



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 9, 2004

Mr. Kevin D. Pagan
Deputy City Attorney
City of McAllen
P.O. Box 220
McAllen, Texas 78505-0220

OR2004-2884

Dear Mr. Pagan:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 199104.

The City of McAllen (the "city") received a request for all Title VII complaints filed during a specific period. You indicate that the city has released some of the responsive information. You claim, however, that portions of the submitted records are excepted from public disclosure under sections 552.101 and 552.102 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information made confidential by other statutes. You argue that provisions of title 42 of the United States Code prohibit the release of the requested information. Specifically, you cite to section 2000e-8(e), which makes it unlawful for any officer or employee of the Equal Employment Opportunity Commission (the "EEOC") to make public in any manner whatever any information obtained by the EEOC pursuant to its authority under this section prior to the institution of any proceeding under this subchapter involving such information. 42 U.S.C. § 2000e-8(e). We note that this provision prohibits the EEOC from releasing information about discrimination charges processed by that agency.

You do not inform us, nor do the documents reflect, that the EEOC processed these complaints or is in any way involved in these matters. Instead, you argue that the release of Title VII complaints would be contrary to Congress' intent to withhold such information from the public. We note, however, that statutory confidentiality requires express language that information is confidential. Moreover, confidentiality will not be implied from a statutory structure. *See* Open Records Decision Nos. 658 (1998), 478 (1987). Thus, this office cannot unilaterally create a confidentiality provision where one does not exist.

Furthermore, in light of Congress' evident preference for limiting the scope of non-disclosure, we are unwilling to assume that Congress meant more than it said in enacting section 2000e-8(e). See *Bd. of Governors v. Dimension Fin. Corp.*, 474 U.S. 361 (1986) (stating that in developing plain language rule, Court recognizes reality of legislative process and concludes that only rarely will outside evidence of broad purposes underlying enactment of legislation be useful); see also *Kofa v INS*, 60 F.3d 1084 (4th Cir. 1995) (stating that statutory construction must begin with language of statute; to do otherwise would assume that Congress does not express its intent in words of statutes, but only by way of legislative history); see generally *Coast Alliance v. Babbitt*, 6 F. Supp. 2d 29 (D.D.C. 1998) (stating that if, in following Congress' plain language in statute, agency cannot carry out Congress' intent, remedy is not to distort or ignore Congress' words, but rather to ask Congress to address problem). We, therefore, conclude that you have failed to establish that the submitted information is confidential under section 2000e-8(e) of title 42 of the United States Code.

You also contend that portions of the submitted documents are protected from disclosure by common-law privacy. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 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 under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), for information claimed to be protected under the doctrine of common-law privacy. Common-law privacy protects information that (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Industrial Found.*, 540 S.W.2d at 685. We note, however, that employee privacy under section 552.102 is significantly narrower than common-law privacy under section 552.101, because of the greater public interest in the disclosure of information relating to public employees. See Attorney General Opinion JM-229 at 2 (1984); Open Records Decision Nos. 470 (1987), 444 (1986), 423 (1984). Generally, section 552.102 protects only that information that reveals "intimate details of a highly personal nature." See Open Records Decision No. 315 (1982).

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 into allegations of sexual harassment. The investigation files in *Ellen* contained individual witness statements, an affidavit by the accused individual responding to the allegations, and the 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.* In accordance with *Ellen*, a governmental body must withhold information that would tend to identify a witness or victim. We note, however, that *Ellen*

provides no protection to individuals who are accused of sexual harassment. *See Ellen*, 840 S.W.2d at 525; *see also* Open Records Decision Nos. 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 complaint is not protected under either constitutional or common law right of privacy). After reviewing the submitted documents, we have marked the information that identifies the victims and witnesses of sexual harassment that must be withheld in accordance with *Ellen*. The remaining information is not protected by common-law privacy.

We note, however, that some of the submitted information may be excepted from disclosure under section 552.117(a)(1). Section 552.117(a)(1) of the Government Code provides that information is excepted from disclosure if it relates to a current or former employee's home address, home telephone number, social security number, or reveals whether the employee has family members. The city is required to withhold this information if the employees timely requested that this information be kept confidential under section 552.024 of the Government Code. *See* Open Records Decision Nos. 622 (1994), 455 (1987); *see generally* Open Records Decision No. 530 (1989) (stating that whether particular piece of information is public must be determined at time request for it is made). You may not, however, withhold the information of an employee who made the request for confidentiality under section 552.024 after this request for information was made. We have marked the information that must be withheld under section 552.117 if the employees timely elected to withhold their personal information from disclosure. *See also* Open Records Decision No. 670 (2001) (extending Gov't Code § 552.117 protection to personal cellular phone number and personal pager number of employee who elects to withhold home phone number in accordance with Gov't Code § 552.024).

The submitted records also contain an employee's personal e-mail address that may be excepted from disclosure under section 552.137 of the Government Code. Section 552.137 provides:

- (a) Except as otherwise provided by this section, an 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 this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.
- (c) Subsection (a) does not apply to an e-mail address:

(1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Under section 552.137, a governmental body must withhold the e-mail address of a member of the general public, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure. *See id.* § 552.137(b). You do not indicate that the employee has affirmatively consented to the release of his personal e-mail address. Thus, the city must withhold the marked e-mail address from disclosure under section 552.137. We note, however, that an employee's work e-mail address is not excepted from disclosure under section 552.137.

In summary, we have marked the information that must be withheld in accordance with *Ellen*. If the employees elected to withhold their personal information under section 552.024, you must withhold the information we have marked under section 552.117(a)(1). The marked personal e-mail address must be withheld under section 552.137. The remaining information, however, must be released.

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).

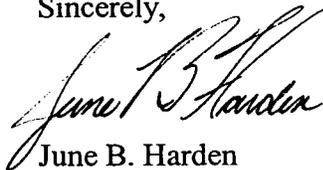
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following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



June B. Harden
Assistant Attorney General
Open Records Division

JBH/sdk

Ref: ID# 199104

Enc: Submitted documents

c: Mr. Anthony Rogers
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(w/o enclosures)