



August 6, 2001

Ms. Janice Mullenix
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR2001-3411

Dear Ms. Mullenix:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 150341.

The Texas Department of Transportation (the "department") received a request for various documents pertaining to a specified audit. You state that you will provide the requestor with some responsive information, including the final audit report which you submitted as Exhibit B. You claim, however, that the remaining portions of the submitted information are excepted from disclosure under sections 552.101 and 552.116 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

You claim that the submitted information in Exhibits C and D is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with the common law right to privacy.¹ Information is protected by the common law right to privacy if it is 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. See *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). However, information may also be withheld from disclosure under section 552.101 in conjunction with the common law right to privacy upon

¹ Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. Section 552.101 encompasses the common law right to privacy.

a showing of certain "special circumstances." *See* Open Records Decision No. 169 (1977). This office considers "special circumstances" to refer to a very narrow set of situations in which the release of information would likely cause someone to face "an imminent threat of physical danger." *Id.* at 6. Such "special circumstances" do not include "a generalized and speculative fear of harassment or retribution." *Id.* You have concluded that release of the witnesses' identifying information and their statements in Exhibits C and D would pose an imminent threat of physical danger to various employees in the department's Eastland Area Engineer's Office. You also state that release of the witness statements would pose an unacceptable risk that the requestor would be able to identify individuals from incidents mentioned or from distinctive ways of speaking. Based on our careful review of your arguments and the submitted information in Exhibits C and D, we conclude in this instance that you must withhold from disclosure the submitted information in Exhibits C and D in its entirety pursuant to section 552.101 of the Government Code in conjunction with the common law right to privacy.

You claim that the submitted information in Exhibit E is excepted from disclosure pursuant to section 552.116 of the Government Code. Section 552.116 provides:

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency or institution of higher education as defined by Section 61.003, Education Code, is excepted from the [public disclosure] requirements of Section 552.021. If information in an audit working paper is also maintained in another record, that other record is not excepted from the requirements of Section 552.021 by this section.

(b) In this section:

(1) "Audit" means an audit authorized or required by a statute of this state or the United States and includes an investigation.

(2) "Audit working paper" includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116. Section 552.116 excepts from disclosure only information that is prepared or maintained in conducting an audit or investigation which is authorized or required by a statute. You state that the submitted information in Exhibit E was prepared by the internal auditor in conducting an audit that was authorized by section 201.108 of the Transportation Code and section 2102.007 of the Government Code. We note that

section 201.108 of the Transportation Code only provides for the appointment of an internal auditor for the department who shall report on the "conduct of department affairs." Transp. Code § 201.108. Additionally, section 2102.007(a) of the Government Code authorizes an internal auditor to conduct "audits," which are defined in section 2102.003(2) to include financial audits, compliance audits, economy and efficiency audits, effectiveness audits, and investigations. *See* Gov't Code §§ 2102.007(a), .003(2)(A)-(E). You have not explained, nor can we discern from our review of the submitted information in Exhibit E, how the information relates to an "audit," as defined by section 2102.003(2) of the Government Code. Therefore, we cannot conclude that the submitted information in Exhibit E is excepted from disclosure pursuant to section 552.116 of the Government Code. Accordingly, you must release the submitted information in Exhibit E 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 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,

Open Records Division

Ref: ID# 150341

Enc. Submitted documents

cc: Mr. Walter B. Neaves
907 Oakhollow Drive
Eastland, Texas 76448
(w/o enclosures)