



November 28, 2001

Mr. Robert R. Ray
Assistant City Attorney
City of Longview
P.O. Box 1952
Longview, Texas 75606-1952

OR2001-5527

Dear Mr. Ray:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 154659.

The City of Longview (the "city") received a request for complaints and investigations concerning the incidents that gave rise to the demotion of the city's fire marshal. You claim that some of the requested information may be excepted from disclosure under sections 552.101 and 552.130 of the Government Code. We have considered the exceptions you raise and reviewed the submitted information.

Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses the doctrines of common law and constitutional privacy. Common law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

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." *Id.*

You question whether the identifying information of the complainant and witness in the investigation as well as the submitted photographs of the complainant and witness must be withheld according to the doctrine of common law privacy and *Ellen*. Unlike *Ellen*, the investigation at issue here did not involve an allegation of sexual harassment. Therefore, we do not believe that *Ellen* applies, and we find that the identifying information of the complainant and the witness are not protected under common law privacy. We also do not believe that the complainant and witness have a legitimate privacy interest in the submitted photographs that were taken in public parks. See *Roberts v. Houston Indep. Sch. Dist.*, 788 S.W.2d 107, 111 (Tex. App.--Houston [1st Dist.] 1990); RESTATEMENT (SECOND) OF TORTS, § 652D cmt. b (1977). Nevertheless, we find that some of the specific details revealed in the investigation, including the photographs of the complainant and witness not taken in public parks, are highly intimate and embarrassing and are not of legitimate interest to the public. Consequently, you must withhold this information, which we have marked, under common law privacy and section 552.101.

The submitted documents also contain social security numbers that may be excepted from disclosure under section 552.101. A social security number or "related record" may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). See Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. See *id.* We have no basis for concluding that any of the social security numbers in the file 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.

Section 552.117 may also be applicable to some of the submitted information. 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. If the

employee timely elected to keep his personal information confidential, the city must withhold the employee's home address and telephone number, social security number, and any information that reveals whether the employee has family members. The city may not withhold this information under section 552.117 if the employee did not make a timely election to keep the information confidential. We have marked those portions of the submitted information that may be excepted from disclosure under section 552.117.

You contend that some of the submitted information is excepted from disclosure under section 552.130. Section 552.130 provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state

While the submitted information contains driver's license numbers, it is unclear whether these driver's licenses were issued by an agency of the State of Texas. To the extent the submitted information contains driver's license numbers from licenses issued by an agency of this state, you must withhold those numbers under section 552.130.

We further note that the submitted information contains e-mail addresses that are excepted from disclosure under section 552.137 of the Government Code. Section 552.137, recently added to the Public Information Act by the Seventy-seventh Legislature,¹ provides "[a]n e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Public Information Act]." We have marked e-mail addresses in the submitted information that are excepted from disclosure under section 552.137. Although the submitted information contains other e-mail addresses, we do not believe these e-mail addresses were provided for the purpose of communicating with a governmental body.

In summary, you must withhold some of the submitted information, which we have marked, under section 552.101 of the Government Code and common law privacy. You must also withhold social security numbers contained in the submitted information under section 552.101 to the extent the city obtained or maintains these numbers pursuant to a provision of law enacted on or after October 1, 1990. You must withhold portions of the submitted information, which we have marked, under section 552.117 to the extent the employee had elected to keep this information confidential under section 552.024 at the time the city received the instant request for information. You must withhold the driver's license numbers

¹Act of May 14, 2001, 77th Leg., R.S., ch. 356, § 1, 2001 Tex. Gen. Laws 614; *see also* Act of May 22, 2001, 77th Leg., R.S., ch. 545, § 5, 2001 Tex. Gen. Laws 974, 975 (adding this exception as § 552.136).

contained in the submitted information under section 552.130 to the extent the corresponding driver's licenses were issued by an agency of this state. Finally, you must withhold the marked e-mail addresses pursuant to section 552.137 of the Government Code. You must release the remainder of the submitted information.

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).

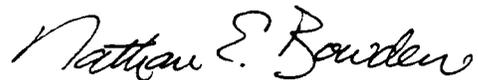
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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); *Tex. Dep't of Pub. 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 Texas Building and Procurement 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,



Nathan E. Bowden
Assistant Attorney General
Open Records Division

NEB/sdk

Ref: ID# 154659

Enc: Submitted documents

c: Mr. John Lynch
Longview News-Journal
P.O. Box 1792
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(w/enclosure)