



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

July 29, 2003

Ms. Anne M. Constantine
Legal Counsel
Dallas/Fort Worth International Airport
P.O. Drawer 619428
DFW Airport, Texas 75261-9428

OR2003-5194

Dear Ms. Constantine:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 185030.

The Dallas/Fort Worth International Airport Board (the "board") received a request for information relating to investigations of sexual harassment, including "investigations conducted and reported to Human Resources for all departments in the last 10 years[,] any and all action taken by Human Resources on these complaints, whether investigated or not[,] information on sexual harassment reported during exit interviews of employees[,] and] audio and video information on an Internal Affairs investigation by [the Dallas/Fort Worth International Airport Department of Public Safety] on [a named public safety officer]." You state that some responsive information will be released to the requestor. You also state that some responsive information may have been destroyed in accordance with the board's record retention policy. We note that the Public Information Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex.Civ.App.-San Antonio 1978, writ dism'd); Open Records Decision No. 452 at 3 (1986). We assume that any remaining responsive information that you have not submitted for our review has been released to the requestor, to the extent it exists. If not, you must release it immediately. See Gov't Code §§ 552.006, .301, .302; Open Records Decision No. 664 (2000) (concluding that section 552.221(a) requires that information not excepted from disclosure must be released as soon as possible under the circumstances). You claim that portions of the submitted information are excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

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. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). You state that the submitted information pertains to investigations of sexual harassment complaints.

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 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. *Ellen*, 840 S.W.2d at 525. 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. *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 of sexual harassment, the summary and any statements of the person under investigation 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, the documents pertaining to the investigation are not excepted from disclosure, but the identities of witnesses and complainants are protected by common-law privacy.

Some of the submitted documents reveal the identities of employee complainants and witnesses in sexual harassment investigations. We determine that pursuant to *Ellen*, the identities of sexual harassment complainants and witnesses are protected by common-law privacy and must be withheld from disclosure under section 552.101 of the Government Code. *See Ellen*, 840 S.W.2d at 525. We have marked the information in the submitted documents that the board must withhold pursuant to *Ellen* and common-law privacy. We note that the submitted videotape depicts interviews with the named public safety officer and contains the name of a sexual harassment complainant. Because the identity of the complainant is protected by common-law privacy, we conclude that the board must withhold the portions of the submitted videotape that identify the complainant. If, however, the board is unable to remove the portions of the submitted videotape that identify the complainant in the investigation, then the board must withhold the videotape in its entirety pursuant to section 552.101 of the Government Code in conjunction with common-law privacy.

Next, in the event the submitted videotape is not excepted in its entirety pursuant to section 552.101 of the Government Code, we must address the applicability of section 552.119 of the Government Code to the videotape in relation to the images of airport

public safety officers that appear on the videotape. Section 552.119 of the Government Code excepts from public disclosure a photograph of a peace officer, that, if released, would endanger the life or physical safety of the officer unless one of three exceptions applies. The three exceptions are: (1) the officer is under indictment or charged with an offense by information; (2) the officer is a party in a fire or police civil service hearing or a case in arbitration; or (3) the photograph is introduced as evidence in a judicial proceeding. A photograph excepted under this section may be made public only if the peace officer gives written consent to the disclosure. This office has determined that this provision excepts such photographs from disclosure without the need for any specific showing that release of the photograph would endanger the life or safety of the officer. Open Records Decision No. 502 (1988). It does not appear that any of the exceptions apply in this case. Thus, in the event the videotape is not excepted in its entirety under section 552.101, we make the following determination: if the public safety officers depicted on the videotape are peace officers as defined by article 2.12 of the Code of Criminal Procedure, and have not provided written consent to the release of their images, then the board must remove the images of the peace officers from the videotape pursuant to section 552.119. If, however, the board is unable to remove or obscure the faces of peace officers on the videotape, then the board must withhold the videotape in its entirety under section 552.119.

The submitted documents also contain information that may be excepted from disclosure under section 552.117 of the Government Code. Section 552.117 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 timely elect to keep this information confidential pursuant to section 552.024. Whether information is protected by section 552.117 must be determined at the time the request for information is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the board may only withhold information under section 552.117 on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. We have marked information in the submitted documents that must be withheld, provided the employees at issue timely elected to keep the information confidential. If the employees at issue did not timely elect to keep this information confidential, the board may not withhold the information under section 552.117 of the Government Code.

We note, however, that the social security number of an employee may be confidential 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 or 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 the social security number in the submitted documents is confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that

section 552.352 of the Public Information Act imposes criminal penalties for the release of confidential information. Prior to releasing the social security number, the board should ensure that the social security number was not obtained or maintained pursuant to any provision of law, enacted on or after October 1, 1990.

In summary, we have marked the information that the board must withhold pursuant to section 552.101 of the Government Code in conjunction with common-law privacy. With respect to the submitted videotape, the board must withhold the portions of the submitted videotape that identify the complainant in the sexual harassment investigation. If, however, the board is unable to remove the portions of the submitted videotape that identify the complainant in the investigation, then the board must withhold the videotape in its entirety pursuant to section 552.101 of the Government Code in conjunction with common-law privacy. If the videotape is not excepted in its entirety under section 552.101, and if the public safety officers depicted on the tape are peace officers and have not consented to release of their images, then the board must remove their images from the tape pursuant to section 552.119 of the Government Code. If, however, the public safety officers are peace officers and the board is unable to remove or obscure their images, the board must withhold the videotape in its entirety under section 552.119. We have marked information that must be withheld under section 552.117 of the Government Code, provided the employees at issue timely elected to keep this information confidential. A social security number may be confidential under section 552.101 in conjunction with federal law. The remainder of the submitted information must be released 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 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,



David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 185030

Enc: Submitted documents

c: Mr. Todd D. Jolliff
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(w/o enclosures)