



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

March 26, 2003

Mr. Mark G. Daniel
City Attorney
Law Offices of Evans, Gandy, Daniel & Moore
113 West Second Street, Ste. 202
Fort Worth, Texas 76102

OR2003-2060

Dear Mr. Daniel:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 178477.

The City of Watauga (the "city"), which you represent, received a request for three categories of information as follows: 1) a specified complaint filed against the city's Department of Public Safety; 2) the investigation conducted concerning allegations in the complaint; and 3) a specified compromise settlement. You state that the city does not maintain the requested complaint.¹ You claim that the remaining requested information is excepted from disclosure pursuant to sections 552.101, 552.102, and 552.108 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

You claim that certain items of "Inter-Office Correspondence" that have been submitted to us for review should not be released to the requestor because they do not specifically relate to the investigation that was referred to by the requestor in his request for information. After carefully reviewing your arguments and this particular information, we do not agree with your contention that these records are not responsive to this portion of the request. Specifically, we note that these particular documents are listed as attachments to a submitted document entitled "Internal Affairs Investigation #01-15-02-179." Accordingly, we will address the city's claimed exceptions to disclosure regarding this particular information.

¹ We note that it is implicit in several provisions of the Public Information Act (the "Act") that the Act applies only to information already in existence. See Gov't Code §§ 552.002, .021, .227, .351. The Act does not require a governmental body to prepare new information in response to a request. See Attorney General Opinion H-90 (1973); see also Open Records Decision Nos. 87 (1975), 342 at 3 (1982), 416 at 5 (1984), 452 at 2-3 (1986), 555 at 1-2 (1990), 572 at 1 (1990). A governmental body must only make a good faith effort to relate a request to information which it holds. See Open Records Decision No. 561 at 8 (1990).

Next, we note that Exhibit B is subject to section 552.022 of the Government Code. Section 552.022 makes certain information public, unless it is expressly confidential under other law. *See* Gov't Code § 552.022(a). One category of public information under section 552.022 is "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108." Gov't Code § 552.022(a)(1). Exhibit B constitutes a completed investigation made of, for, or by the city that is subject to section 552.022(a)(1) and must be released, unless it is confidential under "other law" or is excepted from disclosure under section 552.108. Since you claim that Exhibit B is excepted from disclosure under sections 552.101, 552.102, and 552.108 of the Government Code, we will address these particular claims.

You claim that Exhibit B is excepted from disclosure pursuant to section 552.108 of the Government Code. Section 552.108(b) provides in pertinent part:

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted . . . if:

...

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication[.]

Gov't Code § 552.108(b) (2). Section 552.108(b)(2) protects records pertaining to criminal investigations or prosecutions that have concluded in a final result other than conviction or deferred adjudication. We note that a governmental body that claims that requested information is excepted from disclosure under section 552.108(b)(2) must demonstrate that the information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. Although the city contends that Exhibit B consists of internal records or notations of a law enforcement agency that are maintained for internal use in a matter relating to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication, it appears that Exhibit B consists of records of an internal investigation that was conducted by the city's police department. You do not argue, nor does it appear, that this investigation resulted in any criminal investigation into the alleged conduct of the officer involved in this matter. Therefore, we have no basis for concluding that Exhibit B is excepted from disclosure under section 552.108(b)(2) of the Government Code. *See Morales v. Ellen*, 840 S.W.2d 519, 526 (Tex. App.--El Paso 1992, writ denied) (section 552.108 not applicable where no criminal investigation or prosecution of police officer resulted from investigation of allegation of sexual harassment); *see also* Open Records Decision No. 350 (1982) (predecessor provision of section 552.108 not applicable to Internal Affairs Division investigation file when no criminal charge against officer results from investigation of complaint against police officer). Accordingly, we

conclude that the city may not withhold any portion of Exhibit B pursuant to section 552.108 of the Government Code.

Next, you claim that Exhibits B and C are excepted from disclosure pursuant to section 552.102 of the Government Code. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). Section 552.102(a) is generally applicable to information relating to a public official or employee. See Open Records Decision No. 327 at 2 (1982) (anything relating to employee's employment and its terms constitutes information relevant to person's employment relationship and is part of employee's personnel file). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected from disclosure under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected from disclosure under the common-law right to privacy as incorporated by section 552.101 of the Government Code.² See *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Accordingly, we will address your section 552.101 and 552.102 claims together.

We note that information is protected from disclosure under the common-law right to privacy if (1) it contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) it is not of legitimate concern to the public. See *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. See *Ellen*, 840 S.W.2d at 525. 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. See *id.* 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. See *id.* In concluding, however, 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.* Therefore, when there is an adequate summary of an investigation, the summary and any statements of the person under investigation must be released, but the identities of the victims and witnesses must be redacted and their detailed statements must be withheld from disclosure. However, when no adequate summary exists, detailed

² Section 552.101 excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. See Gov't Code § 552.101.

statements regarding the allegations must be released, but the identities of witnesses and victims must still be redacted from the statements.

Based on our review of your arguments and Exhibits B and C, we find that a portion of Exhibit B, which we have marked, comprises an adequate summary of this investigation. *See id.* at 525-26. Accordingly, we conclude that the city must withhold the remaining portions of Exhibit B pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy. Portions of the marked summary in Exhibit B constitute identifying information of the victim of and witnesses to the sexual harassment that was alleged in this instance. Accordingly, we also conclude that the city must withhold the identifying information of the victim and witnesses that we have marked within this summary in Exhibit B pursuant to section 552.101 in conjunction with the common-law right to privacy. The city must release the remaining portions of the marked summary in Exhibit B to the requestor. Furthermore, after carefully reviewing your arguments and the information in Exhibit C, we do not agree that this exhibit can be considered a part of this investigation. Thus, the city may not withhold any portion of Exhibit C specifically on the basis of *Ellen*. However, in this instance we find that the release of portions of Exhibit C, which we have marked, would otherwise implicate the privacy interests of the victim of the alleged sexual harassment. *Cf. id.; see Industrial Found.*, 540 S.W.2d at 685. Accordingly, we also conclude that the city must withhold the information that we have marked in Exhibit C pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy. The city must release the remaining portions of Exhibit C 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

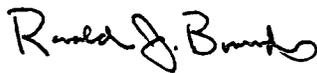
provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to 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 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. 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,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/lmt

Ref: ID# 178477

Enc. Marked documents

c: Mr. James W. Long
6528 Moonglow Lane
Watauga, Texas 76148
(w/o enclosures)