



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 6, 2004

Ms. Cynthia de Roch  
General Counsel  
Texas Building and Procurement Commission  
P.O. Box 13047  
Austin, Texas 78711

OR2004-2791

Dear Ms. de Roch:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID#198860.

The Texas Building and Procurement Commission (the "commission") received a request for a specific report. You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.111 and 552.116 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we must address the procedural requirements of section 552.301 of the Government Code. Pursuant to section 552.301(b), a governmental body must ask the attorney general for a decision as to whether requested information must be disclosed and state the exceptions to disclosure that apply to the requested information not later than the tenth business day after the date of receiving the written request for information. *See Gov't Code* § 552.301(b). In addition, section 552.301(e) provides that a governmental body that requests an attorney general decision under section 552.301(a) must, within a reasonable time, but not later than the fifteenth business day after the date of receiving the written request, submit to the attorney general (1) written comments stating the reasons why the stated exceptions to disclosure apply that would allow the requested information to be withheld; (2) a copy of the written request for information; (3) a signed statement of or evidence sufficient to establish the date that the governmental body received the written request; and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions to disclosure apply to which parts of the documents. *See id.* § 552.301(e).

Within ten business days of receiving the request for information, you submitted a letter to this office asserting exceptions to the disclosure of the requested information. However, as of the date of this ruling, you have not provided written comments stating the reasons why

the exceptions that you claim would apply to the submitted information. We therefore find that you have failed to comply with the procedural requirements of section 552.301(e).

Because the commission failed to comply with the procedural requirements of section 552.301 in requesting this decision from us, the information at issue is now presumed public. *See* Gov't Code § 552.302; *see also* *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.--Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). The commission must demonstrate a compelling interest in order to overcome the presumption that the information at issue is now public. *See id.* Normally, a compelling interest is demonstrated when some other source of law makes the requested information confidential or third party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977).

You claim that the submitted information is excepted from disclosure under sections 552.103, 552.111 and 552.116 of the Government Code. These sections are discretionary exceptions that protect a governmental body's interests and may be waived. As such, they do not generally constitute a compelling reason to withhold information. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.--Dallas 1999, no pet.) (governmental body may waive section 552.103); *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general); 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation, and does not itself make information confidential); 522 (1989)(discretionary exceptions in general); 473 at 2 (1987) (discretionary exceptions under the Public Information Act can be waived); and 470 (1987) (statutory predecessor to section 552.111 is discretionary exception). Therefore, none of the submitted information may be withheld pursuant to section 552.103, 552.111 or 552.116. However, as sections 552.101 and 552.102 can provide compelling reasons for withholding information, we will consider whether these exceptions apply.

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 (Tex. 1976), for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101.<sup>1</sup> We will therefore perform a single privacy analysis for both section 552.101 and section 552.102.

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<sup>1</sup>Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision" and encompasses information protected by the common law right to privacy.

In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if it (1) contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person and (2) 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.* When there is an adequate summary of the investigation, the summary must be released, but the identities of the victims and witnesses must be redacted and their detailed statements must be withheld from disclosure.

Because the requestor requested a specific report, the only documents at issue in this case are summary documents relating to sexual harassment allegations. In this instance, the requestor was the victim of the alleged sexual harassment, and she therefore has a special right of access to the information contained in the documents that implicates her own privacy interests. See Gov't Code § 552.023 (a person has a special right of access to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person's privacy interests); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual asks governmental body for information concerning herself). No witnesses to the alleged sexual harassment are identified in the submitted information. Therefore, the commission must release the submitted information to the requestor in its entirety.

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).

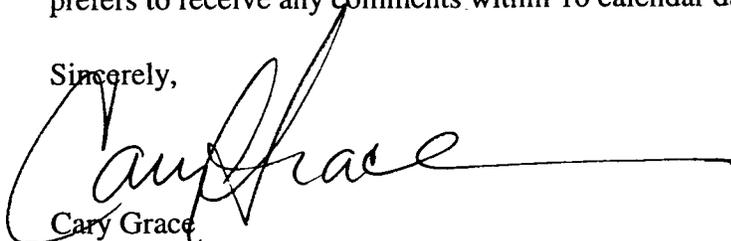
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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,



Cary Grace

Assistant Attorney General  
Open Records Division

ECG/lmt

Ref: ID#198860

Enc. Submitted documents

c: Ms. Shannon Mathena  
c/o Cynthia de Roch  
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(w/o enclosures)