



December 4, 2000

Ms. Stephanie Osburn  
Assistant City Attorney  
City of El Paso  
2 Civic Center Plaza  
El Paso, Texas 79901-1196

OR2000-4590A

Dear Ms. Osburn:

This decision clarifies Open Records Letter No. 2000-4590 (2000) because this office in that decision failed to address certain information contained in the submitted documents and marked by this office as possibly excepted from required public disclosure. Where this office determines that a procedural error was made and that error resulted in an incorrect decision, we will correct the previously issued ruling. The request was assigned ID# 141779.

The City of El Paso (the "city") received a request for all information relating to a specified investigation of sexual harassment. You indicate the city has released to the requestor some information responsive to the request. You submitted additional records for our review, consisting of a set of documents and a tape recording, and you marked for redaction portions of the information contained in the documents. You asserted that the information you identified is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses common law privacy. Information must be withheld from the public as implicating the common law right to privacy when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 at 1 (1992).

The responsive information indicates that two named individuals were investigated as to whether they had engaged in sexual harassment at work. The court in the case of *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App. - El Paso 1992, writ denied) applied the above-referenced common law right of privacy test to the records resulting from a workplace sexual harassment investigation. 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.* 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.* In its conclusion, the court stated:

The records requested contain highly intimate, embarrassing revelations about persons required to cooperate with an investigation by their employer. These witnesses were never informed of the request that these records be made public; they have, thus, had no opportunity to assert privacy interests on their own behalf. To disclose their names and the details of their statements would send a most unfortunate message to all public employees in Texas: that they complain about sexual harassment in their workplace, or cooperate in the investigation of such a complaint, only at risk of embarrassing and offensive publicity. While this may occasionally be a necessary evil in the enforcement of prohibitions against sexual harassment, we do not believe it is warranted here and decline to order the disclosure of documents which would have such a chilling effect.

*Id.* at 526. Unlike the conclusions of the board of inquiry in *Ellen*, our review of the submitted information indicates that it contained no document that may comprise an adequate summary of the result of the investigation and thereby serve the legitimate public interest in the information at issue. We therefore believe that the statements taken as part of the investigation are not excepted from disclosure in this instance. However, information that reveals the identity of both the complainants and witnesses must be withheld. We believe pursuant to *Ellen* that the city must not release this information to the public. However, we do not believe that the identities of the accused individuals are excepted from disclosure by a right of privacy. *See* Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute his private affairs), 455 (1987) (public employee's job performances or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees).

We agree that most of the information you marked for redaction as implicating an individual's right to privacy constitutes information that must be withheld from the public, as provided above. We marked for release the particular highlighted information that we do not believe may be withheld under section 552.101 in conjunction with a right of privacy. We also marked certain information that the city did not mark for redaction, but that we believe implicates an individual's right to privacy. The city must redact this information prior to releasing the records. For your convenience, the documents at issue contain yellow flags, and we have marked the particular information contained in those documents. Upon review of the submitted tape recording, we find no information that identifies a victim or witness in a sexual harassment investigation. Therefore, the information in the tape recording is not excepted by section 552.101 in conjunction with a right of privacy.

Section 552.101 also encompasses information protected by statute. We have marked the social security numbers in the submitted records, which the city may be required to redact under section 552.101 in conjunction with federal law. A social security number is excepted from required public disclosure under section 552.101 of the act in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if it was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994). We have no basis for concluding that any of the social security numbers we have marked are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Public Information Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the city pursuant to any provision of law, enacted on or after October 1, 1990.

The social security numbers, as well as certain family member information we have marked, may be subject to required withholding pursuant to section 552.117 of the Government Code. Section 552.117 excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. 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). Therefore, the city may only withhold information under section 552.117 on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. For those employees who timely elected to keep their personal information confidential, the city must withhold the employee's social security number and information that reveals whether the employee has family members. The city may not withhold this information under section 552.117 for those employees who did not make a timely election to keep the information confidential.

With respect to two pages of notes written by an attorney for the city, you also assert the attorney work product privilege under sections 552.101 and 552.111. We believe that the privilege is properly asserted under section 552.111, regardless of the status of the litigation for which the information was prepared. *See* Open Records Decision No. 647 (1996); *see also* Open Records Decision No. 575 at 2 (1990) (section 552.101 of the Act does not encompass the attorney work product privilege). A governmental body may withhold attorney work product from disclosure if it demonstrates that the material was 1) created for trial or in anticipation of civil litigation, and 2) consists of or tends to reveal an attorney's mental processes, conclusions and legal theories. *Id.* The first prong of the work product test, which requires a governmental body to show that the documents at issue were created in anticipation of litigation, has two parts. A governmental body must demonstrate that 1) a reasonable person would have concluded from the totality of the circumstances that there was a substantial chance that litigation would ensue, and 2) the party resisting discovery or release believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. *Id.* at 4. With respect to the two pages of notes which you assert are protected by the attorney work product privilege, we believe you have demonstrated the applicability of both parts of the first prong of the work product test. As to the second prong of the work product test, we note that the work product privilege does not ordinarily extend to "facts an attorney may acquire." *See* Open Records Decision No. 647 at 4 (1996) (citing *Owens-Corning Fiberglass v. Caldwell*, 818 S.W.2d 749, 750 n.2 (Tex. 1991)); *see also* *Leede Oil & Gas, Inc. v. McCorkle*, 789 S.W.2d 686 (Tex. App.--Houston [1st Dist.] 1990, no writ) (the attorney work product privilege does not protect memoranda prepared by an attorney that contain only a "neutral recital" of facts). However, facts may be excepted from disclosure if they are inextricably intertwined with privileged information. *See, e.g.,* Open Records Decision No. 487 at 4 (1988). We conclude in this instance that the city may withhold the two pages of notes in their entirety pursuant to the attorney work product privilege under section 552.111 of the Act. We have marked these pages with red flags.

In summary, pursuant the attorney work product privilege under section 552.111 of the Act, the city may withhold the two red-flagged pages in their entirety. The remaining documents are subject to release, but the city must first redact from these records the victims' and witnesses' identifying information, pursuant to section 552.101 in conjunction with the common law right to privacy. Because the submitted tape recording contains no information that identifies a victim or witness, the tape recording must be released to the requestor in its entirety. The city may be required to withhold the social security numbers we have marked pursuant to section 552.101 if this information was obtained or is maintained by the city pursuant to any provision of law, enacted on or after October 1, 1999. Finally, the social security numbers, as well as the family member information we have marked, may be subject to required withholding under section 552.117 of the Government Code, provided the employee timely elected pursuant to section 552.024 of the Government Code to keep this

information confidential. Open Records Letter Ruling No. 2000-4590 (2000) is overruled to the extent it conflicts with this decision.

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, 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).

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 General Services Commission 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,



Katherine Minter Cary  
Chief  
Open Records Division

KMC/MG/seg

Ref: ID# 141779

Encl. Submitted documents

cc: Mr. Joe Old  
501 Randolph Drive  
El Paso, Texas 79902  
(w/o enclosures)