 1994, the later of the two requests, you claim that the information is confidential, but you cite no provision of the Open Records Act that would make it so. Section 552.101 of the Government Code, the broadest confidentiality provision in the Open Records Act, excepts from required public disclosure "information considered to be confidential by law, either constitutional,

statutory, or by judicial decision." You have failed to cite any specific statute that deems confidential information such as that you have submitted, however, and we are unaware of any. Likewise, you have not raised any constitutional arguments; indeed, we do not believe that the information here is confidential under the constitution.¹

Under the Texas Supreme Court's decision in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977), information is private under the common law, and therefore protected from required public disclosure under section 552.101 of the Government Code, if the information meets both prongs of a two-pronged test. First, the requested information must contain highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person. Second, the information must be of no legitimate concern to the public. *Industrial Found.*, 540 S.W.2d at 685.

We have examined the information you have submitted. We find no "highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person." *See id.* Furthermore, the information is of legitimate public concern because it involves alleged misconduct by a public employee. We therefore conclude that the information is not confidential; the city must release it in its entirety to the requestors.²

¹Under the federal constitution, a person has a right to keep private (1) information regarding that person's right to make certain kinds of important decisions about matters that the United States Supreme Court has stated are within the "zones of privacy," as described in *Roe v. Wade*, 410 U.S. 113 (1973), and *Paul v. Davis*, 424 U.S. 693 (1976), and (2) information regarding that person's right to decide the kind of personal facts he or she will disclose to the world. *Id.* The "zones of privacy" implicated in the interest in making certain kinds of decisions include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. The second interest, in nondisclosure or confidentiality, may be somewhat broader. To determine whether the constitutional right of privacy protects particular information, the release of which implicates a person's interest in deciding the kinds of personal facts to disclose to the world, this office applies a balancing test, weighing the individual's interest in privacy against the public's right to know the information. Although such a test might appear more protective of privacy interests than the common-law test, the scope of information considered private under the constitutional doctrine is far narrower than that under the common law; the material must concern the "most intimate aspects of human affairs." *See* Open Records Decision No. 455 (1987) at 5 (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986)).

²Although you do not explicitly claim that section 552.108 excepts this information from public disclosure, you argue that release of the information effectively will foil the ongoing investigation. Section 552.108 protects "[a] record of a law enforcement agency . . . that deals with the detection [or] investigation . . . of crime." Section 552.108 is a discretionary exception, *i.e.*, it authorizes a governmental body to withhold certain information, but it does not require the governmental body to do so. *See* Open Records Decision No. 177 (1977) at 3 (discussing statutory predecessor to Gov't Code § 552.108). Thus, section 552.108 does not deem information confidential. Because you did not raise section 552.108 within ten days of receiving the request letters, you have waived the city's right to claim it.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with an informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact this office.

Yours very truly,



Kymberly K. Oltrogge
Assistant Attorney General
Open Government Section

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Ref.: ID# 27775

Enclosures: Submitted documents

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