



February 8, 1999

Ms. Lisa Aguilar
Assistant City Attorney
City of Corpus Christi
Legal Department
P.O. Box 9277
Corpus Christi, Texas 78469-9277

OR99-0364

Dear Ms. Aguilar:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 122022.

The City of Corpus Christi (the "city") received requests for

- 1) [a]ny and all memoranda, reports, internal communications, and/or documents associated with allegations of misappropriations, mismanagement, sexual harassment and/or political activity of the city's Weed and Seed Program [and]
- 2) [a]ny written statements from Weed and Seed employees given to the City Manager or his representative since October.

You advise us that there are eight documents responsive to the request. You have released one document; however, you claim that the remaining seven documents are excepted from disclosure under sections 552.101, 552.103(a) and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

First, you claim that Exhibits 2 - 7 are excepted from disclosure pursuant to section 552.103(a). Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. The city has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a

showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin 1997, no pet.); *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 at 4 (1990). The city must meet both prongs of this test for information to be excepted under section 552.103(a).

You inform us that the city is investigating allegations of misconduct, which if true, will result in disciplinary actions against certain employees. Furthermore, you explain that disciplinary actions are governed by rules and regulations promulgated by the city Civil Service Board. We conclude that the disciplinary contested case process you have presented to this office is not litigation for the purposes of section 552.103(a). Therefore, you may not withhold Exhibits 2 - 7 pursuant to section 552.103.

You also state that section 552.101 excepts Exhibits 2 - 7 from public disclosure. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." The common-law right of privacy is incorporated into the Open Records Act by section 552.101. For information to be protected by common-law privacy it must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The *Industrial Foundation* court held 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 right of common-law privacy 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.*

Because the submitted information contains no adequate summary of the sexual harassment complaint investigation and you do not relate that such a summary has been released, the victim's and witnesses' statements may not be withheld under section 552.101. However, based on *Ellen*, the city must withhold the identities of the victim and the witnesses. We have marked the information in Exhibits 4 and 6 that you must withhold

pursuant to *Ellen*. Because you must release a de-identified copy of Exhibit 6, a summary of the victim's statement, you may withhold Exhibit 7 in this instance. As for the information contained in Exhibits 2, 3, and 5 that is not related to allegations of sexual harassment, only that information which satisfies the criteria set out in *Industrial Foundation* is excepted from disclosure under section 552.101. We have marked the information that must be withheld.

Lastly, you assert that section 552.111 excepts Exhibits 1, 3, and 5 from public disclosure. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. ORD 615 at 5-6. Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. ORD 615 at 4-5.

We have reviewed the submitted information and conclude that most of the information involves internal administrative or personnel matters that is not excepted from public disclosure by section 552.111. We have marked the information that you may withhold under section 552.111.

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 on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/nc

Ref.: ID# 122022

Enclosures: Marked documents

cc: Mr. James A. Suydam
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(w/o enclosures)