



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

February 20, 1995

Mr. John J. Hightower
Olson & Olson
333 Clay Street, Suite 3485
Houston, Texas 77002

OR95-074

Dear Mr. Hightower:

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# 27828.

The City of Brookside Village (the "city"), which you represent, received an open records request for certain records that you contend may be withheld from the public pursuant to section 552.103(a) of the Government Code. Specifically, the requestor, a former city police officer, seeks all records from his personnel file, any traffic tickets, incident forms, and arrest reports he had written while employed with the city, complaints that had been filed against him, and a copy of the city's "standard operating procedures manual" for the city police department.

Although the attorney general will not ordinarily raise an exception that might apply but that the governmental body has failed to claim, *see* Open Records Decision No. 325 (1982) at 1, we will raise section 552.101 of the Government Code because the release of confidential information could impair the rights of third parties and because its improper release constitutes a misdemeanor. *See* Government Code § 552.352. Section 552.101 excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," including the common-law right to privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy protects information if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, *and* it is of no legitimate concern to the public. *Id.* at 685.

Some of the records at issue pertain to allegations of sexual harassment against the requestor. 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 files of an investigation of allegations of sexual harassment. The investigatory files at issue in *Ellen* contained individual witness and victim statements, an affidavit given by the individual accused of the misconduct in response to the allegations, and the conclusions of the board of inquiry that conducted the investigation. *Id.*

The court held that the names of witnesses and their detailed affidavits regarding allegations of sexual harassment were exactly the kinds of information specifically excluded from disclosure under the privacy doctrine as described in *Industrial Foundation. Ellen*, 840 S.W.2d at 525. However, the court ordered the release of the affidavit of the person under investigation, in part because it ruled that he had waived any privacy interest he may have had in the information by publishing a detailed letter explaining his actions and state of mind at the time of his forced resignation. *Id.* The *Ellen* court also ordered the disclosure of the summary of the investigation with the identities of the victims and witnesses deleted from the documents, noting that the public interest in the matter was sufficiently served by disclosure of such documents and that in that particular instance "the public [did] not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements." *Id.*

In this instance it is not clear to this office whether or to what extent the city has released details of the alleged sexual harassment to the public. Consequently, for purposes of this ruling, we will assume that the city has not previously released records that detail all of the allegations. However, after reviewing the records at issue, we have determined that the memorandum dated October 20, 1993, that informed the requestor of his suspension from the city police department serves as an adequate summary of the allegations against him and thus is similar to the summary that the court in *Ellen* held to be public. This memorandum, with the names of the alleged victims, witnesses, and third parties deleted, is therefore public information that must be released to the requestor.¹ However, in accordance with the holding in *Ellen*, the city must withhold all other records pertaining to its investigation of the sexual harassment complaints.

We now address your section 552.103 claims for the remaining requested documents. To secure the protection of section 552.103(a), a governmental body must demonstrate that requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision No. 551 (1990). In this instance you have made the requisite showing that the requested information relates to pending litigation for purposes of section 552.103(a).

¹We conclude that the city must withhold the name of victims, witnesses and third parties pursuant to common-law privacy despite the fact that the requestor has had prior access to this document: we are merely determining here the public's right of access to the summary. Further, because of the requestor's prior access to this document, the city may not now withhold the summary from the public pursuant to section 552.103(a). See discussion *infra*.

This does not, however, end our discussion on the applicability of section 552.103 to the requested information. We note that the requestor, who has filed suit against the city in connection with his termination, has previously had access to all of the remaining records at issue. Absent special circumstances, once information has been obtained by all parties to the litigation, for example, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349, 320 (1982). Consequently, to the extent that the requestor has seen or had access to these records, there would be no justification for now withholding the records from him pursuant to section 552.103(a). Accordingly, the city must release to the requestor² all of the remaining records.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Loretta R. DeHay
Assistant Attorney General
Open Government Section

LRD/RWP/rho

Ref.: ID# 27828

Enclosures: Marked documents

cc: Mr. Tommy S. Macklin
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(w/o enclosures)

²We note that although some of the information at issue may implicate the privacy interests of the requestor, section 552.023 of the Government Code grants to him a special right of access to this information. We do not address here the extent to which any "highly intimate and embarrassing" information about the requestor must be released to any other member of the public.