



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

September 22, 2003

Lieutenant Carol Taylor
Records Manager
County of Taylor
450 Pecan Street
Abilene, Texas 79602-1692

OR2003-6624

Dear Lieutenant Taylor:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 188043.

The Taylor County Sheriff's Department (the "department") received a request for the following information:

[1.] Any and all records in reference to any disciplinary action, counselling reports, reprimands or any other action taken against [a named individual] or any other sheriff's employee concerning; sexual harassment, sexual misconduct or any other improper sexual activity (including telling sexually explicit jokes).

[2.] The names of all persons commissioned as reserve deputy sheriff's by [the sheriff] and the reasons given for commissioning any of the above persons.

You state that information responsive to the second category of the request has been released to the requestor. You state that you requested a clarification from the requestor regarding the first category of information requested, and that the department has identified information that it deems responsive. Open Records Decision No. 561 (1990) (governmental body must make good faith effort to relate request to information it holds). You claim that the submitted

information is excepted from disclosure under sections 552.101, 552.102, and 552.108 of the Government Code. To the extent that it exists, we assume that you have released any other responsive information to the requestor. If you have not released any such information, you must release it to the requestor at this time. See Gov't Code §§ 552.301(a), .302; Open Records Decision No. 664 (2000) (noting that if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible under circumstances). We have considered the exceptions you claim and reviewed the submitted information.

Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977) for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the act. See 540 S.W.2d at 683-85. Accordingly, we will consider your section 552.101 and section 552.102 claims together.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." The common-law right of privacy is incorporated into the Public Information Act (the "Act") by section 552.101. For information to be protected by common-law privacy it must meet the criteria set out in *Industrial Foundation*, 540 S.W.2d 668. The *Industrial Foundation* court stated that information is excepted from disclosure 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. 540 S.W.2d at 685.

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.*

A portion of the submitted information pertains to an investigation of sexual harassment. Because there is no adequate summary of the investigation, you must release the information at issue, except as provided below. However, based on *Ellen*, the department must withhold the identity of the victim of the sexual harassment. We have marked the information that must be withheld under section 552.101 in conjunction with common-law privacy and *Ellen*.

We note that the records otherwise marked for release contain information that may be excepted from disclosure under section 552.1175 of the Government Code. This section provides in part that

(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(b). However, you do not inform this office, nor does any of the submitted information indicate, whether the individual whose information is at issue is a licensed peace officer who has notified the department of his election of confidentiality for this information in accordance with the above-cited subsections 552.1175(b)(1) and (2). *See, e.g., Open Records Decision No. 678 (2003)* (concluding that county voter registrar was authorized to release voter information made confidential under section 552.1175 of Government Code to another governmental entity, but that transferred information would not be confidential in possession of transferee until recipient governmental entity receives a section 552.1175 notification). If the individual whose information is at issue is currently a licensed peace officer who complies with section 552.1175(b), the department must withhold the information that we have marked. If not, the department must release this information.

You contend that the remaining submitted information is excepted from disclosure under section 552.108 of the Government Code. Section 552.108(a)(2) excepts from disclosure information concerning an investigation that concluded in a result other than conviction or deferred adjudication. A governmental body claiming section 552.108(a)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. Based on the information you provided, we understand you to assert that some of the requested information pertains to a criminal case that concluded in a result other than conviction or

deferred adjudication. Therefore, we agree that section 552.108(a)(2) is applicable to the information that we have marked.

However, section 552.108 does not except basic information about an arrested person, an arrest, or a crime. Gov't Code § 552.108(c). We believe such basic information refers to the information held to be public in *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App. --Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Basic information includes the identification and description of the complainant. Open Records Decision No. 127 (1976). Information tending to identify a sexual assault victim is private information that must be withheld. Gov't Code § 552.101 (excepts information made confidential by judicial decision and encompasses common-law privacy); see *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977); Open Records Decision Nos. 393 (1983), 339 (1982). Thus, the department must withhold the identifying information of the sexual assault victim under section 552.101. The department must release the remainder of the basic information pursuant to *Houston Chronicle*.

In summary, the identifying information of the victims of the alleged sexual harassment and sexual assault must be withheld under section 552.101 in conjunction with common-law privacy. If the individual is currently a licensed peace officer who complies with section 552.1175(b), the department must withhold the information that we have marked. If not, the department must release this information. With the exception of basic information, the department may withhold the information that we have marked under section 552.108(a)(2). The remaining 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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/jh

Ref: ID# 188043

Enc. Submitted documents

c: Mr. Alfredo Solis
641 E.N. 22nd
Abilene, Texas 79601
(w/o enclosures)