



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 12, 2006

Ms. Paula J. Alexander  
General Counsel  
Metropolitan Transit Authority of Harris County  
1900 Main, Third Floor  
Houston, Texas 77002

OR2006-00423

Dear Ms. Alexander:

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# 240052.

The Metropolitan Transit Authority of Harris County (the "authority") received a request for a copy of a named employee's personnel file and a specified investigation. You state that the authority will release the requested personnel file but claim that the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

We first note that the submitted information is subject to section 552.022 of the Government Code. Under this section, "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body" must be released to the public, unless the information is excepted from disclosure under section 552.108 or expressly confidential under other law. Gov't Code § 552.022(a)(1). In this instance, the submitted information consists of a completed investigation by the authority. This investigation must be released under section 552.022(a)(1) unless it contains information that is excepted from disclosure under section 552.108 or expressly confidential under other law. You do not claim an exception to disclosure under section 552.108. Section 552.103 is a discretionary exception that protects a governmental body's interests and may be waived. *See* Gov't Code § 552.007;

*Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.–Dallas 1999, no pet.) (section 552.103 may be waived); Open Records Decision Nos. 665 at 2 n.5 (discretionary exceptions generally), 542 at 4 (1990) (statutory predecessor to section 552.103 subject to waiver). As such, section 552.103 is not other law that makes information confidential for the purposes of section 552.022. Therefore, the authority may not withhold the submitted information under section 552.103.

We note, however, that the submitted information is subject to the doctrine of common-law privacy. 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 the doctrine of common-law right of privacy.<sup>1</sup> Common-law privacy protects 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. Tex. 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 *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.

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<sup>1</sup>The Office of the Attorney General will raise mandatory exceptions like section 552.101 on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

The submitted investigation concerns an allegation of sexual harassment. We find that the investigation contains information that is analogous to the summary released in *Ellen*, as well as the accused's statement. In accordance with the holding in *Ellen*, the authority must release the summary and the statement, which we have marked. However, prior to releasing these documents, in accordance with section 552.101 and the holding in *Ellen*, the authority must redact the complainant and witness identifying information we have marked. We note that supervisors are not witnesses for purposes of *Ellen*, and supervisors' identities therefore may generally not be withheld under section 552.101 in conjunction with common-law privacy under *Ellen*. The remaining submitted information must be withheld in its entirety under section 552.101 in conjunction with common-law privacy pursuant to the holding in *Ellen*.

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, 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); *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 Office of the Attorney General 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. 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,



L. Joseph James  
Assistant Attorney General  
Open Records Division

LJJ/segh

Ref: ID# 240052

Enc. Submitted documents

c: Ms. Shalanda Moore  
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(w/o enclosures)