



August 27, 2002

Mr. Stephen Autry
City Attorney
City of Coleman
P.O. Box 592
Coleman, Texas 76834

OR2002-4790

Dear Mr. Autry:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 167731.

The City of Coleman (the "city") received a request for information regarding a former police officer. You state that you have released some of the requested information. You claim, however, that the submitted information is excepted from disclosure under the attorney-client privilege and by common-law privacy. We have considered your arguments and reviewed the submitted information.

You assert that items 4, 8, and 12 are excepted from release under the attorney-client privilege. The attorney-client privilege is incorporated into the Public Information Act (the "Act") as section 552.107 of the Government Code. Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. *Id.* at 5. When communications from attorney to client do not reveal the client's communications to the attorney, section 552.107 protects them only to the extent that such communications reveal the attorney's legal opinion or advice. *Id.* at 3.

You state that items 4 and 8 are notes that the city attorney wrote to his files. Thus, these documents are not "communications" that are protected by the attorney-client privilege. On the other hand, you explain that item 12 is a communication between the city manager and the city attorney that contains the attorney's advice and opinion. Based on your

representation and our review of this document, we agree that item 12 is excepted from disclosure under section 552.107.

We now address your assertions that the remaining documents are protected by common-law privacy. The common-law right of privacy is incorporated into the Act by section 552.101.¹ For information to be protected by common-law privacy it must meet the criteria set out in *Industrial Foundation v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The *Industrial Foundation* court stated 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.

You assert that the release of the remaining documents would implicate the privacy interests of the former officer. We note, however, that the records at issue relate solely to the job performance of a public employee. There is a legitimate public interest in the work behavior of a public employee and how he or she performs job functions. *See* Open Records Decision Nos. 444 at 5-6 (1986) (public has interest in public employee's qualifications and performance and the circumstances of his resignation or termination), 484 (1987) (public's interest in knowing how police departments resolve complaints against police officer ordinarily outweighs officer's privacy interest), 405 at 2-3 (1983) (public has interest in manner in which public employee performs his job), 329 at 2 (1982) (information relating to complaints against public employees and discipline resulting therefrom is not protected under former Gov't Code §§ 552.101 or 552.102), 208 at 2 (1978) (information relating to complaint against public employee and disposition of the complaint is not protected under either the constitutional or common law right of privacy). Accordingly, you may not withhold any of the submitted information on the basis of the former employee's privacy.

We note, however, that many of the documents relate to allegations of sexual harassment. 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.*

¹Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes.

Because there is no adequate summary of the investigation, you must release the information relating to the sexual harassment investigation. However, based on *Ellen*, the city must withhold the identities of the victim and the witnesses. We have marked the information that must be withheld under section 552.101 in conjunction with common-law privacy and *Ellen*.

We also note that the submitted documents contain references to a peace officer's family members. Section 552.117(2) of the Government Code exempts from public disclosure a peace officer's home address, home telephone number, social security number, and information indicating whether the peace officer has family members. We have marked the information that must be withheld under section 552.117(2).

Finally, you contend that item 11, which contains information regarding the former officer's salary, is protected by common-law privacy. We note, however, that section 552.022(a)(2) of the Government Code makes the salary of each employee and officer of a governmental body expressly public. *See* Gov't Code § 552.022(a)(2). Furthermore, we find that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision Nos. 600 (1992), 545 (1990), 373 (1983). Accordingly, we find that item 11 is not protected by privacy and must be released.

In summary, you must withhold the identifying information of the victim and any witnesses to the alleged sexual harassment under section 552.101 in conjunction with common-law privacy and *Ellen*. You may also withhold item 12 under section 552.107. The city must also withhold the information we have marked under section 552.117(2). You must, however, release the remaining 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); *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 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Maverick F. Fisher
Assistant Attorney General
Open Records Division

MFF/seg

Ref: ID# 167731

Enc. Submitted documents

c: Mr. J. D. Caudle
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(w/o enclosures)