



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 8, 2007

Mr. Mark Daniel
Watauga City Attorney
Law Offices of Evans, Gandy, Daniel & Moore
Sundance Square
115 West Second Street, Suite 202
Fort Worth, Texas 76102

OR2007-10165

Dear Mr. Daniel:

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# 286047.

The City of Watauga (the "city") received a request for information related to allegations of sexual harassment against a named firefighter, commendations or disciplinary actions taken against the named firefighter, and a copy of the city's sexual harassment policy. You state that you have released the city's sexual harassment policy. You claim that the remaining 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.

Section 552.101 of the Government Code excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision" and encompasses information that another statute makes confidential. Gov't Code § 552.101. The City of Watauga is a civil service city under chapter 143 of the Local Government Code. Section 143.089 contemplates two different types of personnel files, a firefighter's civil service file that the civil service director is required to maintain, and

an internal file that the fire department may maintain for its own use. Local Gov't Code § 143.089(a), (g).

In cases in which a fire department investigates an firefighter's misconduct and takes disciplinary action against the firefighter, 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 officer's civil service file maintained under section 143.089(a). *Abbott v. 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 city fire department because of its investigation into a firefighter's misconduct, and the fire department must forward them to the civil service commission for placement in the civil service personnel file. *Id.* at 120, 122. Such records are subject to release under the Act. *See* Local Gov't Code § 143.089(f); Open Records Decision No. 562 at 6 (1990).

However, a document relating to a firefighter's alleged misconduct may not be placed in his civil service personnel file if there is insufficient evidence to sustain the charge of misconduct. Local Gov't Code § 143.089(b). Information that reasonably relates to a firefighter's employment relationship with the fire department and that is maintained in a fire department's internal file pursuant to section 143.089(g) is confidential and must not be released. *City of San Antonio v. San Antonio Express-News*, 47 S.W.3d 556 (Tex. App.—San Antonio 2000, pet. denied); *City of San Antonio v. Tex. Attorney General*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied).

You state that “copies of any commendations or disciplinary actions taken against” the named individual are excepted from disclosure under section 143.089. *Contradictorily*, you then refer to section 143.089(a), which provides a list of the items that must be maintained in the firefighter's civil service file, and thus are subject to release. We note that a firefighter's civil service file must contain commendations, as well as documents relating to any misconduct in those cases where the fire department took disciplinary action against the firefighter. *See* Local Gov't Code §§ 143.089(a)(1)(2), 143.051–.055 (describing “disciplinary action” for purposes of section 143.089(a)(2)); Attorney General Opinion JC-0257 (2000). Most of the submitted information relates to a charge of misconduct that resulted in the demotion of the firefighter at issue. Therefore, this information, and the submitted commendation, must be maintained in the civil service file pursuant to subsections 143.089(a)(1) and (2), and may not be withheld under section 552.101 in conjunction with section 143.089(g) of the Local Government Code. The city does not clearly state whether the remaining document in Exhibit D is maintained in the fire department's internal file. If this document is maintained in the fire department's internal file, it must be withheld under 552.101 in conjunction with section 143.089(g) of the Local

Government Code.¹ However, if the remaining document is not maintained in the fire department's internal file, it must be released.

We now address your remaining arguments for the information contained in the firefighter's civil service file, which is subject to the Act. Section 552.102(a) of the Government Code exempts 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(a) is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* 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. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 683-85. Accordingly, we will consider your section 552.101 and section 552.102(a) privacy claims together.

Section 552.101 of the Government Code encompasses the common-law right of privacy. For information to be protected from public disclosure by the common-law right of privacy under section 552.101, the information must meet the criteria set out in *Industrial Foundation*. In *Industrial Foundation*, the Texas Supreme 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*, 40 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.*

Thus, if there is an adequate summary of an investigation of alleged sexual harassment, the investigation summary must be released under *Ellen*, but the identities of the victims and witnesses of the alleged sexual harassment must be redacted, and their detailed statements must be withheld from disclosure. See Open Records Decision Nos. 393 (1983), 339 (1982). If no adequate summary of the investigation exists, then all of the information relating to the

¹We note that section 143.089(g) requires a fire department who receives a request for information maintained in a file under section 143.089(g) to refer that person to the civil service director or the director's designee.

investigation ordinarily must be released, with the exception of information that would identify the victims and witnesses. In either case, the identity of the individual accused of sexual harassment is not protected from public disclosure. Common-law privacy does not protect information about a public employee's alleged misconduct on the job or complaints made about a public employee's job performance. *See* Open Records Decision Nos. 438 (1986), 405 (1983), 230 (1979), 219 (1978).

In this instance, the information at issue relates to a completed investigation of sexual harassment and includes an adequate summary of that investigation. In accordance with the holding in *Ellen*, the city must release the summary redacting information that identifies the alleged victim and witnesses. We have marked the identifying information accordingly. We note that supervisors are not considered witnesses under *Ellen*. We further note that the adequate summary contains a statement from the accused. The city must withhold the remaining information related to the sexual harassment investigation, which we have marked, under section 552.101 in conjunction with common-law privacy under *Ellen*.

Section 552.117(a)(1) excepts from disclosure the home address, home telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code. 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). If the firefighter at issue made a request for confidentiality under section 552.024 prior to the date on which the request for information was made, the city must withhold the information we have marked pursuant to section 552.117(a)(1). If the firefighter at issue did not make a timely request for confidentiality, the information at issue must be released.

In summary, if the remaining document in Exhibit D is maintained in the fire department's internal file, the city must withhold the document under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code. The city must withhold the information that we have marked under section 552.101 in conjunction with common-law privacy under *Ellen*. If the firefighter at issue made a timely request for confidentiality, the city must withhold the information we have marked pursuant to section 552.117(a)(1). The remaining information must be released.

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,



Kara A. Batey
Assistant Attorney General
Open Records Division

KAB/mcf

Ref: ID# 286047

Enc. Submitted documents

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(w/o enclosures)