



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

September 26, 1997

Mr. G. Chadwick Weaver  
First Assistant City Attorney  
City of Midland  
P.O. Box 1152  
Midland, Texas 79702-1152

OR97-2181

Dear Mr. Weaver:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 108835.

The City of Midland (the "city") received a request for "any/all records pertaining to employment, disciplinary actions, promotions/demotions or investigations regarding a particular police officer." However, the city is withholding the file based on sections 552.101, 552.102, 552.103, 552.111, 552.117, and 552.119 of the Government Code. You enclose the documents you seek to withhold.

You reference Open Records Letter No. 94-0190 (1994), which addressed the applicability of section 143.089 of the Local Government Code to police personnel records. It is our understanding, however, that the city is not subject to chapter 143 of the Local Government Code. You also claim that the requested information is excepted under section 552.101.<sup>1</sup>

Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.102(a) is designed to protect public employees' personal privacy. The scope of section 552.102(a) protection, however, is very narrow. *See* Open Records Decision No. 336 (1982); *see also* Attorney General Opinion JM-36 (1983). The test for section 552.102(a) protection of common-law privacy is the same as that for section 552.101: the information must contain highly intimate and

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<sup>1</sup>The civil service system set out in chapter 143 of the Local Government Code applies to a municipality if the municipality votes to adopt the system. Gov't Code § 143.002(3).

embarrassing facts about a person's *private* affairs such that its release would be highly objectionable to a reasonable person *and* the information must be of no legitimate concern to the public. *Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d. 546,550 (Tex. App.--Austin 1983, writ ref'd n.r.e.).

Additionally, we note that employee education training; names and addresses of former employers; dates of employment; kind of work, salary, and reasons for leaving; names, occupations, addresses and phone numbers of character references; job performances or abilities; birth dates, height and weight, are not protected by privacy. Open Records Decision No. 455 (1987). Home addresses and phone numbers are not "intimate" information. Additionally, this information is not protected as to private citizens. Open Records Decision No. 478 (1987), 455 (1987).

The information at issue pertains to the personnel file of a particular police officer. You state that the information contained in the personnel file is confidential by law and, thus, should be withheld from public disclosure. Because there is a legitimate public interest in the activities of public employees in the workplace, information about public employees is commonly held not to be excepted from required public disclosure under common-law privacy. For example, information about public employees' job performance or the reasons for their dismissal, demotion, promotion, or resignation is not excepted from public disclosure. We have reviewed your markings throughout the file and indicated where your markings do not come within this exception.

Financial information concerning an individual may be protected by a common-law right of privacy. See Open Records Decision Nos. 545 (1990), 523 (1989). You have submitted to this office some documents which present financial information about the police officer and as such this information may be protected under a common-law right to privacy. See Open Records Decision Nos. 600 (1992), 545 (1990). We have also marked those items, outside of your markings where this information comes within the section 552.101 exception.

Furthermore, 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." Accordingly, we have reviewed your markings in the "internal affairs file" from pages 1 through 77 and agree that

you may withhold information that would identify the victim and witnesses of sexual harassment.

We also note that section 552.101 of the Government Code protects “information considered to be confidential by law, either constitutional, *statutory*, or by judicial decision.” (Emphasis added.) We note that some of the records you submitted to this office are made confidential by statute. The Texas Medical Practice Act, V.T.C.S. article 4495b provides:

Records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician are confidential and privileged and may not be disclosed except as provided in this section.

V.T.C.S. art. 4495b, § 5.08(b). We agree with most of your markings and we have marked those documents where we do not agree.

Next we note that included among the documents you seek to withhold are accident report forms that appear to have been completed pursuant to chapter 550 of the Transportation Code. *See* Transp. Code § 550.064 (officer’s accident report). You seek to withhold some accident report information and we observe that the Seventy-fifth Legislature repealed, codified, and amended V.T.C.S. article 6701d, concerning the disclosure of accident report information. Act of May 29, 1997, S.B. 1069, § 13, 75th Leg., R.S. (to be codified at Transp. Code § 550.065). However, a Travis County district court has issued a temporary injunction enjoining the enforcement of section 13 of S.B. 1069 for ninety days. *Texas Daily Newspaper Association, et al. v. Morales, et al.*, No. 97-08930 (345th Dist. Ct., Travis County, Tex., Aug. 29, 1997) (order granting temporary injunction). A temporary injunction preserves the status quo until the final hearing of a case on its merits. *Janus Films, Inc. v. City of Fort Worth*, 163 Tex. 616, 617, 358 S.W.2d 589 (1962). The Supreme Court has defined the status quo as “the last, actual peaceable, non-contested status that preceded the pending controversy.” *Texas v. Southwestern Bell Tel. Co.* 526 S.W.2d 526, 528 (Tex. 1975). The status quo of accident report information prior to the enactment of S.B. 1069 is governed by section 47 of article 6701d, V.T.C.S.

Section 47(b)(1) provides that the department or a law enforcement agency employing a peace officer who made an accident report *is required to release a copy of the report* on request to:

- (D) a person who provides the Department or the law enforcement agency with two or more of the following:
  - (i) the date of the accident;
  - (ii) the name of any person involved in the accident; or
  - (iii) the specific location of the accident

V.T.C.S. art. 6701d, § 47(b)(1) (emphasis added). Under this provision, a law enforcement agency "is required to release" a copy of an accident report to a person who provides the law enforcement agency with two or more pieces of information specified by the statute. *Id.* In the situation at hand, the requestor has not provided the city with the dates of the accidents, the names of persons involved in the accidents, as well as the location of the accidents. Thus, you are not required to release this information under section 47(b)(1)(D) of article 6701d, V.T.C.S.

We next discuss the exception you raise under 552.101 under the federal Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g, or section 552.111 of the Government Code. This office has issued Open Records Decision No. 634 (1995), which concluded: (1) an educational agency or institution may withhold from public disclosure information that is protected by FERPA and excepted from required public disclosure by sections 552.026 and 552.101 without the necessity of requesting an attorney general decision as to those exceptions, and (2) an educational agency or institution that is state-funded may withhold from public disclosure information that is excepted from required public disclosure by section 552.114 as a "student record," insofar as the "student record" is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception.

We remind you that this ruling applies only to "education records" under FERPA. "Education records" are records that

- (i) contain information directly related to a student; and
- (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

20 U.S.C. § 1232g(a)(4)(A). *See also* Open Records Decision Nos. 462 (1987), 447 (1986). We believe that this ruling is dispositive as to the records that are excepted from required public disclosure by FERPA or section 552.114 of the Government Code. You have not submitted any argument nor is it apparent that the city is an educational institution. Accordingly, the transcripts may not be withheld under FERPA. Furthermore, we note again that the public has a legitimate interest in the job qualifications, including college transcripts of public employees and that college transcripts submitted by a public employee to a governmental body are not excepted by common law privacy. Open Records Decision No. 467 (1987).

Additionally we observe documents which contain information concerning juveniles which at the time the conduct occurred, the applicable law in effect was Family Code section 51.14(d) which provided, in pertinent part:

Except as provided by Article 15.27, Code of Criminal Procedure, and except for files and records relating to a charge for

which a child is transferred under Section 52.02 of this code to a criminal court for prosecution, the law-enforcement files and records [concerning a child] are not open to public inspection nor may their contents be disclosed to the public.

In Open Records Decision No. 181 (1977) at 2, this office held that former section 51.14(d) excepts police reports which identify juveniles or furnish a basis for their identification. *See also* Open Records Decision No. 394 (1983) at 4-5 (applying former Fam. Code § 51.14(d) to "police blotter" and related information). To the extent that these provisions apply here, the documents are excepted under former section 51.14(d). Accordingly, we agree with your assertion that the city must withhold those documents under section 552.101 of the Government Code as information deemed confidential by law.

You assert that the information contained in the "internal file" is excepted from disclosure under section 552.103. Section 552.103(a) applies to information:

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

To show that section 552.103(a) is applicable, the department must demonstrate that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4.

You state that a settlement letter relates to an Equal Employment Opportunity Commission ("EEOC") complaint. The pendency of a complaint before the EEOC indicates a substantial likelihood of litigation. *See* Open Records Decision No. 386 (1983). From the submitted records, it appears that an EEOC claim is pending at this time. Thus, assuming that the complainant has not dismissed her EEOC complaint, the city may withhold from public disclosure the letter requested under section 552.103.

Section 552.111 excepts from disclosure "only those internal agency communications consisting of advice, recommendations, opinions and other material reflecting the deliberative or policymaking processes of the governmental body at issue." Open Records Decision No. 615 (1993) at 5. This exception is intended to protect advice and opinions given on policy matters and to encourage frank and open discussions within an agency in connection with the agency's decision-making processes. *Texas Dep't of Pub. Safety v.*

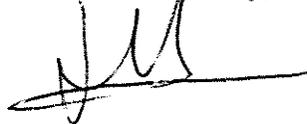
*Gilbreath*, 842 S.W.2d 408, 412 (Tex. App.--Austin 1992, no writ) (citing *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.--San Antonio 1982, writ ref'd n.r.e.). This section does not protect administrative or personnel matters. Open Records Decision No. 615 (1993) at 5. The documents you submitted for review contain personnel matters and administrative matters that do not relate to the policy functions of the city. You may not withhold the documents for which you assert the section 552.111 exception from public disclosure.

You also assert that certain information is excepted from disclosure under section 552.117. Section 552.117 protects from required public disclosure information relating to a peace officer's home address, home telephone number, or social security number, as well as names of family members. Open Records Decision Nos. 622 (1994), 455 (1987). The information at issue here contains the peace officer's home address, telephone numbers, social security number, and names of family members. This section also excepts from disclosure the former home addresses and telephone numbers of peace officers. Open Records Decision No. 622 (1994) at 7. Therefore, the city must not release information that discloses the officer's home address, social security number, home telephone number, and names of family members. We have reviewed your markings and are in agreement unless otherwise indicated through our markings.

We note that photographs of the officer are included with the documents submitted to this office for review. Pursuant to section 552.119 of the Government Code, you must withhold the photographs of the officer unless the officer has given the city written consent to its disclosure.

We are resolving this matter with this 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 may 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,



Janet I. Monteros  
Assistant Attorney General  
Open Records Division

JIM/ulg

Ref.: ID# 108835

Enclosures: Submitted/marked documents

cc: Mr. Mike Gibson  
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Midland, Texas 79711  
(w/o enclosures)

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