



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 27, 2006

Ms. Marianna M. McGowan
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P. O. Box 1210
McKinney, Texas 75070-1210

OR2006-01904

Dear Ms. McGowan:

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# 243102.

The Collin County Community College District (the "district"), which you represent, received a request for "all paperwork [the requestor has] submitted to H.R. as well as any other paperwork . . . in reference to this investigation and the past one submitted to [a named individual]." You explain that the responsive information pertains to an investigation regarding an employment grievance the requestor has made against the district. You state that the district has released some of the requested information but claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We first address the applicability of section 552.022 of the Government Code. Specifically, section 552.022(a)(1) provides that

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:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). You state that the submitted information consists of "a completed investigation made by [the district]." Thus, this information is subject to section 552.022(a)(1). Completed investigations must be released under section 552.022(a)(1)

unless excepted from disclosure under section 552.108 or expressly confidential under other law. Although you claim this information is excepted from disclosure under section 552.103 of the Government Code, we note that this exception is a discretionary exception to disclosure that does not constitute “other law” for the purposes of section 552.022.¹ Accordingly, the district may not withhold any of the submitted information under section 552.103 of the Government Code. However, because sections 552.101 and 552.102 of the Government Code are “other law” for purposes of section 552.022, we will address your arguments under these exceptions.

Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision” and encompasses the doctrine of common-law privacy. *See id.* § 552.101. Section 552.102 excepts from public disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]” *Id.* § 552.102(a). Section 552.102 is applicable to information that relates to public officials and employees. *See* Open Records Decision No. 327 at 2 (1982) (anything relating to employee’s employment and its terms constitutes information relevant to person’s employment relationship and is part of employee’s personnel file). The privacy analysis under section 552.102(a) is the same as the common-law privacy standard under section 552.101. *See Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref’d n.r.e.) (addressing statutory predecessor). We will therefore consider the applicability of common-law privacy under section 552.101 together with your claim regarding section 552.102.

In *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), the Texas Supreme Court held that information is protected by common-law privacy if it (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person and (2) is not of a legitimate concern to the public. *See Indus. Found.*, 540 S.W.2d at 685. 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. *Id.* at 683.

Also, information pertaining to a sexual harassment investigation is subject to common-law privacy on the basis of the holding in *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied). The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the

¹Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 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 at 4 (1989) (discretionary exceptions in general); *see also 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). Discretionary exceptions, therefore, do not constitute “other law” that makes information confidential for purposes of section 552.022.

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 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. In either case, the identity of the individual accused of sexual harassment is not protected from public disclosure. We further note that common-law privacy does not protect information about a public employee's alleged misconduct on the job or complaints made about a public employee's job performance. *See* Open Records Decision Nos. 438 (1986), 405 (1983), 230 (1979), 219 (1978).

You contend that "the submitted information contains some documents that [are] analogous to the summary released in *Ellen*, as well as correspondence dealing with the investigation and the accompanying witness interviews." Upon review of the records at issue, we find that only a small portion of the investigation deals with a potential incident of sexual harassment. We note that this portion of the information only identifies the individual suspected of committing the sexual harassment and the alleged victim. As mentioned above, the identity of the individual accused of sexual harassment is not protected from public disclosure under common-law privacy. Also, the alleged victim here is the requestor. Section 552.023 of the Government Code gives a person or a person's authorized representative a "special right of access, beyond the right of the general public, 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." Gov't Code § 552.023. Therefore, the requestor has a special right of access to the information in the submitted documents that would otherwise be protected from public disclosure based on her privacy interests. Furthermore, upon review, we find that none of the information at issue implicates the privacy rights of any other individual discussed in the investigation report. As such, we conclude that none of the submitted information may be withheld under section 552.101 on the basis of common-law privacy or under section 552.102.

However, we note that some of the information at issue may be subject to sections 552.117 and 552.147 of the Government Code.² Section 552.117(a)(1) of the Government Code exempts from disclosure the current and former home addresses, home telephone numbers, personal cellular telephone numbers, social security numbers, and family member

²The Office of the Attorney General will raise mandatory exceptions like sections 552.117 and 552.147 on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Section 552.117(a)(2) excepts from disclosure this same information regarding a peace officer regardless of whether the officer elected under section 552.024 or 552.1175 of the Government Code to keep such information confidential.³ Section 552.147 of the Government Code provides that “[t]he social security number of a living person is excepted from” required public disclosure under the Act.

We note that the submitted information includes nine-digit numbers that may be social security numbers. If these numbers, which we have marked, are social security numbers, they are subject to sections 552.117 and 552.147 as described below. If these nine-digit numbers are not social security numbers, they are not subject to either section.

To the extent the information that we have marked pertains to peace officers who are currently licensed, such information must be withheld from public disclosure pursuant to section 552.117(a)(2). However, to the extent the information that we have marked pertains to individuals who are not currently licensed peace officers but are current or former district employees who made timely confidentiality elections, the district must withhold this information pursuant to section 552.117(a)(1). The district may not withhold this information under section 552.117(a)(1) for current or former employees who did not make a timely election under section 552.024. Also, if the nine-digit numbers that we have marked are social security numbers that are not excepted under section 552.117, the district must withhold them under section 552.147.⁴

In summary, to the extent the information we have marked under section 552.117 of the Government Code pertains to licensed peace officers, such information must be withheld pursuant to section 552.117(a)(2); to the extent this information does not pertain to licensed peace officers, the district must withhold this information under section 552.117(a)(1) if the employees to whom it pertains made timely elections for confidentiality under section 552.024 of the Government Code. Pursuant to section 552.147 of the Government Code, the district must withhold any social security numbers to which section 552.117 is not applicable. 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.

³The term peace officer is defined in article 2.12 of the Texas Code of Criminal Procedure.

⁴We note that section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

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 ten 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 ten calendar days of the date of this ruling.

Sincerely,



Robert B. Rapfogel
Assistant Attorney General
Open Records Division

RBR/er

Ref: ID# 243102

Enc. Submitted documents

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