



August 10, 2000

Ms. Anita Stevenson
Assistant City Attorney
City of Austin
P.O. Box 1546
Austin, Texas 78767-1546

OR2000-3052

Dear Ms. Stevenson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 137962.

The City of Austin (the "city") received a written request for all materials pertaining to investigations concerning a named park police officer regarding matters of discrimination and harassment. The requestor additionally seeks all related records of "disciplinary action or other actions which were taken with the individuals involved." You contend that the requested information, a representative sample of which you have submitted to this office, is excepted from disclosure under sections 552.103 and 552.117 of the Government Code.¹

Section 552.301 of the Government Code dictates the procedure that a governmental body must follow when it seeks a decision from the attorney general as to whether requested information falls within an exception to disclosure. Among other requirements, the governmental body must submit to this office within fifteen business days of receipt of an information request "a copy of the specific information requested, or . . . representative samples of the information if a voluminous amount of information was requested." Gov't Code § 552.301(e)(1)(D). Otherwise, the requested information "is presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information." Gov't Code § 552.302.

¹In reaching our conclusion here, 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 No. 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. In this regard, we note that you have not supplied this office with any of the requested disciplinary records.

The city received the records request on May 25, 2000, but you did not submit the requested records to this office until June 21, 2000. Consequently, you failed to comply with the requirements of section 552.301(e) of the Government Code in that you did not submit to us the records at issue within fifteen business days of the city's receipt of the records request. You have not provided this office with compelling reasons for withholding the requested information pursuant to section 552.103; consequently, we deem this exception as being waived. *See* Gov't Code § 552.302.

On the other hand, a demonstration that information comes under the protection of one of the act's mandatory exceptions constitutes a compelling reason for non-disclosure. *See, e.g.*, Open Records Decision No. 150 (1977). For example, section 552.117(2) of the Government Code requires the city to withhold all information that relates to the home address, home telephone number, social security number, and family information of a peace officer as defined by article 2.12, Code of Criminal Procedure. Unlike other public employees, a peace officer need not affirmatively claim confidentiality for this information. Open Records Decision No. 488 (1988); *see also* Open Records Decision No. 506 (1988). We agree that the city must withhold the types of information protected under section 552.117(2) and have marked the documents at issue accordingly.

Although the attorney general will not ordinarily raise an exception that might apply but that the governmental body has failed to claim, *see* Open Records Decision No. 325 at 1 (1982), we will raise section 552.101 of the Government Code, which protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," because the release of confidential information could impair the rights of third parties and because the improper release of confidential information constitutes a misdemeanor. *See* Government Code § 552.352. The applicability of section 552.101 to requested information overcomes the resulting presumption of openness. Open Records Decision No. 150 (1977).

Section 552.101 protects from public disclosure information coming within the common law right of privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976) (common law privacy protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and is of no legitimate concern to the public). In this regard, we note that some of the information at issue pertains to an investigation 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 investigatory files at issue in *Ellen* contained individual witness and victim statements, an affidavit given by the individual accused of the misconduct in response to the allegations, and the conclusions of the board of inquiry that conducted the investigation.

The court held that the names of witnesses and their detailed affidavits regarding allegations of sexual harassment are exactly the types of information specifically excluded from disclosure under the privacy doctrine as described in *Industrial Foundation. Ellen*, 840

S.W.2d at 525. However, the court ordered the release of the affidavit of the person under investigation. *Id.* The *Ellen* court also ordered the disclosure of the summary of the investigation with the identities of the victims and witnesses deleted from the documents, noting that the public interest in the matter was sufficiently served by disclosure of such documents and that in that particular instance “the public [did] not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements.” *Id.*

We additionally note that 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 or the content of his statement, and we decline to extend such protection here. We believe there is a legitimate public interest in the identity of public employees accused of sexual harassment in the workplace. *See, e.g.*, Open Records Decision Nos. 484 (1987), 400 (1983); *cf.* Open Records Decision No. 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees).

In this instance, we believe that the information regarding the sexual harassment investigation contained in the April 11, 2000 version of the “Investigative Summary” constitutes an adequate summary of that investigation. Consequently, in accordance with *Ellen*, the only information the city must release regarding the sexual harassment investigation is the summary information referenced above with the identity of the victim redacted.² We have marked the documents at issue accordingly.

In summary, the city must withhold peace officers’ home addresses and telephone numbers pursuant to section 552.117(2) of the Government Code. The city must also withhold all information pertaining to the sexual harassment investigation except for the summary contained in the April 11, 2000 “Investigative Summary,” with the identity of the victim redacted. All remaining responsive 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

²None of the records before us contain a statement by the accused harasser regarding the harassment claims. If the city possesses such a statement, it must be released to the requestor with the identity of the alleged victim redacted.

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,



Julie Reagan Watson
Assistant Attorney General
Open Records Division

JRW/RWP/ljp

Ref: ID# 137962

Encl. Submitted documents

cc: Mr. Greg Powell
Business Manager
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(w/o enclosures)