



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 4, 1997

Ms. Betsy Elam
Fielding, Barrett & Taylor
500 Throckmorton Street, Suite 3400
Fort Worth, Texas 76102-3821

OR97-1293

Dear Ms. Elam:

You have asked whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 106126.

The City of Mansfield (the "city") received various requests for information concerning certain former and current city employees. You contend that some of the information at issue is excepted from disclosure pursuant to sections 552.101, 552.102, 552.103, and 552.108 of the Government Code.¹ You also inform this office that the city does not have certain documents responsive to one of the requests for information. We note that the city is not obligated to provide information which is not in its possession or to compile new information. Open Records Decision Nos. 561 (1990) at 9 (city does not have to obtain new information); 483 (1987) at 2; 452 (1986) at 3 (open records request applies to information in existence when request is received); 362 (1983) at 2 (city does not have to supply information which does not exist). You submitted to this office for review representative samples of other records that are responsive to the request.²

You assert that all of the responsive records are excepted from disclosure pursuant to section 552.103(a) of the Government Code. To show that section 552.103(a) is applicable, a governmental entity must show that (1) litigation is pending or reasonably anticipated and (2) the information at issue is related to the litigation. *Heard v. Houston*

¹You raised, but did not explain the applicability of, sections 552.107 and 552.111 of the Government Code.

²We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision No. 499 (1988), 497 (1988). Here, we do not address any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Post Co., 684 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 governmental entity must meet both prongs of this test for information to be excepted under section 552.103(a).

You submitted documents to this office that show the city is being sued by a former-building inspector for wrongful discharge. However, you have not explained how this pending litigation relates to the documents at issue. We have examined the documents submitted to this office and it does not appear that these records are related to the subject of the pending litigation. Since the city has not met its burden under section 552.103(a), this exception is not applicable.

The information submitted to this office appears to contain information about an employee's medical condition that may be confidential pursuant to the Americans with Disabilities Act of 1990 (the "ADA") 42 U.S.C. § 12101 *et seq.*, in conjunction with section 552.101 of the Government Code. Section 12112(d)(3)(B) of title 42 of the United States Code provides that information regarding medical conditions or medical histories may be disclosed only as follows:

(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) government officials investigating compliance with this Act shall be provided relevant information on request.

These restrictions are applicable to information about medical conditions obtained from employees. 29 C.F.R. § 1630.14(c)(1)(i)-(iii). *See also* 29 C.F.R. § 1630.14(b)(1) (providing that medical information "shall be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record"). We have marked the information that is protected from disclosure.

There is also confidential polygraph information in the records submitted to this office. Access to the polygraph information at issue is governed by section 19A of article 4413(29cc), V.T.C.S, rather than chapter 552 of the Government Code. 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 (c) 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.

Thus, in this situation the marked polygraph information may not be released.

You object to releasing certain documents because of concern that such release would be an unwarranted invasion of privacy. The test to determine whether information is excepted from disclosure under common-law privacy provisions, which are encompassed in sections 552.101 and 552.102 of the Government Code, is whether the information is (1) highly intimate or embarrassing to a reasonable person and (2) of no legitimate public concern. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 930 (1977); *Hubert v. Harte-Hanks Texas Newspapers Inc.*, 652 S.W.2d 546 (Tex. App.-Austin 1983, writ ref'd n.r.e.). We note that most of the information at issue is of legitimate public interest and may not be withheld from disclosure pursuant to either section 552.101 or 552.102. Open Records

Decision Nos. 470 (1987) at 4 (public has legitimate interest in job performance of public employees); 423 (1984) at 2 (scope of public employee privacy is narrow).

However, some of the information at issue concerns allegations of sexual harassment. 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 court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the public's interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held that "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.* at 525.

The court in *Ellen* did not reach the issue of whether the public employee who was accused of the harassment had any inherent right of privacy to his identity. Although certain identifying information was withheld, the court held that the public possesses a legitimate interest in full disclosure of the facts surrounding employee discipline in this type of situation. *Id.* at 525. Pursuant to the court's decision in *Ellen*, you may not disclose identifying information about the alleged sexual harassment victims. However, this office believes that there is a legitimate public interest in the identity of public employees accused of sexual harassment in the workplace and the details of the complaint, regardless of the outcome of the investigation. See Open Records Decision Nos. 470 (1987) at 4 (public has legitimate interest in job performance of public employees); 423 (1984) at 2 (scope of public employee privacy is generally narrow). We have marked the identifying information that must be withheld from disclosure

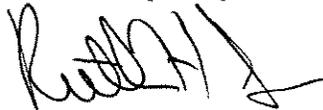
You have asserted that a number of records are excepted from disclosure pursuant to section 552.108 of the Government Code. Section 552.108 excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime" and "[a]n 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." Gov't Code § 552.108; see *Holmes v. Morales*, 924 S.W.2d 920 (Tex. 1996). Some of the documents at issue concern criminal offenses and investigations of such offense. These documents may be withheld pursuant to section 552.108.

However, some of the records at issue are internal personnel records that do not appear to relate to law enforcement or prosecution within the meaning of section 552.108(b). See *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied). The records at issue that concern personnel issues and do not appear to involve criminal investigations or prosecutions may not be withheld from disclosure pursuant to section 552.108. See Open Records Decision No. 438 (1986) (section 552.108 inapplicable to complaint against employee where there is no anticipated prosecution.)

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 should not be relied upon as a previous determination 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 Records Division

RHS/ch

Ref.: ID# 106126

Enclosures: Submitted documents

cc: Ms. Jennifer Autrey
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(w/o enclosures)

