



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

May 12, 2003

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

OR2003-3159

Dear Ms. Wright:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 180829.

The Texas Department of Transportation (the "department") received a written request for "all supporting documents and all facts concerning" various complaints referenced by the requestor. You indicate that some of the responsive information will be released to the requestor. You contend, however, that the remaining information coming within the scope of the request is excepted from required disclosure pursuant to sections 552.101, 552.107(1), 552.117, 552.130, and 552.137 of the Government Code.

You contend that the witness statements you submitted to this office as Exhibit B are excepted from public disclosure pursuant to section 552.101 of the Government Code in conjunction with the common-law right of privacy. Section 552.101 protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," including information coming within the common-law right of privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976) (common-law privacy protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and is of no legitimate concern to the public).

Exhibit B consists of witness statements and investigator notes concerning a sexual harassment complaint. 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 investigatory files at issue in *Ellen* contained individual witness and victim statements, an affidavit given by the individual accused of the misconduct in response to the allegations, and the conclusions of the board of inquiry that conducted the investigation.

The court held that the names of witnesses and their detailed affidavits regarding allegations of sexual harassment are exactly the types of information specifically excluded from disclosure under the privacy doctrine as described in *Industrial Foundation. Ellen*, 840 S.W.2d at 525. However, the court ordered the release of the affidavit of the person under investigation. *Id.* The *Ellen* court also ordered the disclosure of the summary of the investigation with the identities of the victims and witnesses deleted from the documents, noting that the public interest in the matter was sufficiently served by disclosure of such documents and that in that particular instance “the public [did] not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements.” *Id.*

In this instance, however, after reviewing the documents you submitted to this office, we conclude that none of the documents at issue consist of an adequate summary of the investigation. We therefore conclude in this instance that the department must withhold pursuant to common-law privacy the identities of both the victim of the alleged sexual harassment and the witnesses, whose privacy interests are implicated here. We have marked the information the department must withhold in accordance with *Ellen*. However, the remaining portions of the witness statements must be released to the requestor.

You next contend that portions of the documents you submitted as Exhibit C are excepted from public disclosure pursuant to sections 552.101, 552.117(1), 552.130, and 552.137 of the Government Code. Section 552.117(1) requires that the department withhold an employee’s home address, home telephone number, social security number, and information that reveals whether the employee has family members, but only if the employee elected to keep this information confidential in accordance with section 552.024 of the Government Code. *But see* Open Records Decision No. 455 (1987) (statutory predecessor not applicable to applicants for government employment). Whether a particular piece of information is protected by section 552.117(1) must be determined at the time the request for the information is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, in order to withhold section 552.117(1) information from the public, a proper election must be made prior to the receipt of the request for information. We have marked a representative sample of the types of information the department must withhold pursuant to section 552.117(1) regarding department employees who have made timely section 552.024 elections.¹

¹We note, however, that the requestor has a special right of access to his client’s section 552.117(1) information. *See* Gov’t Code § 552.023.

We note that the social security numbers contained in Exhibit C that are not otherwise excepted from disclosure under section 552.117 might nevertheless be excepted from disclosure under section 552.101 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.* You inform us that the department maintains employees' social security numbers pursuant to provisions of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. § 653a(a)(2)(B), (b)(1)(A). Under this federal law, an employer is required to furnish to the Directory of New Hires of the State in which a newly hired employee works, a report that includes the employee's social security number. 42 U.S.C. § 653a(b)(1)(A). Thus, we agree that the department must withhold from disclosure the social security numbers of department employees whose numbers were collected pursuant to this law. For employees who were hired before this law was enacted, social security numbers were not obtained or maintained pursuant to the law and therefore, those numbers may not be withheld under section 552.101 and the federal law.²

Section 552.130(a)(1) of the Government Code requires the department to withhold "information [that] relates to . . . a motor vehicle operator's or driver's license or permit issued by an agency of this state." Accordingly, the department must withhold the types of Texas driver's license information that we have marked in the representative sample pursuant to section 552.130(a)(1) of the Government Code.³

Section 552.137 of the Government Code makes certain e-mail addresses confidential and provides in relevant part:

(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. [Emphasis added.]

²Although you also note that section 158.203 of the Family Code constitutes a statute enacted after October 1, 1990 that requires the collection of certain employees' social security numbers, you have not argued that this provision of law is in fact applicable in this instance. Accordingly, we do not address the applicability of section 158.203 in this instance.

³We note, however, that the requestor has a special right of access to his client's license information. *See* Gov't Code § 552.023.

We agree that the e-mail addresses you marked in Exhibit C consist of private e-mail addresses that must be withheld pursuant to section 552.137 unless the department receives an affirmative consent to release from the person to whom an e-mail address belongs. We note that section 552.137 does not apply to a public employee's governmental e-mail address.

Finally, you contend that the e-mail communications you submitted to this office as Exhibit E are excepted from required public disclosure pursuant to section 552.107(1) of the Government Code, which protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002).

First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." *Id.* 503(a)(5).

Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

After reviewing your arguments and the contents of Exhibit E, we conclude that you have demonstrated the applicability of section 552.107(1) to all of these records. Accordingly, we conclude that the department may withhold Exhibit E in its entirety pursuant to section 552.107(1) of the Government Code.

In summary, the department must withhold the information we have marked in Exhibit B pursuant to common-law privacy, but the remaining information within those documents must be released to the requestor. The department must also withhold the types of information we have marked in Exhibit C as coming within the protection of sections 552.117(1) and 552.130, as well as any social security numbers made confidential by federal law, and the marked e-mail addresses, which must be withheld pursuant to sections 552.101 and 552.137, respectively; the remaining portions of Exhibit C must be released to the requestor. Finally, the department may withhold Exhibit E in its entirety pursuant to section 552.107(1).

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,



Sarah I. Swanson
Assistant Attorney General
Open Records Division

SIS/RWP/seg

Ref: ID# 180829

Enc: Submitted documents

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