



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 7, 2003

Mr. Eddie Martin
Assistant City Attorney
City of Denton
215 East Mckinney
Denton, Texas 76201

OR2003-8048

Dear Mr. Martin:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 190786.

The City of Denton (the "city") received eight requests from the same requestor for correspondence from various named individuals with the engineering department, information related to the survey department, a specified city purchase order, information related to the investigation of a named individual, and that named individual's personnel file. You state that most of the requested information will be provided to the requestor. You claim that the remaining requested information related to the investigation and personnel file is excepted from disclosure under sections 552.101, 552.102, 552.117, and 552.130 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted sample of information.²

Section 552.102 of the Government Code excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*,

¹ We note that you have submitted no arguments for your section 552.130 claim. Upon our review of the information, we find section 552.130 inapplicable to the submitted information.

² We note that you state that the information you have submitted as responsive to the request for the personnel file is a representative sample. We 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 Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Government Code. Therefore, we will address your claim of section 552.102 together with your common-law privacy claims under section 552.101.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision,” including information that is encompassed by the common-law right to privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found.*, 540 S.W.2d at 685. The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. This office has concluded that financial information concerning an individual is in some instances protected by a common law right to privacy. *See* Open Records Decision Nos. 545 (1990), 523 (1989). A previous opinion of this office states that “all financial information relating to an individual . . . ordinarily satisfies the first requirement of common law privacy, in that it constitutes highly intimate or embarrassing facts about the individual, such that its public disclosure would be highly objectionable to a person of ordinary sensibilities.” Open Records Decision No. 373 at 3 (1983). You must withhold the personal financial information that we have marked.

We note that you argue that some of the submitted information pertains to allegations of sexual harassment. In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the court applied the common-law right to privacy to an investigation of allegations of sexual harassment. The investigation files at issue in *Ellen* contained third-party witness statements, an affidavit in which the individual accused of the misconduct responded to the allegations, and the conclusions of the board of inquiry that conducted the investigation. *See* 840 S.W.2d at 525. The court upheld the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the disclosure of such documents sufficiently served the public’s interest in the matter. *Id.* The court further held, however, that “the public does 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.* In accordance with *Ellen*, this office typically has required the release of a document analogous to the conclusions of the board of inquiry in *Ellen*, but has held that a governmental body must withhold any information that would tend to identify the victims and witnesses of alleged sexual harassment. *See* Open Records Decision Nos. 393 (1983), 339 (1982).

In this instance, the submitted information includes a human resources investigation report. Upon careful review of the submitted information, we agree that the investigation report is analogous to the conclusions of the board of inquiry, the release of which was upheld in *Ellen*. Accordingly, we conclude that the city must release the investigation report. In doing so, however, the city must withhold any information that would tend to identify the victims and witnesses of alleged sexual harassment. *See Ellen*, 840 S.W.2d at 525.³ The identity of the individual accused of sexual harassment is not protected from public disclosure, as common-law privacy does not protect information about a public employee's alleged misconduct on the job or complaints made about the employee's job performance. *See Open Records Decision Nos. 438 (1986), 230 (1979), 219 (1978)*. You must withhold the information in the investigation report that we have marked under section 552.101 in conjunction with common-law privacy. You must also withhold the remainder of the documents related to the investigation, which we have marked.

The submitted documents also contain a Form I-9. Section 1324a of title 8 of the United States Code provides that an Employment Eligibility Verification Form I-9 "may not be used for purposes other than for enforcement of this chapter" and for enforcement of other federal statutes governing crime and criminal investigations. *See 8 U.S.C. § 1324a(b)(5); see also 8 C.F.R. § 274a.2(b)(4)*. The release of the submitted Form I-9 in response to this request for information would be "for purposes other than for enforcement" of the referenced federal statutes. Therefore, the city must withhold the submitted Form I-9 under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code.⁴

The submitted documents also contain a W-4 form that must be withheld under section 552.101. Employee W-4 forms are excepted from disclosure under section 552.101 in conjunction with section 6103(a) of title 26 of the United States Code. *Open Records Decision No. 600 (1992)*. The city must therefore withhold the W-4 form, which we have marked, under section 552.101.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under 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)*. Therefore, the city may withhold information under section 552.117 only on behalf of current or former officials or employees who made

³ We note that because common-law privacy exists to protect the privacy of individuals, the requestor here has a special right of access to his own identifying information. *See Gov't Code § 552.023* (person or person's authorized representative has special right of access beyond right of general public to information held by governmental body that relates to person and is protected from public disclosure by laws intended to protect that person's privacy interests). However, if the city should receive a request for this same information from another requestor, the city should again submit this same information to this office for a ruling.

⁴ Section 552.101 also encompasses information made confidential by other statutes.

a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. You have submitted the form on which the employee whose information is at issue made an election under section 552.024 to deny access to his personal information prior to the date this request for information was made. Thus, we conclude that the city must the information that we have marked under section 552.117(a)(1).

Lastly, the submitted information contains bank account numbers. Section 552.136 of the Government Code states that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136. The city must, therefore, withhold the marked bank account numbers under section 552.136.

In summary, you must withhold the personal financial information we have marked under section 552.101 and common-law privacy. In accordance with section 552.101 and *Ellen*, you must release the investigation report regarding sexual harassment after redacting the names of victims and witnesses. The remaining information concerning this investigation must be withheld under section 552.101 and *Ellen*. You must withhold the Form I-9 that we have marked under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code. You must withhold the W-4 form that we have marked under section 552.101 in conjunction with section 6103(a) of title 26 of the United States Code. You must withhold the information we have marked under section 552.117(a)(1). You must withhold the account numbers we have marked under section 552.136. The remaining information must be released to the requestor.

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

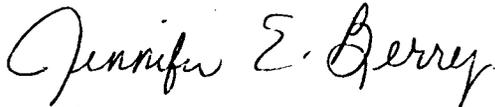
will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure 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 Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Jennifer E. Berry
Assistant Attorney General
Open Records Division

JEB/sdk

Ref: ID# 190786

Enc: Submitted documents

c: Mr. Doug McKoy
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(w/o enclosures)