



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 13, 1995

Mr. Mark S. Houser
Vial, Hamilton, Koch & Knox, L.L.P.
1717 Main, Suite 400
Dallas, Texas 75201

OR95-541

Dear Mr. Houser :

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act. Your request was assigned ID# 27026.

The City of Highland Village (the "city") received three separate requests for information. The first request was for:

1. Any results or preliminary reports made to the City Council concerning a compliance audit.
2. The personnel file of former police chief David Farrar, including all reviews, reprimands and paperwork regarding his termination.
3. Memos or correspondence between the city manager and a named police officer.

The second request asked for:

1. All information, memoranda, preliminary findings, final findings, and supplemental reports from Parker-Jones Inc.'s compliance audit.
2. Former police officer Doug Williams' personnel file, including any information about reprimands.

3. The personnel files of Acting Police Chief Van Maples and several other former police officers, including written records of verbal or written warnings and resignation letters.
4. Any other information about the result of an internal investigation of sexual harassment complaints filed by [a named police officer], including taped interviews of witnesses.
5. A copy of Farrar's L-1 forms that were reviewed by city manager Bo McDaniel in 1994.

The third request again asked for information about the compliance audit.¹ You indicate that the city has already disclosed many of the requested records. However, you contend that some of the requested information may be excepted from disclosure under sections 552.102, 552.103(a), 552.107 and 552.108 of chapter 552.

You submitted to this office a number of documents as responsive to the requests. You state that the city has released the compliance audit except for two statements submitted to this office and identifying information about the individuals who supplied those statements.² The requestor raised the question of whether there was information about the audit not in the custody of city officials, but held for the city by an outside consultant. We note that information held by outside consultants for a governmental body may be within the scope of the Open Records Act. See Gov't Code § 552.012 (definition of "public information"). In Open Records Decision No. 631 (1995) at 2, this office concluded that section 552.111 would be applicable "when the outside consultant is acting at the request of the governmental body and performing a task within the authority of the governmental body."

You submitted to this office four separate sets of exhibits. The set of exhibits that was first sent to this office was marked "A" through "D." A second set of exhibits, marked "A" through "O," was sent later in response to a second request for information. A third and fourth set of documents was sent unmarked to this office. For convenience, we will refer to the set of exhibits that was first submitted to this office as "A-1" through

¹The third request also sought copies of all correspondence, memoranda and letters between the city and Parker-Jones, including contracts or agreements. You state that this information has already been released to the requestor.

²We note that the requestor sought information about the audit prior to the time it was completed. One of your letters stated that because the compliance audit was not completed, preliminary information was not available to the requestor. Section 552.021 provides that information is generally public "if, under a law or ordinance or in connection with the transaction of official business, it is collected, assembled, or maintained: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it." Section 552.022(1) provides that a completed report is an *example* of the type of information that is generally public. Information is not excepted from disclosure under chapter 552 merely because it is not in final form.

“D-1” and the set of exhibits that was submitted later as “A-2” through “O-2.” The third stack of documents that was submitted we will refer to as the Farrar personnel file. The fourth set of documents submitted will be referred to as the compliance audit statements. We will consider each of your arguments as they relate to the submitted documents.

Section 552.103(a) of the Open Records Act

You contend that exhibits A-1 through D-1, G-2 through K-2, and the Farrar personnel file are excepted from disclosure under section 552.103(a) of the Open Records Act. To show the applicability of section 552.103(a), the city must show that (1) litigation is pending or reasonably anticipated and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 640 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. The city must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a).

You indicate that an employee has filed a complaint against the city with the Equal Employment Opportunity Commission (“EEOC”). This office has previously determined that litigation is reasonably anticipated when a complaint is pending before the EEOC. Open Records Decision Nos. 386 (1983), 336 (1982). Your letter states that Mr. Farrar and others have retained an attorney. This attorney has threatened to file suit against the city for wrongful termination of Mr. Farrar. Your letter states that at Mr. Farrar’s pre-termination hearing his attorney told the city manager: “We’ll see you in court, Cowboy.” You also submitted several newspaper articles in which the attorney was quoted as stating that he will file suit against the city and seek monetary damages of \$500,000 based on Mr. Farrar’s wrongful termination. This office has determined that litigation is pending when a former employee has taken steps toward litigation by complaining of wrongful discharge and hiring an attorney, and then that attorney asserts an intent to sue. Open Records Decision No. 555 (1990) at 3. Based on the information the city has supplied about the pending EEOC complaint and the threatened litigation concerning Mr. Farrar, you have met the first prong of the section 552.103(a) test.

The second prong of the section 552.103(a) test concerns whether the information at issue is related to the litigation. A review of the documents indicates that the documents are related to the EEOC claim and the anticipated litigation involving Mr. Farrar. Open Records Decision No. 551 (1990) at 5 (governmental body must “reasonably” establish the relatedness of the information to litigation). However, even though the documents are related to the subjects of the litigation, section 552.103(a) is not applicable when the opposing parties in the anticipated litigation have already seen or had access to the documents. Open Records Decision No. 349 (1982) at 2.

Exhibits A-1 and C-1 are related to anticipated litigation concerning the EEOC complaint. However, since the complainant has already had access to both documents at issue the documents may not be withheld from public disclosure under section 552.103(a). Exhibit B-1 appears to be related both to the EEOC complaint and the

anticipated litigation involving Mr. Farrar. The complainant has had access to the exhibit, but since Exhibit B-1 is also related to the litigation involving Mr. Farrar it may be withheld from disclosure unless Mr. Farrar has also already had access to it. Exhibit D-1, consisting of various statements, is also related to the EEOC complaint and the anticipated litigation involving Mr. Farrar. The non-confidential information may be withheld from disclosure under section 552.103(a) unless it has otherwise been disclosed. The documents in Exhibits G-2 through K-2 are related to the anticipated litigation involving Mr. Farrar. However, you may not withhold Exhibits G-2 through K-2 under section 552.103(a) because Mr. Farrar, the opposing party in that litigation, has already seen or had access to these documents.

The contents of the Farrar personnel file are related to the anticipated litigation with Mr. Farrar, since such litigation may involve his work conduct and performance. We have marked information that it is obvious Mr. Farrar has seen or had access to, but we note that Mr. Farrar may also have seen or had access to other documents in the file. Although information Mr. Farrar has already seen or had access to may not be withheld from disclosure pursuant to section 552.103(a), some of the information in the personnel file is made confidential under other law. *See* Gov't Code § 552.352. This confidential information will be addressed under the discussions concerning section 552.101. The other information in Exhibits G-2 through K-2 may be withheld from disclosure if Mr. Farrar has not already seen or had access to it. It is within the city's discretion to release this non-confidential information to the requestor. Gov't Code § 552.007; Open Records Decision No. 542 (1990) at 4. We note that the applicability of section 552.103(a) also ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982) at 3.

Sections 552.101, 552.102, 552.117, 552.119 of the Open Records Act

Section 552.101 of the Open Records Act excepts from disclosure information "considered to be confidential by law, either constitutional, statutory, or by judicial decision." Some of the information in the Farrar personnel file is confidential by law. Mr. Farrar's home address and home telephone number are protected from disclosure under section 552.117(1)(B). A photograph of Mr. Farrar contained in the file is protected from disclosure under section 552.119. Open Records Decision No. 502 (1988) (section 552.119 generally prohibits release of peace officers' photographs).

The Farrar personnel file contains medical records, access to which is governed by the Medical Practice Act (the "MPA"), article 4495b of Vernon's Texas Civil Statutes. Sections 5.08(b) and (c) of the MPA provide:

- (b) Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except as provided in this section.

(c) Any person who receives information from confidential communications or records as described in this section other than the persons listed in Subsection (h) of this section who are acting on the patient's behalf may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Section 5.08(j)(1) provides for release of medical records upon the patient's written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Section 5.08(j)(3) requires that any subsequent release of medical records be consistent with the purposes for which the city police department obtained the records. Open Records Decision No. 565 (1990) at 7. Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991).

The Farrar personnel file also contains information created by a mental health professional. Chapter 611 of the Health and Safety Code provides for the confidentiality of mental health records created or maintained by a mental health professional. Section 611.002(a) reads as follows:

Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

Section 611.004 provides for access to these records by certain individuals, including "a person who has the written consent of the patient." Access to these records is governed by the provisions of chapter 611. See Open Records Decision No. 565 (1990) at 3.

There is also polygraph information included in the file. Access to this information is governed by section 19A of article 4413(29cc), V.T.C.S. Section 19A provides:

(a) Except as provided by Subsection (c) of this section, a licensed polygraph examiner, licensed trainee, or employee of a licensed polygraph examiner may not disclose to another person information acquired from a polygraph examination.

(b) Except as provided by Subsection (d) of this section, a person for whom a polygraph examination is conducted or an employee of the person may not disclose to another person information acquired from the examination.

(c) A licensed polygraph examiner, licensed trainee, or employee of a licensed polygraph examiner may disclose information acquired from a polygraph examination to:

- (1) the examinee or any other person specifically designated in writing by the examinee;
 - (2) the person, firm, corporation, partnership, business entity, or governmental agency that requested the examination;
 - (3) members or their agents of governmental agencies such as federal, state, county, or municipal agencies that license, supervise, or control the activities of polygraph examiners;
 - (4) other polygraph examiners in private consultation, all of whom will adhere to this section; or
 - (5) others as may be required by due process of law.
- (d) A person for whom a polygraph examination is conducted or an employee of the person may disclose information acquired from the examination to a person described by Subdivisions (1) through (5) of Subsection (d) of this section.
- (e) The board or any other governmental agency that acquires information from a polygraph examination under Subdivision (3) of Subsection (c) of this section shall keep the information confidential.

Since the examination was conducted for the city, the city may disclose the information only as provided by section 19A(d).

The Farrar personnel file also contains copies of the Employee's Withholding Allowance Certificate, Form W-4 of the Internal Revenue Service, which are confidential under section 6103(a) of title 26 of the United States Code. Open Records Decision No. 600 (1992) at 8-9. Mr. Farrar's social security number and information about his social security number is disclosed in the file. Social security information is confidential if such information was obtained or maintained by the city pursuant to any provision of law enacted on or after October 1, 1990. 42 U.S.C. § 405(c)(2)(C)(viii); Open Records Decision No. 622 (1994). Although it is not apparent to this office that any of the social security information on Mr. Farrar was obtained or is maintained by the city pursuant to any provision of law enacted on or after October 1, 1990, we caution that section 552.352 of the Open Records Act imposes criminal penalties for the release of confidential information.

Additionally, some of the information in the personnel file is excepted from disclosure by a common-law right of privacy under section 552.101. Information is excepted under common-law privacy if the information is (1) highly intimate or embarrassing to a reasonable person and (2) of no legitimate public concern. *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), cert.

denied, 430 U.S. 931 (1977). In Open Records Decision No. 373 (1983) at 3, this office recognized that financial information relating to an individual meets the first prong of the test as information that is highly intimate or embarrassing to a reasonable person. However, certain financial information concerning public servants is of legitimate public interest. Open Records Decision Nos. 600 (1992), 545 (1990).

The public has a legitimate interest in "the essential facts about a financial transaction between an individual and a governmental body." Open Records Decision No. 600 (1992) at 9. The amount of a public employee's salary is generally of legitimate public interest. Open Records Decision No. 545 (1990). If an employee participates in group insurance programs funded in part by the governmental body, information about the "essential features" of the transaction are public information. Open Records Decision No. 600 (1992) at 9-10. The legitimate public interest includes knowing that the employee has enrolled family members in the group plan. *Id.* However, there is no legitimate public interest in personal investment decisions made by public servants, such as the employee's allocation of salary to voluntary investment programs or to optional insurance coverage. Open Records Decision Nos. 600 (1992), 545 (1990). You must withhold from disclosure the financial information that is of no legitimate public interest, as explained above. We note that we are unable to determine from the information provided what salary deductions, if any, are paid for in full or in part by the governmental body.

You contend that Exhibits A-2, B-2, C-2, D-2, F-2, O-2 and parts of E-2 are protected by section 552.102. We note that some of this information is confidential by law and may not be disclosed to the public. Some of the information submitted is criminal history information that appears to have been generated by the National Crime Information Center ("NCIC") or the Texas Crime Information Center ("TCIC"). Title 28, part 20 of the Code of Federal Regulations governs the release of criminal history information which states obtain from the federal government or other states. Open Records Decision No. 565 (1990). Federal regulations allow each state to follow its individual law with respect to the information each state generates. *Id.* TCIC information must be withheld from disclosure under section 552.101 in conjunction with chapter 4211, subchapter F of the Government Code. *See* Gov't Code §§ 411.083, .089.

The MPA governs access to portions of Exhibit A-2.

You also submitted to this office for review two compliance audit statements. In your letter of August 2, 1994, you stated:

[T]he City has released the compliance audit (a summary of which is included), save and except the enclosed statements. The two (2) affiants have expressed a concern that their statements may be exempt under Section 552.101, the Confidential information Exception. The City does not express an opinion with regard to the asserted exception.

We have marked information in one compliance audit statement that is intimate and embarrassing and of no legitimate public interest. We note that some of the information in the other compliance audit statement includes allegations of sexual harassment.

In *Morales v. Ellen*, 840 S.W.2d 519, 525 (Tex. App.--El Paso 1992, writ denied), the court addressed the applicability of common-law privacy under *Industrial Foundation* to the files of an investigation into allegations of sexual harassment. The court ordered the release of the affidavit of the person being investigated for sexual harassment and the summary of the investigation, concluding that the public's interest was sufficiently served by the disclosure of these documents. *Id.* The preliminary audit you provided does not contain a summary of the allegations of sexual harassment. However, in accordance with the holding in *Ellen*, we have marked information that identifies or tends to identify witnesses and alleged victims of sexual harassment as confidential.³

Section 552.107

You contend that Exhibits L-2 through N-2 are excepted from disclosure under section 552.107. Section 552.017 excepts information from required public disclosure if:

- (1) it is information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Rules of the State Bar of Texas; or
- (2) a court by order has prohibited disclosure of the information.

The attorney-client privilege applies to confidential communications from a client to an attorney or from an attorney to a client. Open Records Decision No. 574 (1990) at 5. Attorney-client communications may be withheld only to the extent that the communications would reveal client confidences or the attorney's legal advice, opinions, and recommendations to the client. *Id.* at 5-7. Section 552.107(1) does not protect purely factual information such as an attorney's documentation of meetings attended or calls made, as such information does not reveal client confidences or the attorney's legal advice, opinions and recommendations. Open Records Decision No. 574 (1990) at 5-7. Section 552.107 does not except from disclosure Exhibit L-2, a memorandum from the city manager that was shared with a number of individuals and thus is not a confidential communication.⁴ We have marked information in M-2 that may be withheld from disclosure under section 552.107.

³We note that one of the alleged victims of sexual harassment was identified in newspaper articles submitted to this office. We are unable to determine whether this individual voluntarily waived her privacy interest.

⁴We note that L-2 and N-2 are duplicate documents.

Section 552.108

You assert that two documents under Exhibit E-2 are protected from disclosure by 552.108 of the Open Records Act. Section 552.108 excepts from disclosure:

- (a) A record of a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . ; [and]
- (b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution

The records contain what seem to be criminal history information that has been previously discussed. However, we note that you have not demonstrated, nor is it obvious to this office, how these particular records are related to allegations of criminal activity uncovered by the audit investigation.

We are resolving this matter with an informal letter ruling rather than with a published open records decision.⁵ This ruling is limited to the particular records at issue under the facts presented to us in this request and should 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,



Ruth H. Soucy
Assistant Attorney General
Open Government Section

RHS/MAR/rho

Ref.: ID# 27026

Enclosures: Marked documents

⁵The Seventy-fourth Legislature has significantly amended the Open Records Act effective September 1, 1995. See Act of May 29, 1995, H.B. 1718, 74th Leg., R.S. (to be codified at Gov't Code ch. 552) (copy available from House Document Distribution Office). We do not address in this ruling whether these recent amendments to chapter 552 will affect requests for this information that are made on or after September 1, 1995.

cc: Mr. Stephen Hadel
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(w/o enclosures)