



April 20, 2000

Ms. Kathleen F. Watel
Assistant City Attorney
City of San Antonio
P O Box 839966
San Antonio, Texas 78283-3966

OR2000-1563

Dear Ms. Watel:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code, the Public Information Act (the "Act"). Your request was assigned ID# 134292.

The City of San Antonio (the "city") received a request for all documentation related to a sexual harassment complaint against the city.¹ You seek to withhold all documentation filed by the city with the Equal Employment Opportunity Commission (the "EEOC") in response to the complaint and the statements of witnesses and victims under section 552.101 of the Government Code.² You also wish to withhold documentation created in anticipation of pending litigation that reflects the city attorney's mental processes and legal strategies under section 552.111 of the Government Code.

¹The requestor has indicated by postscript in his current request for information that he had submitted a request to the city on December 14, 1999. In the request for a decision submitted by the city to this office by facsimile, the city states that the prior request was only for the city's internal investigation into the complainant's sexual harassment claim and not the EEOC file. However, in the request for a decision submitted by mail, the city states that it did not receive the December 14, 1999 request. As these statements are conflicting, this office cannot reconcile them with a determination. *See* Open Records Decision No. 426 (1988) (Attorney General cannot resolve questions of fact in opinion process).

²The city submitted documentation pertaining to another employee's EEOC file. Apparently, the city believes this information is responsive to the request although the city provides no explanation or argument against its disclosure. We note that a governmental body may always ask a requestor to clarify a request for information if the request is unclear. *See* Gov't Code §552.222(a)(b), Open Records Decisions Nos. 304(1982), 663(1999). It is not clear to this office that the requestor seeks this information. If the requestor indeed seeks this information, the city must withhold the information pertaining to the other employee's EEOC file to the extent that it is confidential. Gov't Code §552.352.

Initially, we address your contention that you do not wish to, again, provide documentation that has been previously requested and provided to the requestor in response to the current request for information. You state that in response to a prior request for information, the city provided the complainant with a copy of the summary of the city's investigation, the complainant's own statement and the statements of others with the names of witnesses and victims redacted.³ Section 552.232 provides for responding to repetitious or redundant requests. A governmental body which receives a request for information for which it has previously furnished or made copies available to the requestor upon payment of applicable charges under Subchapter F of the Government Code, must respond to the request by certifying to the requestor that it has already made the information available to him. *See* Gov't Code §552.232(b) (concerning requirements of certification).

You assert that some of the documentation you have submitted for our review should be withheld from disclosure under section 552.101. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. You state that the federal Freedom of Information Act (the "FOIA"), the Privacy Act and the EEOC regulations, specifically section 1611.1 of title 29 of the Code of Federal Regulations provides that information maintained by the EEOC is confidential and excepted from disclosure. The city argues that, by extension, the information the city was required to submit to the EEOC in its investigation of sexual harassment charges is confidential under section 552.101 in conjunction with the above-listed federal law. This office has ruled, however, that the mere fact that a governmental body holds certain information confidential under the FOIA or the Privacy Act will not bring the information within the section 552.101 exception, as those acts govern disclosure only of information federal agencies hold. Attorney General Opinion MW-95 (1979); Open Records Decision No 124 (1976). Turning to the law concerning EEOC investigations, title VII of the Civil Rights Act of 1964, *see* 42 U.S.C. §2000e-8(e), and related federal regulations, apply to information held by the EEOC that was obtained during an EEOC investigation of employment discrimination. Section 2000e-8(e) reads as follows:

It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this subchapter involving such information. Any officer or employee of the Commission who shall make public in any manner whatever any information in violation of this subsection shall be guilty, of a misdemeanor and upon conviction thereof, shall be fined not more than \$1,000, or imprisoned not more than one year.

³In the future, we advise the city to redact the victim and witness names every place they appear in the documents.

We have previously held that “the federal statute only restricts disclosure by those enforcing the Equal Employment Opportunity Act.” See Open Records Decision Nos. 245 (1980), 155 (1977), 59 (1974); *Whitaker v. Carney*, 778 F2d 216 (1985), *cert denied*, 479 U.S. 813 (1986) (title VII proscribes release of information only when held by EEOC or EEOC employees not when held by employer). No federal statute or regulation prevents an employer’s disclosure of information relating to a claim of employment discrimination. See Open Records Decision Nos. 132 (1976). Therefore, the information the city was required to submit to the EEOC in its investigation of sexual harassment charges, in the hands of the city, is not made confidential by federal law.

You also argue against disclosure of the victims and witnesses statements in the sexual harassment investigation file under the common law privacy protection of section 552.101. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information may be withheld under section 552.101 in conjunction with the common law right to privacy if the information (1) contains highly intimate or embarrassing facts about a person’s private affairs such that release of the information would be highly objectionable to a reasonable person, and (2) is of no legitimate concern to the public. *Id.* The court addressed the applicability of the common law privacy doctrine to files of an investigation of allegations of sexual harassment in *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied). The investigation files in *Ellen* contained individual witness statements, a statement of the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *Ellen*, 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 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.*

When there is an adequate summary of the investigation, the summary must be released, but the identities of the victims and witnesses must be redacted and their detailed statements must be withheld from disclosure. As the city has already released a summary of the city’s investigation, the complainant’s own statement and the statements of others with the names of witnesses and victims redacted, we agree that victims’ and witness’ statements must be withheld from disclosure under section 552.101 in conjunction with the common law right of privacy.

Although the city did not mark any of the documentation it submitted for review, you contend that all documents containing attorney work product are excepted from disclosure. You argue that, under section 552.111, the city may withhold attorney work product from disclosure if it demonstrates that the material was 1) created for trial or in anticipation of civil litigation, and 2) consists of or tends to reveal an attorney’s mental processes,

conclusions and legal theories. Open Records Decision No. 647 (1996). The first prong of the work product test, which requires a governmental body to show that the documents at issue were created in anticipation of litigation, has two parts. A governmental body must demonstrate that 1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and 2) the party resisting discovery or release believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. *Id.* at 4. After careful review of the submitted documentation, we conclude that the city has waived its attorney work product privilege with regard to the information it has disclosed to the EEOC. We further find that section 552.111 is not applicable to the remaining documentation. Therefore, the city may not withhold any of the submitted information under section 552.111.

We note that some of the documents subject to release may include information that is excepted from disclosure under section 552.117. Section 552.117 of the Government Code excepts from disclosure the home addresses, home telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who requests that this information be kept confidential in accordance with section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). The city must withhold this type of information pursuant to section 552.117 only to the extent that its employees elected to keep this information confidential prior to the city's receipt of the current records request.

We additionally note that a social security number is excepted from required public disclosure under section 552.101 of the Government Code in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), *if it was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990*. *See* Open Records Decision No. 622 (1994). It is not apparent to us that the social security numbers contained in the records at issue were obtained or are maintained by the city pursuant to any provision of law enacted on or after October 1, 1990. You have cited no law, nor are we aware of any law, enacted on or after October 1, 1990, that authorizes the city to obtain or maintain a social security number. Therefore, we have no basis for concluding that the social security numbers at issue were obtained or are maintained pursuant to such a statute and are, therefore, confidential under section 405(c)(2)(C)(vii)(I). We caution the city, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing the social security numbers, the city should ensure that these numbers were not obtained or are maintained by the city pursuant to any provision of law enacted on or after October 1, 1990.

Finally, you submitted the city's training materials regarding EEOC complaint procedures and other pertinent EEOC information. We refer you to section 552.022 of the Government Code which sets forth the categories of public information and provides in pertinent part that:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

...

(8) a statement of the general course and method by which an agency's functions are channeled and determined, including the nature and requirements of all formal and informal policies and procedures;

(9) a rule of procedure, a description of forms available or the places at which forms may be obtained, and instructions relating to the scope and content of all papers, reports, or examinations; [and]

...

(13) a policy statement or interpretation that has been adopted or issued by an agency[.]

We conclude that the city's training materials regarding EEOC complaint procedures and the other pertinent EEOC information are included in the above categories of section 552.022 and, therefore, must be released as public information.

This letter ruling is limited to the particular records 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 records or any other circumstances.

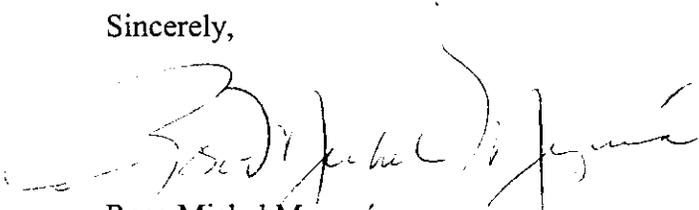
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Rose Michel Munguía
Assistant Attorney General
Open Records Division

RMM/nc

Ref: ID# 134292

Encl. Submitted documents