



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 14, 2005

Mr. Brendan Hall
City Attorney
City of Harlingen
P.O. Box 2207
Harlingen, Texas 78551

OR2005-08399

Dear Mr. Hall:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 232341.

The City of Harlingen (the "city") received a request for (1) information regarding a specified complaint against a named officer, and (2) copies of all settlements with the complainant. You claim that the requested information is excepted from disclosure under sections 552.101 and 552.102 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the submitted information includes a settlement agreement among the city, the Harlingen Police Department (the "department"), and a former communications center employee of the department. Pursuant to section 552.022(a)(18) of the Government Code, a settlement agreement to which a governmental body is a party is public information unless expressly confidential under other law. Gov't Code § 552.022(a)(18). Because sections 552.101 and 552.102 of the Government Code are "other law" for purposes of section 552.022, we will consider your arguments under those sections for the submitted settlement agreement, in addition to the remaining submitted documents. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001).

Section 552.101 excepts from disclosure “information deemed confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses information protected by other statutes. We understand that the city is a civil service city under chapter 143 of the Local Government Code. Section 143.089 contemplates two different types of personnel files, a police officer’s civil service file that the civil service director is required to maintain, and an internal file that the police department may maintain for its own use. Local Gov’t Code § 143.089(a), (g). In cases in which a police department investigates a police officer’s misconduct and takes disciplinary action against an officer, it is required by section 143.089(a)(2) to place all investigatory records relating to the investigation and disciplinary action, including background documents such as complaints, witness statements, and documents of like nature from individuals who were not in a supervisory capacity, in the police officer’s civil service file maintained under section 143.089(a). *Abbott v. City of Corpus Christi*, 109 S.W.3d 113, 122 (Tex. App.—Austin 2003, no pet.). All investigatory materials in a case resulting in disciplinary action are “from the employing department” when they are held by or in possession of the department because of its investigation into a police officer’s misconduct, and the department must forward them to the civil service commission for placement in the civil service personnel file. *Id.* Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. *See* Local Gov’t Code §§ 143.051-143.055. Such records are subject to release under chapter 552 of the Government Code. *See* Local Gov’t Code § 143.089(f); Open Records Decision No. 562 at 6 (1990). However, information maintained in a police department’s internal file pursuant to section 143.089(g) is confidential and must not be released. *City of San Antonio v. Tex. Attorney Gen.*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied).

You indicate that the submitted information is maintained in the department’s internal file pursuant to section 143.089(g). You also state that no disciplinary action has been taken against the officer in question. Upon review, we agree that most of the submitted information is confidential pursuant to section 143.089(g) of the Local Government Code and, thus, must be withheld pursuant to section 552.101 of the Government Code.¹

However, as noted earlier, the submitted information includes a settlement agreement with a former communications center employee of the department. We assume the city also maintains this information outside of the department’s personnel file for this officer. The city may not engraft the confidentiality afforded to records under section 143.089(g) to other records that exist independently of the officer’s personnel file. Accordingly, we conclude that the city may not withhold the submitted settlement agreement under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code.

¹As we are able to make this determination, we do not address your remaining claim against disclosure for this information.

You claim that the submitted settlement agreement is excepted from disclosure under section 552.102 of the Government Code, which 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*, 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* for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101 of the Government Code. See *Indus. Found.*, 540 S.W.2d at 683-685. Accordingly, we will consider your section 552.102 claim in the context of the doctrine of common law privacy under section 552.101 of the Government Code.

For information to be protected by common law privacy it must meet the criteria set out in *Industrial Foundation*. The *Industrial Foundation* court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. 540 S.W.2d at 685.

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 investigation files in *Ellen* contained individual witness statements, an affidavit by 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 an investigation, the summary and any statements of the person under investigation must be released, but the identities of the victims and witnesses must be redacted and their detailed statements must be withheld from disclosure. However, when no adequate summary exists, detailed statements regarding the allegations must be released, but the identities of witnesses and victims must still be redacted from the statements.

In this instance, the submitted settlement agreement contains allegations of sexual harassment. Because there is no adequate summary of the investigation, this document must generally be released. However, based on *Ellen*, the city must withhold the identity of the alleged victim of sexual harassment, which we have marked, under sections 552.101 and 552.102 of the Government Code in conjunction with common law privacy.

In summary, the information we have marked must be withheld under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code. The marked identifying information of the alleged victim of sexual harassment must be withheld under sections 552.101 and 552.102 of the Government Code in conjunction with common law privacy. 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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. 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,



Caroline E. Cho
Assistant Attorney General
Open Records Division

CEC/sdk

Ref: ID# 232341

Enc. Submitted documents

c: Mr. Tony Chapa
Anti Police Abuse Advocate
1721 Hickory Court
Harlingen, Texas 78550
(w/o enclosures)