



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

April 2, 2003

Ms. Pamela Smith
Assistant General Counsel
Texas Department of Public Safety
P.O. Box 4087
Austin, Texas 78773-0001

OR2003-2239

Dear Ms. Smith:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 178348.

The Texas Department of Public Safety (the "DPS") received a request for all information concerning any investigation by the Texas Rangers involving or regarding the requestor's client. The request encompasses the following specified items:

1. Information regarding polygraph tests, including testing and scoring procedures, questions given, and results[.]
2. Affidavit for arrest dated on or about January 14, 2002[.]
3. Warrant number 121098[.]
4. Reports dated on or about November 15, 2001 and numbered 2002-105, 2002-184.834, 2002-303313.

You inform us the DPS will release a copy of the arrest warrant affidavit and the arrest warrant to the requestor. Further, the DPS intends to release copies of the investigative reports and the polygraph examination information of the requestor's client in redacted form. You assert some of the submitted information is excepted from disclosure under

sections 552.101 and 552.136 of the Government Code. We have reviewed the information you submitted and we have considered the exceptions you claim.

Initially, we note the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides as follows:

[T]he 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). In this instance, the submitted information consists of a completed criminal investigation. Thus, this information must be released under section 552.022(a)(1) unless it is expressly confidential under other law or excepted from disclosure under section 552.108.¹

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 doctrine of common-law privacy. For information to be protected from public disclosure under common-law privacy, the information must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy protects information when (1) it is highly intimate or embarrassing such that its release would be highly objectionable to a reasonable person, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 at 1 (1992). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included 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. *Industrial Found.*, 540 S.W.2d at 683. In this instance, the information pertains to a criminal investigation into allegations of official oppression involving sexual harassment in the workplace. See Penal Code § 39.03(a)(3). After reviewing the information, we agree that the identifying information of the victim is highly intimate or embarrassing and the public has no legitimate interest in this information. See *Industrial Found.*, 540 S.W.2d at 685. However, we disagree with the DPS about the applicability of *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied) (identities of witnesses to and victims of sexual harassment was highly intimate or embarrassing information and the public did not have a legitimate interest in such information). In *Ellen*, the court considered whether the public had a legitimate interest in

¹Because you do not raise section 552.108, we do not consider the applicability of this exception.

the identities of witnesses and their statements regarding allegations of sexual harassment in an *employment* context. Here, the information pertains to a *criminal* charge of official oppression. *Id.* Accordingly, we conclude *Ellen* does not provide authority for the DPS to withhold the names of the witnesses and their statements. Therefore, the DPS must withhold only the identifying information of the victim that we have marked under common-law privacy. The DPS must release the identifying information of witnesses and their statements.

Section 552.101 of the Government Code also incorporates information protected by other statutes. First, as you acknowledge, the submitted information contains polygraph records, which are governed by section 1703.306 of the Occupations Code. Section 1703.306 states the following:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

- (1) the examinee or any other person specifically designated in writing by the examinee;
- (2) the person that requested the examination;
- (3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;
- (4) another polygraph examiner in private consultation; or
- (5) any other person required by due process of law.

Occ. Code § 1703.306. Here, the requestor represents one of the examinees. Access to polygraph information is governed by section 1703.306 of the Occupations Code. *See* Occ. Code § 1703.306. Therefore, though the polygraph information contains private victim-identifying information, section 1703.306(a)(1) expressly provides the examinee's representative with access to the information. Accordingly, upon receipt of proper consent, the DPS must release to the requestor his client's polygraph information, without redactions. We have marked the information to be released. Additionally, we have marked the polygraph information of another examinee that is confidential under section 1703.306 of the Occupations Code.

Additionally, you state the DPS routinely receives requests for information regarding polygraph test results, and you request a previous determination ruling that would permit the

DPS to withhold these results unless authorized for release under section 1703.306 of the Occupations Code. We decline to issue a previous determination at this time allowing the DPS to withhold this general category of information in the future. *See* Open Records Decision No. 673 (2001).

Second, a social security number may be withheld in some circumstances under section 552.101 of the Government Code in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that social security numbers in the responsive records are confidential under section 405(c)(2)(C)(viii)(I), and therefore, excepted from public disclosure under section 552.101 of the Government Code and the referenced federal provision. However, we caution the DPS that section 552.352 of the Public Information Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, the DPS should ensure that no such information was obtained or is maintained by the DPS pursuant to any provision of law enacted on or after October 1, 1990.

Next, we note the submitted documents contain information subject to section 552.1175 of the Government Code. Section 552.1175 states in pertinent part:

(a) This section applies only to:

(1) peace officers as defined by Article 2.12, Code of Criminal Procedure;

...

(b) Information that relates to the home address, home telephone number, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

(1) chooses to restrict public access to the information; and

(2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Gov't Code § 552.1175(a)(1), (b). You do not inform this office, nor does any of the submitted information indicate, whether the peace officers have elected confidentiality for

information about themselves in accordance with subsections 552.1175(b)(1) and (2). If any of the peace officers have elected confidentiality under section 552.1175, then the information we have marked in the submitted offense report must be redacted in accordance with section 552.1175. If not, we conclude the DPS may not withhold the information we have marked. We note the requestor's client has a special right of access, beyond the general public, to this information under section 552.023(a) of the Government Code. *See* Gov't Code § 552.023(a).

Also, section 552.130 of the Government Code excepts from public disclosure information relating to a driver's license or motor vehicle title or registration issued by an agency of this state. However, a person has a special right of access, beyond the general public, to information held by a governmental body that relates to the person and is protected from public disclosure by laws intended to protect a person's privacy interests. Gov't Code § 552.023(a). In this case, the submitted information contains a license class, license plate numbers, an expiration date, and driver's license numbers, one of which belongs to the requestor's client, who has a special right of access to this information. Therefore, the DPS must withhold the information we have marked under section 552.130.

Finally, the submitted information contains e-mail addresses subject to section 552.137 of the Government Code. Specifically, section 552.137 states the following:

- (a) 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.

Gov't Code § 552.137. This provision makes certain e-mail addresses confidential. *See* Gov't Code § 552.137. You do not inform us that any member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. Therefore, the DPS must withhold the e-mail addresses of the members of the public, which we have marked, under section 552.137.

In summary, the DPS must withhold the identifying information of the victim, which we have marked, in accordance with section 552.101 of the Government Code and common-law privacy. Further, the DPS must withhold the polygraph information, which we have marked, under section 552.101 of the Government Code in conjunction with section 1703.306. However, if and when the requestor provides the proper authorization for release, the DPS must release the polygraph information of the requestor's client under section 1703.306. If necessary, the DPS must withhold the social security numbers in the submitted information under section 552.101 of the Government Code in conjunction with the 1990 amendments

to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). If applicable, the DPS must withhold the information we have marked under section 552.1175 of the Government Code. The DPS must withhold the motor vehicle information we have marked under section 552.130 of the Government Code. However, the DPS must release information subject to sections 552.1175 and 552.130 that concerns the requestor's client, as his client has a special right of access to such information under section 552.023 of the Government Code. The DPS must withhold the e-mail addresses we have marked in accordance with section 552.137 of the Government Code. The DPS must release the remainder of the 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 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,



Christen Sorrell
Assistant Attorney General
Open Records Division

CHS/seg

Ref: ID# 178348

Enc: Submitted documents

c: Mr. David Hansen
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(w/o enclosures)