



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

September 2, 2003

Mr. Juan E. Gonzalez
Law Office of Juan E. Gonzalez
3110 East Business Highway 83
Weslaco, Texas 78596

OR2003-6122

Dear Mr. Gonzalez:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 187030.

The Mercedes Housing Authority (the "authority"), which you represent, received a request for "affidavits filed by female employees of the [authority]" regarding two named individuals. You claim that the requested information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the information you have submitted to us for review is the identical information that was the subject of a previous ruling from this office. In Open Records Letter No. 2003-3208 (2003), we concluded that the authority could withhold the submitted information under section 552.108(a)(1) of the Government Code. However, the circumstances existing at the time of the issuance of that ruling have changed. Consequently, the four criteria for a "previous determination" established by this office in Open Records Decision No. 673 (2001) have not been met in this situation.¹ See Gov't Code § 552.301(f);

¹The four criteria for this type of "previous determination" are 1) the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D) of the Government Code; 2) the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general; 3) the attorney general's prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Act; and 4) the law, facts, and circumstances on which the prior attorney

Open Records Decision No. 673 (2001). Thus, you may not rely on that ruling in this case. We will therefore consider your arguments against disclosure of this information.

We next note that some of the submitted documents are not responsive to the instant request for information. We have marked these documents, which the authority need not release in response to this request.

You claim that the submitted information is excepted from public disclosure under section 552.108 of the Government Code. A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain, if the requested information does not supply an explanation on its face, how and why section 552.108 is applicable to that information. *See* Gov't Code § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986). The authority is not a law enforcement agency. However, this office has recognized that information that is not held by a law enforcement agency may be excepted from disclosure under section 552.108 if the information relates to a pending criminal investigation being conducted by a law enforcement agency. *See* Open Records Decision Nos. 474 (1987) (statutory predecessor to section 552.108 may be invoked by proper custodian of information relevant to incident involving allegedly criminal conduct that is still under active investigation or prosecution), 372 (1983). Similarly, this office has determined that records from an administrative investigation of a non-law enforcement agency may be withheld under section 552.108 if the records reveal possible criminal conduct that the non-law enforcement agency intends to report or has reported to the appropriate law enforcement agency or prosecutor. Attorney General Opinion MW-575 (1982); Open Records Decision No. 493 (1988).

Based on the information you provided, we understand you to assert that the requested information pertains to a case that was investigated by the Mercedes Police Department and concluded in a result other than conviction or deferred adjudication. Thus, the submitted information does not comprise records from an administrative investigation of a non-law enforcement agency that reveals possible criminal conduct that the authority intends to report or has reported to the appropriate law enforcement agency or prosecutor. You indicate that the criminal case is no longer pending. Therefore, the authority may not raise section

general ruling was based have not changed since the issuance of the ruling. *See* Open Records Decision No. 673 (2001).

552.108 as an exception to disclosure. See Attorney General Opinion MW-575; Open Records Decision Nos. 493, 474 at 4-5, 372.

You also claim that section 552.101 of the Government Code excepts from disclosure the submitted information. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and encompasses the doctrines of constitutional and common-law privacy.

For information to be protected by common-law privacy it must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 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.

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.*

Because there is no adequate summary of the investigation, you must release the requested information, except as noted below. Based on *Ellen*, the authority 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.

We next address your claim under constitutional privacy for the remaining submitted information. The constitutional right to privacy protects two interests. Open Records Decision No. 600 at 4 (1992) (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir.

1985), *cert. denied*, 474 U.S. 1062 (1986)). The first is the interest in independence in making certain important decisions related to the "zones of privacy" recognized by the United States Supreme Court. Open Records Decision No. 600 at 4 (1992). The zones of privacy recognized by the United States Supreme Court are matters pertaining to marriage, procreation, contraception, family relationships, and child rearing and education. *See id.*

The second interest is in avoiding disclosure of personal matters. The test for whether information may be publicly disclosed without violating constitutional privacy rights involves a balancing of the individual's privacy interests against the public's need to know information of public concern. *See* Open Records Decision No. 455 at 5-7 (1987) (citing *Fadjo v. Coon*, 633 F.2d 1172, 1176 (5th Cir. 1981)). The scope of information considered private under the constitutional doctrine is far narrower than that under the common law; the material must concern the "most intimate aspects of human affairs." *See* Open Records Decision No. 455 at 5 (1987) (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490, 492 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986)).

The remaining responsive information concerns an investigation of sexual harassment. We find that this information is of legitimate concern to the public, and we must balance that need against the privacy interest. *In re Crawford*, 194 F.3d 954, 959 (9th Cir. 1999) (in weighing competing interests to determine whether governmental body may disclose private information, court considers whether there is "an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access"). We find that the legitimate public interest in the remaining responsive information outweighs any privacy interest, and conclude that the authority may not withhold this information under constitutional privacy. *See* Open Records Decision Nos. 329 at 2 (1982) (information relating to complaints against public employees and discipline resulting therefrom not protected under former section 552.101 or 552.102), 208 at 2 (1978) (information relating to complaint against public employee and disposition of complaint not protected under either the constitutional or common-law right of privacy).

Finally, we note that section 552.117 of the Government Code may also be applicable to some of the submitted information. Section 552.117(a)(1) 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(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the authority 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 authority must withhold the employees' home addresses and telephone numbers, social security numbers, and any information that reveals whether these employees have family members. The authority may not withhold this information under section 552.117(a)(1) for those employees who did not make a timely election to keep the information confidential.

In summary, we have marked the information that must be withheld under section 552.101 in conjunction with common-law privacy. For those employees who timely elected to keep their personal information confidential, the authority must withhold the employees' home addresses and telephone numbers, social security numbers, and any information that reveals whether these employees have family members. The remaining responsive 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 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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/jh

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Enc. Submitted documents

c: Mr. Jose F. Rodriguez
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(w/o enclosures)