



October 15, 2002

Ms. Mary Kay Fischer
City Attorney
City of Killeen
101 North College
Killeen, Texas 76541

OR2002-5856

Dear Ms. Fischer:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 170686.

The City of Killeen (the “city”) received two requests for information related to a former city employee. You state that you have released some of the requested information. However, you claim that other information is excepted from disclosure under sections 552.101, 552.117, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered the comments submitted by an interested third party. *See Gov’t Code § 552.304* (providing for submission of public comments.)

We first note that the submitted information contains information which generally must be released pursuant to section 552.022(a)(1) of the Government Code. Section 552.022 makes “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body” public information unless expressly made confidential under other law and “except as provided by [s]ection 552.108[.]” As you indicate that the Killeen Police Department’s investigative report is excepted from disclosure under section 552.101, an exception to disclosure for information made confidential by other law, we will address your arguments with respect to the investigation report.

We next note that the city received the first request on July 26, 2002. However, the city did not raise sections 552.117 and 552.137 until more than ten business-days after the city’s receipt of the first request. Therefore, the city failed to comply with section 552.301(b) with regard to raising these two exceptions.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, *no writ*) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). *See also* Open Records Decision No. 150 (1977) (presumption of openness overcome by showing that information is made confidential by another source of law or affects third party interests). As sections 552.117 and 552.137 provide compelling reasons to overcome the presumption of openness, we will address the entirety of the city's arguments.

You state that the city is "uncertain whether [information recovered from the former city employee's computer] is excepted from disclosure under section 552.101." Though you do not cite any particular exception to disclosure of this information, we will address the required public disclosure of the investigation information under section 552.101 in conjunction with common-law and constitutional privacy.

Section 552.101 encompasses, *inter alia*, the doctrine of common-law 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). To demonstrate the applicability of common-law privacy, a person must affirmatively establish *both* prongs of this test. *Id.* at 681-82. In applying Texas common-law, the courts have rejected the balancing of interests test. *See Industrial Found.*, 540 S.W.2d at 681-82 (under policy determination that Texas legislature made in enacting section 552.101, court is not free to balance public's interest in disclosure against harm to person's privacy); *Ross v. Midwest Communications, Inc.*, 870 F.2d 271, 272 (5th Cir. 1989) (rejecting "open-ended balancing of interests" and applying *Industrial Foundation* test). As the Austin Court of Appeals has noted, the requirement of showing both elements of the *Industrial Foundation* test properly "balances" the individual's privacy and the articulated purpose of the Public Information Act. *Hubert*, 652 S.W.2d at 550.

Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common-law doctrine of privacy;

the information must concern the “most intimate aspects of human affairs.” *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)).

The information concerns an investigation of an allegation of improper use of a city computer. You have provided to this office information indicating that the computer belonged to the city and that the computer was assigned to the former city employee. Given the aforementioned factors, we find that the public has a legitimate interest in the investigation information, even if that information may be intimate or embarrassing to the former city employee. Thus, the investigation information may not be withheld under a common-law right of privacy belonging to the former city employee. *See* Open Records Decision Nos. 444 at 5 (1986) (stating that public has legitimate interest in knowing reasons for dismissal, demotion, or promotion of a public employee), 423 at 2 (1984) (stating that information may not be withheld under section 552.102 if it is of sufficient legitimate public interest, even if person of ordinary sensibilities would object to release on grounds that information is highly intimate or embarrassing), 405 at 2 (1983) (stating that information relating to manner in which public employee performed his or her job cannot be said to be of minimal public interest).

We next address whether release of the investigation information would violate the former city employee’s constitutional right to privacy. Under the federal constitution, “in the context of governmental disclosure of personal matters, an individual’s right to privacy is violated if: (1) the person had a legitimate expectation of privacy; and (2) that privacy interest outweighs the public need for disclosure.” *Cantu v. Rocha*, 77 F.3d 795, 806 (5th Cir 1996); *see also Abdeljalil v. City of Fort Worth*, 55 F. Supp.2d 614 (N.D. Tex. 1999). The constitutional test requires a balancing of these two elements. This balancing test considers a number of factors, including the potential for harm in any subsequent non-consensual disclosure of the information, and “whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access.” *Doe v. Attorney Gen.*, 941 F.2d 780, 796 (9th Cir. 1991) (quoting *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 578 (3rd Cir. 1980)). We will apply the balancing test to the investigation information to determine whether the city must withhold this information under the constitutional right to privacy.

Although we question whether the former city employee had a legitimate expectation of privacy for information in the city-issued computer, under the constitutional privacy test we must weigh whatever privacy interest the former city employee had with the public need for disclosure. As we discussed above, there is substantial public interest in the contents of the investigation information. Thus, we conclude that the legitimate public interest outweighs any privacy interest of the former city employee. Thus, the city may not withhold the investigation information under a constitutional right of privacy of the former city employee.

We will next address whether any of the other individuals whose photographs and personal information appear in the investigation information have a common-law or constitutional

right of privacy that prevents disclosure. For the photographs that depict identifiable individuals, whether clothed or unclothed, we find that if these pictures were obtained from publicly available websites, the individuals depicted are not afforded protection under either common-law or constitutional privacy. If the city determines that these photographs are in the public domain, we believe that the individuals pictured have no reasonable expectation of privacy and the city must release the information. See *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 496 (1975) (action for invasion of privacy cannot be maintained where information is in public domain); *Star Telegram, Inc. v. Walker*, 834 S.W.2d 54, 57 (Tex. 1992) (law cannot recall information once in public domain), *Roberts v. Houston Indep. Sch. Dist.*, 788 S.W.2d 107, 111 (Tex. App.--Houston [1st Dist.] 1990). However, should the city determine that the pictures were not obtained from publicly available websites, we must determine the privacy rights of the identifiable individuals. We note that the city submitted representative samples of the information at issue. We find that the privacy rights of fully clothed individuals is not violated by the release of the information. However, we find that the photographs of identifiable individuals who are partially or completely nude are excepted from disclosure under section 552.101 based on the constitutional right to privacy.

You next assert that certain information pertaining to a sexual harassment investigation is excepted under section 552.101 in conjunction with common-law privacy. 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.

You state that the city has released to the requestor a certain interoffice memorandum which the Director of Human Resources sent to the City Manager. You have submitted this memorandum to this office and assert that the information it contains comprises an adequate summary of the investigation and thereby serves the legitimate public interest in the information at issue. Upon review of this document and the other submitted information, we agree that the submitted interoffice memorandum provides an adequate summary of the investigation. The city must, however, also release the statements of the individual accused of sexual harassment, but must redact the information in those statements that reveals the identity of the alleged victim. We have marked the information in the accused's statements the city must withhold from disclosure. The remaining submitted sexual harassment investigation information must be withheld from disclosure under section 552.101 in conjunction with the common-law right to privacy.

We note that some of the submitted information includes criminal history record information ("CHRI"). CHRI obtained from the National Crime Information Center ("NCIC") or the Texas Crime Information Center ("TCIC") is confidential under federal law and subchapter F of chapter 411 of the Government Code. Federal regulations prohibit the release of CHRI maintained in state and local CHRI systems to the general public. *See* 28 C.F.R. §20.21(c)(1) ("Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given.") and (2) ("No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself."). Section 411.083 of the Government Code provides that any CHRI maintained by the Texas Department of Public Safety (the "DPS") is confidential. *See* Gov't Code §411.083(a); *see also id.* §§ 411.106(b), .082(2) (defining criminal history record information). Similarly, CHRI obtained from the DPS pursuant to statute also is confidential and may be disclosed only in very limited instances. *See id.* §411.084; *see also id.* §411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). Thus, any criminal history information that was obtained from the NCIC or TCIC networks must be withheld from disclosure under section 552.101 of the Government Code. We have marked this information accordingly.

You also argue that some of the submitted information is excepted under section 552.101 in conjunction with common-law privacy. As we have already stated, under the *Industrial Foundation* case, information is excepted from disclosure under section 552.101 in conjunction with the common-law right to privacy if the information contains highly intimate or embarrassing facts, the release of which would be highly objectionable to a reasonable person and the information is not of legitimate concern to the public. *See Industrial Foundation*, 540 S.W.2d at 685. When a governmental body compiles information that depicts an individual as a criminal suspect, arrestee, or defendant, the compilation of information takes on a character that implicates the individual's right to privacy in a manner that the same information in an uncompiled state does not. *See United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989); Open Records Decision

No. 616 at 2-3 (1993). In this case, however, some of the submitted information concerns a background check of a former city employee. Information about the qualifications of a public employee is of legitimate concern to the public. Open Records Decision No. 542 (1990). As we find that there is a legitimate public interest in this information, the city must release the information relating to the former city employee's background check. We have marked this information accordingly.

We note that the submitted materials include fingerprint information subject to sections 559.001, 559.002, and 559.003 of the Government Code, which provide as follows:

Sec. 559.001. DEFINITIONS. In this chapter:

- (1) "Biometric identifier" means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry.
- (2) "Governmental body" has the meaning assigned by Section 552.003 [of the Government Code], except that the term includes each entity within or created by the judicial branch of state government.

Sec. 559.002. DISCLOSURE OF BIOMETRIC IDENTIFIER. A governmental body that possesses a biometric identifier of an individual:

- (1) may not sell, lease, or otherwise disclose the biometric identifier to another person unless:
 - (A) the individual consents to the disclosure;
 - (B) the disclosure is required or permitted by a federal statute or by a state statute other than Chapter 552 [of the Government Code]; or
 - (C) the disclosure is made by or to a law enforcement agency for a law enforcement purpose; and
- (2) shall store, transmit, and protect from disclosure the biometric identifier using reasonable care and in a manner that is the same as or more protective than the manner in which the governmental body stores, transmits, and protects its other confidential information.

Sec. 559.003. APPLICATION OF CHAPTER 552. A biometric identifier in the possession of a governmental body is exempt from disclosure under Chapter 552.

It does not appear to this office that section 559.002 permits the disclosure of the submitted fingerprint information. Therefore, the city must withhold the fingerprints in the submitted documents, which we have marked, under section 552.101 in conjunction with section 559.003 of the Government Code.

You indicate that the information submitted includes information excepted under section 552.117. Section 552.117(1) of the Government Code excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests 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 a current or former employee who made a request for confidentiality under section 552.024 prior to the date on which the present request for this information was received. However, you do not state, and provide no documentation showing, whether the former city employee has made such an election. Accordingly, we have marked the information that must be withheld under section 552.117(1) if this individual has made a timely election under section 552.024. We have also marked other information the city must withhold under this exception for employees making timely elections under section 552.024.

We note that some of the submitted information includes motor vehicle information. Section 552.130 of the Government Code excepts from public disclosure information relating to a driver's license or motor vehicle title or registration issued by an agency of this state. We have marked the information in the submitted documents that the city must withhold pursuant to section 552.130.

Finally, some of the investigation information includes e-mail addresses subject to section 552.137. Section 552.137 provides that "[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]." *See* Gov't Code § 552.137(a). As there is no indication that the individuals to whom the e-mail addresses belong have consented to their release, the city must withhold the e-mail addresses in the submitted information that we have marked under section 552.137 of the Government Code. *See* Gov't Code § 552.137(b) (confidential information described by this section that relates to member of the public may be disclosed if member of public affirmatively consents to its release).

In summary, the city must withhold from disclosure information pertaining to a sexual harassment investigation under section 552.101 in conjunction with common-law privacy. The city must release the statements of the accused with redaction of all information that identifies the alleged victim. The city must withhold images of nude, identifiable individuals to the extent those images do not originate from publicly available websites. The city must withhold from disclosure criminal history record information, which we have marked, under section 552.101 in conjunction with chapter 411 of the Government Code. The city must withhold from disclosure the submitted fingerprint information under section 552.101 in conjunction with section 559.003 of the Government Code. Motor vehicle information, which we have marked, is excepted under section 552.130. Certain information we have marked under section 552.117 is confidential and must be withheld from disclosure for employees making a timely election under section 552.024 of the Government Code. Finally, e-mail addresses in the submitted information must be withheld from disclosure under section 552.137. The remaining information must be released to the requestor.

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).

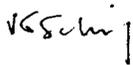
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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,



V.G. Schimmel
Assistant Attorney General
Open Records Division

VGS/sdk

Ref: ID# 170686

Enc: Submitted documents

c: Ms. Kimberly Reynolds
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(w/o enclosures)