



January 9, 2001

Mr. Leonard W. Peck, Jr.
Assistant General Counsel
Texas Department of Criminal Justice
P.O. Box 4004
Huntsville, Texas 77342

OR2001-0099

Dear Mr. Peck:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 143052.

The Texas Department of Criminal Justice (the "department") received a request for information relating to an internal affairs investigation undertaken as a result of the requestor's statements to a television reporter. You state that you have released the requestor's statements. You claim that the remaining 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.

Section 552.108 provides in pertinent part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:

- (1) release of the information would interfere with the detection, investigation, or prosecution of crime;
- (2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication; or

...

(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 from the requirements of Section 552.021 if:

- (1) release of the internal record or notation would interfere with law enforcement or prosecution;
- (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(a)(1)-(2), (b)(1)-(2). Generally, a governmental body claiming an exception under section 552.108 must reasonably explain, if the information does not supply the explanation on its face, how and why section 552.108 is applicable. *See* Gov't Code §§ 552.108, .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977).

You explain that the department is a law enforcement agency and that the Internal Affairs Division is the internal criminal investigative agency. You state that the investigation was "launched as a review of employee conduct on the job and not with an initial objective of filing criminal charges if appropriate evidence developed." Although you state that the submitted investigation deals with matters that are "facially criminal," you also inform us that the investigation did not support any criminal allegations but that release of the submitted information could interfere with a criminal prosecution if one developed later from this investigation. Because the submitted information relates to an internal affairs investigation of employee misconduct that did not result in a criminal investigation or pertain to criminal conduct that will be forwarded for criminal prosecution, we conclude that the department may not withhold the submitted information under section 552.108. *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); Open Records Decision No. 350 (1982) (predecessor provision of section 552.108 not applicable to IAD investigation file when no criminal charge against officer results from investigation of complaint against police officer).

You also assert that allegations of sexual conduct should be excepted under section 552.101 in conjunction with common law privacy. Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," including information protected by the common law right of privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The doctrine of common law privacy protects information that contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and the information must be of no legitimate concern to the public. *Id.*

You contend that the allegations of improper sexual activity are “highly intimate or embarrassing” and should be withheld under the standards set forth in *Ellen*. 840 S.W.2d at 519. However, *Ellen* withheld the identities of victims and witnesses of sexual harassment. As you state in your brief and from our review of the submitted information, most of the allegations concerned sexual conduct in the workplace rather than allegations of sexual harassment. You may withhold the names of victims and witnesses to the alleged sexual harassment, which we have marked, under section 552.101 and the holding in *Ellen*. *Id.* However, there is a legitimate public interest in how a public employee conducts himself while on-duty and how he performs his job functions. *See* Open Records Decision Nos. 470 at 4 (1987) (public has legitimate interest in job performance of public employees), 423 at 2 (1984) (scope of public employee privacy is narrow). Thus, we conclude that the remaining submitted information is not protected by common law privacy and may not be withheld under section 552.101.

However, we note that the submitted information contains criminal history record information (“CHRI”) which is excepted under section 552.101. Section 552.101 also encompasses information protected by statute. CHRI generated by the National Crime Information Center (“NCIC”) and the Texas Crime Information Center (“TCIC”) is confidential. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety (“DPS”) maintains, except that the DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov’t Code § 411.083.

Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090 - .127. Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. *See* Open Records Decision No. 565 (1990). Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. Thus, the department must withhold the CHRI which we have marked.

We also note that the submitted information contains information that is excepted under section 552.117(3) of the Government Code. Subsection 552.117(3) provides for the confidentiality of home addresses, home telephone numbers, social security numbers, and family member information of department employees, regardless of whether the employees comply with section 552.024 of the Government Code. Based on the plain language of

section 552.117(3), we believe that only the information of *current* employees is confidential under this provision. Therefore, under section 552.117(3), the department must withhold the home address, home telephone number, social security number, and family member information of the current department employees.

However, we note that section 552.117(1) makes confidential the same types of information covered by section 552.117(3) but for current *and former* employees of governmental bodies who request that this information be kept confidential under section 552.024. Therefore, section 552.117(1) requires the department to withhold the home address, home telephone number, social security number, and family member information of any former employees who have submitted timely elections under section 552.024. *See* Open Records Decision Nos. 622 (1994), 455 (1987).

Moreover, the social security numbers of the former employees who have not submitted timely elections under section 552.024 may be confidential nevertheless under section 552.101 in conjunction with federal law. Social security numbers and related records are excepted from disclosure under section 552.101 in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), *if the social security number information was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990. See* Open Records Decision No. 622 (1994). However, it is not apparent to us that the social security numbers were obtained or are maintained by the department pursuant to any provision of law enacted on or after October 1, 1990. You have cited no law, nor are we aware of any law, enacted on or after October 1, 1990, that authorizes the department to obtain or maintain social security numbers. Therefore, we have no basis for concluding that the social security numbers at issue were obtained or are maintained pursuant to such a statute and are, therefore, confidential under section 405(c)(2)(C)(viii)(I). We caution the department, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Gov't Code § 552.352. Prior to releasing the social security numbers, the department should ensure that these numbers were not obtained or are maintained by the department pursuant to any provision of law enacted on or after October 1, 1990.

Further, the requestor has a special right of access to his address, telephone number, social security number, and family member information under section 552.023. Section 552.023 of the Government Code grants a special right of access to a person or a person's authorized representative to records that contain information relating to the person that are protected from public disclosure by laws intended to protect that person's privacy interests. Therefore, you may not withhold the requestor's address, telephone number, social security number, or family member information in this instance.

We also note that the submitted information contains the requestor's driver's license number. Section 552.130 of the Government Code excepts driver's license numbers. However, the requestor has a special right of access to his driver's license number under section 552.023 and you may not withhold this information from the requestor.

In conclusion, you must withhold the marked names and the CHRI under section 552.101 of the Government Code. You must also withhold information that is excepted under section 552.117 of the Government Code. However, you must release the requestor's section 552.117 information and driver's license number pursuant to section 552.023 of the Government Code. You must release the remaining submitted information.

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 General Services 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. 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,



Jennifer H. Bialek
Assistant Attorney General
Open Records Division

JHB/er

Ref: ID# 143052

Encl: Marked documents

cc: Mr. David Robison, Parole Officer II
Dallas Region IV Parole Office
2505 South Second Avenue
Dallas, Texas 75210
(w/o enclosures)