



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 8, 2005

Mr. James M. Frazier, III
Assistant General Counsel
Texas Department of Criminal Justice
P.O. Box 4004
Huntsville, Texas 77342

OR2005-01984

Dear Mr. Frazier:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 219748.

The Texas Department of Criminal Justice (the "department") received a request for twelve categories of information relating to a named employee. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.108, 552.117, 552.130, 552.134, and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of the requested information.¹

Initially, we note that some of the submitted documents appear to have been produced in response to grand jury subpoenas. This office has concluded that grand juries are not governmental bodies that are subject to chapter 552 of the Government Code, so that records that are within the actual or constructive possession of a grand jury are not subject to disclosure under chapter 552. *See* Open Records Decision No. 513 (1988). When an individual or entity acts at the direction of the grand jury as its agent, information prepared or collected by the agent is within the grand jury's constructive possession and is not subject

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

to chapter 552. *Id.* at 3. Information that is not so held or maintained is subject to chapter 552 and may be withheld only if a specific exception to disclosure is applicable. *Id.* Thus, to the extent that the information at issue is in the custody of the department as an agent of the grand jury, it is not subject to disclosure under chapter 552. *Id.* at 4. However, to the extent that this information is not in the custody of the department as an agent of the grand jury, it is subject to disclosure under chapter 552 and the ruling below.

Next, we note that one of the documents that the department asserts is protected under section 552.108 is made public under section 552.022 of the Government Code. Section 552.022 provides, in relevant part, as follows:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(3). The document we have marked is expressly public under section 552.022(a)(3) unless it is confidential under other law. Although you claim that this document is excepted under section 552.108, this section is a discretionary exception to disclosure and therefore not other law that makes information expressly confidential for purposes of section 552.022(a). *See* Open Records Decision No. 177 (1977) (governmental body may waive statutory predecessor to section 552.108); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the department may not withhold the document that we have marked as subject to section 552.022(a)(3) under section 552.108.

The document that we have marked for release under section 552.022(a)(3) contains an account number made confidential under other law. Section 552.136 of the Government Code states that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov't Code § 552.136. We have marked an additional account number found elsewhere in the submitted documents. The department must withhold the marked account numbers under section 552.136.

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 information protected by other statutes. Section 6103(a) of title 26 of the United States Code provides that tax return information is confidential. Thus, the department must withhold the submitted W-2 and W-4 forms in their entirety. Open Records Decision No. 600 (1992).

One of the documents submitted to this office for review is an Employment Eligibility Verification, Form I-9. Form I-9 is governed by title 8, section 1324a of the United States Code, which provides that the form "may not be used for purposes other than for enforcement of this chapter" and for enforcement of other federal statutes governing crime and criminal investigations. 8 U.S.C. § 1324a(b)(5); *see* 8 C.F.R. § 274a.2(b)(4). Release of this document under the Public Information Act (the "Act") would be "for purposes other than for enforcement" of the referenced federal statutes. Accordingly, we conclude that Form I-9 is confidential under section 552.101 of the Government Code and may only be released in compliance with the federal laws and regulations governing the employment verification system.

Section 552.101 also 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. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). 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.*

The submitted information contains an adequate summary of an investigation into alleged sexual harassment. Therefore, you must withhold the documents in the investigation file except for the summary which must be disclosed pursuant to *Ellen*, 840 S.W.2d at 525. However, the identities of the victim and witnesses to the alleged sexual harassment are protected by the common law privacy doctrine and must be withheld. *Id.* Contrarily, the public interest in the statement and the identity of the alleged harasser outweighs any privacy interest the alleged harasser may have in that information; therefore, the department may not withhold this information under section 552.101. The public has no legitimate interest in the details of the victims' and witnesses' personal statements, and they may not be disclosed. *Id.*

This office has found that common law privacy also protects personal financial information not related to a financial transaction between an individual and a governmental body. *See* Open Records Decision Nos. 600 (1992) (public employee's withholding allowance certificate, designation of beneficiary of employee's retirement benefits, direct deposit authorization, and employee's decisions regarding voluntary benefits programs, among

others, are protected under common law privacy), 545 (1990) (deferred compensation information, mortgage payments, assets, bills, and credit history protected under common law privacy), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common law privacy). We have marked the personal financial information contained in the submitted documents that must be withheld by the department under section 552.101 in conjunction with common law privacy.

Section 552.108(a) excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime.” Generally, a governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See* Gov’t Code §§ 552.108(a)(1), (b)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state that some of the requested information relates to an ongoing criminal investigation. Based upon this representation, we conclude that the release of the information we have marked would interfere with the detection, investigation, or prosecution of crime.² *See Houston Chronicle Publ’g 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) (court delineates law enforcement interests that are present in active cases).

We note, however, that information normally found on the front page of an offense report is generally considered public. *See generally* Gov’t Code § 552.108(c); *Houston Chronicle Publ’g 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); Open Records Decision No. front page offense report information, even if this information is not actually located on the front page of the offense report. Although section 552.108(a)(1) authorizes you to withhold the remaining information from disclosure, you may choose to release all or part of the information at issue that is not otherwise confidential by law. *See* Gov’t Code § 552.007.

Section 552.117(a)(3) of the Government Code excepts from public disclosure the home addresses, home telephone numbers, social security numbers, and family member information of current and former employees of the department, regardless of whether the employees complied with section 552.1175.³ Thus, you must withhold the home addresses, home telephone numbers, social security numbers, and family member information of current or former department employees contained in the submitted information under section 552.117(a)(3). We have marked the information that must be withheld under this exception.

²Because our ruling on this issue is dispositive, we need not address the department’s remaining arguments for this information.

³We note that Open Records Letter No. 2005-1067(2005) was recently issued and serves as a previous determination for this type of information maintained by the department.

Section 552.130 of the Government Code excepts from public disclosure information that relates to:

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state;
- (2) a motor vehicle title or registration issued by an agency of this state; or
- (3) a personal identification document issued by an agency of this state or a local agency authorized to issue an identification document.

Gov't Code § 552.130(a). We have marked the information that must be withheld under section 552.130.⁴

In summary, to the extent that any portion of the information at issue is in the custody of the department as an agent of the grand jury, the grand jury records are not subject to the Act pursuant to section 552.003 of the Government Code. The department must withhold the marked federal tax return information made confidential under section 552.101 of the Government Code and section 6103(a) of title 26 of the United States Code. The submitted I-9 form must be withheld under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code. The information we have marked as protected under section 552.101 of the Government Code and common law privacy must be withheld. The department must withhold the information we have marked under section 552.117(a)(3) of the Government Code. We have marked Texas driver's license information that must be withheld under section 552.130 of the Government Code. We have marked the documents that may, with the exception of basic offense report information, be withheld under section 552.108(a)(1) of the Government Code. Finally, we have marked account numbers that must be withheld under section 552.136 of the Government Code. The department must release the remaining information.

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.

⁴Open Records Letter No. 2005-1067(2005) was recently issued and serves as a previous determination for this type of information maintained by the department.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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); *Tex. 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,



Amanda Crawford
Assistant Attorney General
Open Records Division

AEC/sdk

Ref: ID# 219748

Enc. Submitted documents

c: Ms. Yolanda M. Torres
ACLU
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(w/o enclosures)