



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 18, 2003

Ms. Rebecca L. Payne
Assistant General Counsel
Texas Department of Human Services
P.O. Box 149030
Austin, Texas 78714-9030

OR2003-9171

Dear Ms. Payne:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 192991.

The Texas Department of Human Services (the "department") received a request for "the entire file of the OIG investigation conducted in Region 08, which resulted in the recommendation of [the requestor's] dismissal." You state that the requestor will be provided with access to some of the requested information. You claim that other requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.¹

We begin by addressing the department's responsibilities under the Public Information Act. When a governmental body receives a request for information that it wishes to withhold from disclosure but for which it does not have a previous determination, the governmental body must request a ruling from this office and state the exceptions that apply not later than the 10th business day after the date of receiving the written request. Gov't Code

¹Although we previously ruled on some of the submitted information in Open Records Letter No. 2003-5984, you inform us that the circumstances surrounding that ruling have changed. Therefore, that ruling may not be relied on as a previous determination for the information that was at issue in it. See Open Records Decision No. 673 (2001) (describing criteria of two types of previous determinations).

§ 552.301(a), (b). Within fifteen business days of receiving the open records request, the governmental body must submit (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *Id.* § 552.301(e).

In this instance, you state that “the date appearing on the request memorandum [September 24, 2003] was also the date of receipt.” Ten business days following September 24 is October 8, 2003. Fifteen days following that date was October 15, 2003. You did not submit your request for a ruling until October 9, 2003 and did not submit the required documentation and arguments until October 16, 2003. You do not allege that the department was closed for any of the business days between September 24 and October 16. Consequently, you failed to comply with either the ten or fifteen business-day deadline mandated by section 552.301 of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body’s failure to comply with the procedural requirements of section 552.301(e) results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Gov’t Code § 552.302; Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). Normally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. *See Open Records Decision No. 150 at 2 (1977).*

You assert that portions of the requested information are excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code. You also claim that the common law informer’s privilege applies. These exceptions are all discretionary in nature; they serve only to protect a governmental body’s interests and may be waived. As such, they do not generally constitute compelling reasons to withhold information. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 677 at 10 (2002) (claim of attorney work-product privilege under section 552.111 or Texas Rule of Civil Procedure 192.5 does not provide compelling reason for purposes of section 552.302 if it does not implicate third party rights), 676 at 11-12 (2002) (claim of attorney-client privilege under section 552.107 or Texas Rule of Evidence 503 does not provide compelling reason for purposes of section 552.302 if it does not implicate third party rights), 549 at 6 (1990) (governmental body may waive informer’s privilege), 473 (1987) (statutory

predecessor to section 552.111 may be waived); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). However, you also assert that some of the information must be withheld pursuant to section 552.101 because it is confidential. The fact that information is confidential generally constitutes a compelling reason to withhold information; we will therefore address your arguments on this issue. *See* ORD 150 at 2.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses the common law right of privacy, which excepts from disclosure information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person and (2) not of legitimate concern to the public. *Indus. Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). 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. 540 S.W.2d at 683. In addition, this office has found that the following types of information are excepted from required public disclosure under common law privacy: an individual’s criminal history when compiled by a governmental body, *see* Open Records Decision No. 565 (*citing United States Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989)), personal financial information not relating to a financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982).

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 into allegations of sexual harassment. The investigation files in *Ellen* contained individual witness statements, an affidavit by the accused individual responding to the allegations, and the 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.*

When there is an adequate summary of a sexual harassment investigation, the summary must be released along with the statement of the accused, 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.

You have submitted documents that pertain to investigations of sexual harassment and other charges. We have reviewed the submitted information and conclude that it does not include an adequate summary. Therefore, the department must release all of the documents pertaining to this investigation. However, in accordance with the common law privacy principles discussed in *Ellen*, the department must redact the information that we have indicated tends to identify the witnesses and victims before releasing these documents. We have also marked other information that the department must withhold pursuant to section 552.101 and common law privacy.

We also note that the submitted records include information that may be protected by section 552.117 of the Government Code. Section 552.117(a)(1) excepts from public disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of governmental body who timely request that such information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, pursuant to section 552.117(a)(1), the department must withhold the above-listed information for all current or former officials or employees who elected, prior to the department's receipt of this request, to keep such information confidential. We have marked the information that must be withheld if section 552.117 applies.

Regardless of whether the employees timely complied with section 552.024, their social security numbers may be excepted from disclosure under section 552.101 in conjunction with federal law. Amendments to the Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), 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* Open Records Decision No. 622 (1994). We have no basis for concluding that the social security numbers at issue are 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 Government Code imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that such information is not obtained or maintained pursuant to any provision of law enacted on or after October 1, 1990.

In summary, we have marked information that must be withheld pursuant to section 552.101 and common law privacy. In accordance with section 552.117, the department must withhold the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees who made a timely request to keep such information confidential. Social security numbers may also be confidential under federal law. The remaining submitted information must be released.

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).

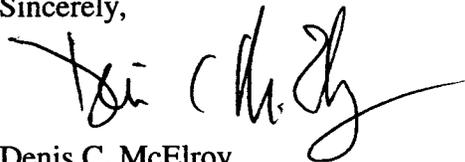
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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,

A handwritten signature in black ink, appearing to read "Denis C. McElroy", written over a horizontal line.

Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/lmt

Ref: ID# 192991

Enc. Submitted documents

c: Mr. J. Richard Avena
13310 Thornridge Lane
San Antonio, Texas 78232
(w/o enclosures)