



August 7, 2002

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

OR2002-4337

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# 166741.

The Texas Department of Transportation (the "department") received two requests for copies of documents pertaining to a specified sexual harassment investigation. You state that you will provide one of the requestors with some responsive information. You claim, however, that portions of the remaining requested information are excepted from disclosure pursuant to sections 552.101, 552.107, 552.111, and 552.117 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

Initially, we note that Exhibits B and C are subject to section 552.022 of the Government Code. Section 552.022 provides that:

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[;]

Gov't Code § 552.022(a)(1). Exhibits B and C comprise a completed sexual harassment investigation that must be released under section 552.022(a)(1), unless it is confidential under other law or is excepted from disclosure under section 552.108 of the Government

Code. Since the department claims that portions of Exhibits B and C are excepted from disclosure under sections 552.101 and 552.117 of the Government Code, we address those claims.

You claim that portions of Exhibits B and C are excepted from disclosure pursuant to section 552.101 in conjunction with the common-law right to privacy.¹ Information is protected from disclosure under the common-law right to privacy 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. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). 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. *See Ellen*, 840 S.W.2d at 525. 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. *See id.* 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. *See 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.* Therefore, when there is an adequate summary of an investigation, the summary must be released, 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.

Although information relating to an investigation of a sexual harassment claim involving a public employee may be highly intimate or embarrassing, the public generally has a legitimate interest in knowing the details of such an investigation. *See Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute his private affairs), 455 (1987) (public employee's job performances or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (1984) (scope of public employee privacy is narrow); see also Ellen*, 840 S.W.2d at 525.

Based on our review of your arguments and Exhibits B and C, we conclude that the accused individuals' statements, together with the conclusions of the board of inquiry, which we have marked in red in Exhibit C, comprise an adequate summary of the investigation. *See id.*

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 information protected by the common-law right to privacy.

at 525-26. Thus, we conclude that the department must withhold the entirety of Exhibit B and the remaining information in Exhibit C from disclosure pursuant to section 552.101 in conjunction with the common-law right to privacy. We note, however, that portions of the accused individuals' statements and conclusions of the board of inquiry constitute identifying information of victims of and witnesses to the alleged sexual harassment. Accordingly, we conclude that the department must withhold from disclosure the identifying information of the victims and witnesses that are marked in red in these particular documents pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy.

We note that portions of the accused individuals' statements and conclusions of the board of inquiry are subject to section 552.117(1) of the Government Code. Section 552.117(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 of the Government Code. *See Gov't Code § 552.117(1)*. However, information that is responsive to a request may not be withheld from disclosure under section 552.117(1) if the employee did not request confidentiality in accordance with section 552.024 or if the request for confidentiality under section 552.024 was not made until after the request for information at issue was received by the governmental body. Whether a particular piece of information is public must be determined at the time the request for it is made. *See Open Records Decision No. 530 at 5 (1989)*. You have submitted documentation showing that some department employees filed confidentiality requests pursuant to section 552.024 with respect to certain section 552.117(1) information requested about each of them. Based on our review of these particular documents in Exhibit E, it appears that these confidentiality requests were filed pursuant to section 552.024 prior to the department's receipt of the present request. Accordingly, we conclude that the department must withhold from disclosure the information in the accused individuals' statements and conclusions of the board of inquiry that are marked in red pursuant to section 552.117(1) of the Government Code. However, we also conclude that the department may not withhold this particular information from the second requestor in any event pursuant to section 552.023 of the Government Code. *See Gov't Code § 552.023* (providing that individual has limited special right of access to information when only basis for excepting information from disclosure involves protection of same individual's privacy interest); *see also Open Records Decision No. 481 (1987)*.

You also claim that a portion of Exhibit D is excepted from disclosure pursuant to section 552.107 of the Government Code. Section 552.107(1) protects information encompassed by the attorney-client privilege. We note that in instances where an attorney represents a governmental entity, the attorney-client privilege protects only an attorney's legal advice and the client's confidences made to the attorney. *See Open Records Decision No. 574 (1990)*. Accordingly, these two classes of information are the only information contained in the record at issue that may be withheld pursuant to the attorney-client privilege. Section 552.107(1) excepts information that an attorney cannot disclose because of a duty

to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from disclosure only “privileged information,” that is, information that reflects either confidential communications from the client to the attorney or the attorney’s legal advice or opinions; it does not apply to all client information held by a governmental body’s attorney. *See* Open Records Decision No. 574 at 5 (1990). Based on our review of Exhibit D, we agree that the information that you have marked constitutes an attorney’s legal advice or opinion provided in furtherance of the rendition of legal services to the client. Accordingly, we conclude that the department may withhold this particular information from disclosure pursuant to section 552.107 of the Government Code.

In summary, the department must withhold from disclosure the identifying information of the victims and witnesses that we have marked in red in the accused individuals’ statements and conclusions of the board of inquiry in Exhibit C pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy. The department must also withhold from disclosure the information in the accused individuals’ statements and conclusions of the board of inquiry that are marked in red pursuant to section 552.117(1) of the Government Code. However, the department may not withhold this particular information from the second requestor in any event pursuant to section 552.023 of the Government Code. The department must release the remaining portions of the accused individuals’ statements and conclusions of the board of inquiry to the requestors. The department must withhold Exhibit B in its entirety, as well as the remaining portions of Exhibit C, from disclosure pursuant to section 552.101 in conjunction with the common-law right to privacy. The department may withhold the information that it has marked in Exhibit D from disclosure pursuant to section 552.107 of the Government Code. The department must release the remaining portions of Exhibit D to the requestors.

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

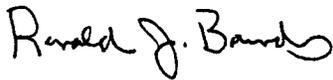
governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge 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 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,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/seg

Ref: ID# 166741

Enc. Marked documents

cc: Mr. Richard Morrissey
308 Las Cruces
Buda, Texas 78610
(w/o enclosures)