



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 24, 2007

Ms. Sharon Alexander
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR2007-00790

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# 269801.

The Texas Department of Transportation (the "department") received a request for all closed investigative files for a named department employee. You claim that the requested information is excepted from disclosure under sections 552.101, 552.107, 552.111, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, we note that the submitted information is subject to section 552.022 of the Government Code, which provides in part 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:

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.

(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). In this instance, the submitted information is part of a completed investigation made by and for the department. This information must be released under section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or expressly confidential under other law. The department seeks to withhold the submitted information under sections 552.107 and 552.111. We note, however, that these sections are discretionary exceptions to public disclosure that protect the governmental body's interests and may be waived. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 677 at 10 (attorney work product privilege under section 552.111 may be waived). As such, sections 552.107 and 552.111 do not qualify as other laws that make information confidential for the purposes of section 552.022. Therefore, the department may not withhold any portion of the submitted information under section 552.107 or 552.111. However, sections 552.101 and 552.117 of the Government Code are "other law" for purposes of section 552.022 and we consider your arguments under these sections.

Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and 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.*

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.

The submitted information includes an adequate summary of the investigation. In accordance with the holding in *Ellen*, the department must release the summary redacting information that identifies the alleged victim and witnesses. We have marked the identifying information accordingly. We note that supervisors are not considered witnesses under *Ellen*. Additionally, the department must release the signed statement of the individual accused of misconduct. The department must withhold the remaining information related to the sexual harassment investigation under section 552.101 in conjunction with common law privacy under *Ellen*.

Common law privacy is also applicable to other types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation*, including 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. *Indus. Found.*, 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: personal financial information not relating to a financial transaction between an individual and a governmental body, Open Records Decision No. 600 (1992), some kinds of medical information or information indicating disabilities or specific illnesses, Open Records Decision Nos. 470 (1987), 455 (1987), and identities of victims of sexual abuse, Open Records Decision No. 440 (1986). We have marked the additional information that must be withheld under common law privacy in conjunction with section 552.101.

Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov't Code §§ 552.024, .117(a)(1). 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). You inform us that the employee at issue made a timely election for confidentiality under section 552.024. We therefore conclude that the department must withhold the information you have marked under section 552.117(a)(1).

We note that some of the submitted information may be excepted under section 552.1175 of the Government Code, which provides in part as follows:

- (b) Information that relates to the home address, home telephone number, or social security number of [a peace officer as defined by article 2.12 of the Code of Criminal Procedure], or that reveals whether the individual has

family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

- (1) chooses to restrict public access to the information; and
- (2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Id. § 552.1175(b). If the peace officer at issue notifies the department that he chooses to keep the information we have marked confidential in accordance with section 552.1175(2), the department must withhold this information pursuant to section 552.1175 of the Government Code.

Lastly, one document does not relate to the sexual harassment investigation. Thus, the department may not withhold this document under section 552.101 and *Ellen*.

In summary, the department must withhold the information we have marked under common law privacy in conjunction with section 552.101. You must withhold the information you have marked pursuant to section 552.117. If the peace officer at issue notifies the department that he chooses to keep the information we have marked confidential in accordance with section 552.1175(2) of the Government Code, the department must withhold this information pursuant to section 552.1175. The remaining 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the

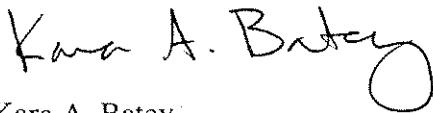
Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor 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,



Kara A. Batey
Assistant Attorney General
Open Records Division

KAB/krl

Ref: ID# 269801

Enc. Submitted documents

c: Mr. Kevin Krause
Dallas Morning News
P. O. Box 655237
Dallas, Texas 75265
(w/o enclosures)