



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 22, 2007

Mr. Ernesto Rodriguez
Assistant City Attorney
City of El Paso
2 Civic Center Plaza, 9th Floor
El Paso, Texas 79901

OR2007-10910

Dear Mr. Rodriguez:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 287234.

The El Paso Police Department (the "department") received ten requests from the same requestor for information regarding several specified employment issues and for all e-mails from a named employee during a specified time period. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.117, 552.130, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we address your assertion that the submitted information is excepted from disclosure under section 552.101 of the Government Code because it is confidential. Information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. *See Attorney General Opinion JM-672* (1987). Consequently, unless the submitted information falls within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

Next, because your claims under sections 552.103 and 552.108 of the Government Code are potentially the broadest, we will address your arguments regarding these exceptions first. Section 552.103 of the Government Code provides in relevant part as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date that the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You state that a lawsuit styled *Angela Sommers vs. City of El Paso, et al*, Cause No. EP-06-CA-0407-KC is currently pending in the District Court of the Western District of Texas, El Paso, Texas. However, upon review of your arguments, we find that you have not established that litigation was pending on the date the department received the present request for information. Additionally, we conclude you have failed to demonstrate how the submitted information is related to the currently pending litigation. Therefore, the department may not withhold any of the submitted information under section 552.103 of the Government Code.

Section 552.108 of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime.” Gov’t Code § 52.108(a)(1). Generally, a governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), (b)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706

(Tex. 1977). The submitted information relates to *internal affairs investigations*. Section 552.108 is generally not applicable to information relating to an administrative investigation that did not result in a criminal investigation or prosecution. *See Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.—El Paso 1992, writ denied) (statutory predecessor to section 552.108 not applicable to internal investigation that did not result in criminal investigation or prosecution); *see also* Open Records Decision No. 350 at 3-4 (1982). You do not indicate that these administrative investigations resulted in criminal investigations or prosecutions. We therefore conclude that the department may not withhold any of the submitted information under section 552.108 of the Government Code.

We note that some of the submitted information is excepted under section 552.101 of the Government Code, which excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision,” and encompasses information protected by other statutes. Gov’t Code § 552.101. Section 552.101 encompasses information protected by section 58.007 of the Family Code. Juvenile law enforcement records relating to conduct that occurred on or after September 1, 1997 are confidential under section 58.007. For purposes of section 58.007, “child” means a person who is ten years of age or older and under seventeen years of age. *See* Fam. Code § 51.02(2). The relevant language of section 58.007(c) reads as follows:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

- (1) if maintained on paper or microfilm, kept separate from adult files and records;
- (2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and
- (3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapter B.

Id. § 58.007(c). We have reviewed the submitted information and find that a portion involves allegations of juvenile conduct in violation of penal statutes that occurred after September 1, 1997. Thus, the information we have marked is subject to section 58.007. Since none of the exceptions in section 58.007 appear to apply, the information we have marked is confidential under section 58.007(c) of the Family Code and must be withheld pursuant to section 552.101 of the Government Code.

We note that the submitted information includes medical records. Section 552.101 also encompasses the Medical Practice Act (the “MPA”), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient’s behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(b)-(c). Information subject to the MPA includes both medical records and information obtained from those medical records. *See* Open Records Decision No. 598 (1991). Medical records may be released only as provided under the MPA. *Id.* Accordingly, the information we have marked may be released only in accordance with the MPA.

Section 552.101 also encompasses 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. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976).

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.*

When there is an adequate summary of a sexual harassment investigation, the summary must be released along with the statement of the accused, 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 statements regarding the allegations must be released, but the identities of witnesses and victims must still be redacted from the

statements. In either case, the identity of the individual accused of sexual harassment is not protected from public disclosure.

We note that the submitted information includes three sexual harassment investigations, each of which includes an adequate summary of the investigation and statements by the individuals who were accused of sexual harassment. In accordance with the holding in *Ellen*, the department must release the summaries and statements, redacting information that identifies the alleged victims and witnesses. We have marked the identifying information accordingly. We note that supervisors are not considered witnesses under *Ellen*. The department must withhold the remaining information related to the sexual harassment investigations under section 552.101 in conjunction with common-law privacy under *Ellen*.

Common-law privacy is also applicable to other types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation*, including information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Indus. Found.*, 540 S.W.2d at 683. In addition, this office has found that personal financial information not relating to a financial transaction between an individual and a governmental body and some kinds of medical information or information indicating disabilities or specific illnesses. See Open Records Decision Nos. 600 (1992), 545 (1990), 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Common-law privacy also protects the identifying information of juvenile offenders. See Open Records Decision No. 394 (1983); cf. Fam. Code § 58.007. We have marked the additional information that must be withheld under common-law privacy in conjunction with section 552.101 of the Government Code.

Next, we note that some of the submitted information is excepted from disclosure under section 552.117 of the Government Code.¹ Section 552.117(a)(2) excepts from public disclosure a peace officer's current and former home address and telephone number, social security number, and family member information regardless of whether the peace officer made an election under section 552.024 of the Government Code.² We note that section 552.117 also encompasses a personal cellular telephone and pager number, provided that the service is not paid for by a governmental body. See Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular mobile phone numbers paid for by governmental body and intended for official use). If the cellular telephone or pager number of the peace officer is not paid for by a governmental body it must be withheld under

¹The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

²Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure.

section 552.117(a)(2); otherwise, the cellular telephone or pager number must be released. Pursuant to section 552.117(a)(2), the department must withhold the current and former home addresses and telephone numbers, social security numbers, and family member information of peace officers contained in the submitted information. We have marked the types of information that the department must withhold under section 552.117(a)(2) of the Government Code.

In summary, the department must withhold the following under section 552.101 of the Government Code: 1) the information we have marked in conjunction with section 58.007 of the Family Code; 2) the medical records we have marked pursuant to the MPA; and 3) the information we have marked in conjunction with common-law privacy. The department must also withhold the type of information we have marked pursuant to section 552.117(a)(2) of the Government Code. The remaining information must be released to the requestor.³

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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).

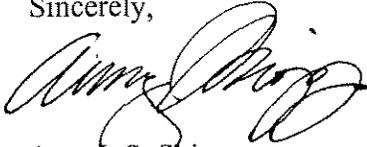
³As our ruling is dispositive, we need not address your remaining arguments against disclosure.

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 Office of the Attorney General 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. 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,



Amy L.S. Shipp
Assistant Attorney General
Open Records Division

ALS/mcf

Ref: ID# 287234

Enc. Submitted documents

c: Ms. Angela Sommers
5305 Rockwood
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(w/o enclosures)