



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 8, 1996

Mr. Robert J. Miklos
Assistant City Attorney
Office of the City Attorney
City Hall
Dallas, Texas 76201

OR96-0487

Dear Mr. Miklos:

You have asked whether certain information is subject to required public disclosure under the Texas Open Records Act. Your request was assigned ID# 39011.

The City of Dallas (the "city") received a request for the personnel file of an employee and for information concerning an internal affairs investigation into an allegation of sexual harassment. You contend that portions of the personnel file and the investigation file are excepted from disclosure pursuant to section 552.101. You submitted to this office for review the entire investigation file and a representative sample of information in the personnel file.

Section 552.101 of the Open Records Act excepts from disclosure information made confidential by law, either constitutional, statutory, or by judicial decision. Information is excepted under common-law privacy if the information is (1) highly intimate or embarrassing to a reasonable person and (2) of no legitimate public concern. *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). In *Morales v. Ellen*, 840 S.W.2d 519, 525 (Tex. App.--El Paso 1992, writ denied), the court addressed the applicability of common-law privacy under *Industrial Foundation* to the files of an investigation into 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. *Id.* 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.*

We agree that most of the documents in the investigation file are excepted from disclosure by a common-law right of privacy under section 552.101. In accordance with the holding in *Ellen*, you must release the summary and the statement of the individual against whom the allegations were made. However, you must withhold information in the summary and the statement that would identify the alleged victim and witnesses to the alleged sexual harassment. We have marked this information. The other documents in the investigation file are excepted from disclosure.¹

As to the personnel file, we have marked information that may be confidential in the representative sample submitted to this office. Some of the information is excepted from disclosure under common-law privacy. Also, in the sample submitted, the employee's home address, home telephone number, and social security number may be confidential. Sections 552.117 and 552.024 of the Government Code provide for confidentiality of a public employee's home address, home telephone number, social security number, or information revealing whether the employee has family members *if the employee has elected to keep this information private*. You must withhold this information if the employee, as of the time of the request for the information, had elected to keep this information private. Open Records Decision Nos. 530 (1989) at 5, 482 (1987) at 4.

Even if the employee has not made such an election, his social security number may be confidential under federal law. Social security information is confidential if such information was obtained or maintained by the city pursuant to any provision of law enacted on or after October 1, 1990. 42 U.S.C. § 405(c)(2)(C)(viii); Open Records Decision No. 622 (1994).

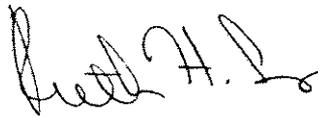
You also state that the personnel file contains federal income tax information and other types of information made confidential by law. We note that when a governmental body submits a “representative sample” of records to this office, we assume that the sample is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). We do not generally address any other requested records to the extent that those records contain substantially different types of information than that submitted to this office. The sample of personnel records submitted to this office did not contain income tax information and other types of information made confidential by law, other than that already discussed.

¹Although the *Ellen* court recognized that the person accused of misconduct may in some instances have a privacy interest in information contained within investigation files, we think in this case the public's interest in disclosure of this information greatly outweighs any privacy interest the accused may have. *See Ellen*, 840 S.W.2d at 525.

Please note, however, that Form W-4, the Employees' Withholding Allowance Certificate, income tax returns, Form W-2, which reports wages, and Form W2-P, which reports pension benefits, are confidential by federal law. *See* Open Records Decision No. 600 (1992) at 8-9. Additionally, if any other information in the personnel file is excepted from disclosure by a common-law right of privacy or other applicable law, this information may not be disclosed. *See* Open Records Decision Nos. 600 (1992), 545 (1990) (certain personal financial decisions of public employees are excepted from disclosure). Section 552.352 of the Open Records Act imposes criminal penalties for the release of confidential information.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Ruth H. Soucy
Assistant Attorney General
Open Records Division

RHS/ch

Ref.: ID# 39011

Enclosures: Marked documents

cc: Mr. Robert Ingrassia
The Dallas Morning News
Communications Center
Dallas, Texas 75265
(w/o enclosures)