



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 13, 2007

Mr. John C. West
General Counsel
Office of the Inspector General
Texas Department of Criminal Justice
P.O. Box 13084
Austin, Texas 78711

OR2007-07481

Dear Mr. West:

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# 280928.

The Texas Department of Criminal Justice (the "department") received a request for two categories of information pertaining to complaints against a named individual. You state that you have released two responsive files to the requestor. You claim that other responsive information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the information you submitted.

We note that the request seeks two categories of documents. You have only submitted investigative and administrative reports and supporting documents responsive to the first category of the request. To the extent any information responsive to the second category existed when the department received this request, we assume you have released it. If you have not released any such records, then you must do so at this time. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

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 privacy. Gov't Code § 552.101. Section 552.101 encompasses chapter 560 of the Government Code, which provides that a governmental body may not release fingerprint information except in certain limited circumstances. *See id.* §§ 560.001 (defining "biometric identifier" to include fingerprints), .002 (prescribing manner

in which biometric identifiers must be maintained and circumstances in which they can be released), .003 (providing that biometric identifiers in possession of governmental body are exempt from disclosure under Act). You do not inform us, and the submitted information does not indicate, that section 560.002 permits the disclosure of the submitted fingerprint information. Therefore, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 560.003 of the Government Code.

Section 552.101 of the Government Code also encompasses common-law privacy. For information to be protected from public disclosure by the common-law right of privacy under section 552.101, the information must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976). In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Id.* 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.

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.*

Thus, if there is an adequate summary of an investigation of alleged sexual harassment, then the investigation summary must be released along with the statement of the accused under *Ellen*, but the identities of the victims and witnesses of the alleged sexual harassment must be redacted, and their detailed statements must be withheld from disclosure. See Open Records Decision Nos. 393 (1983), 339 (1982). If no adequate summary of the investigation exists, then all of the information relating to the investigation ordinarily must be released, with the exception of information that would identify the victims and witnesses. Since 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, the identity of the individual accused of sexual harassment is not protected from public

disclosure. See Open Records Decision Nos. 438 (1986), 405 (1983), 230 (1979), 219 (1978).

In this instance, you represent that case number SC.15.0175.04.HQ is a sexual harassment investigation completed by the department. Upon review of this record we find that this investigation includes an adequate summary of the investigation at issue, which we have marked. In accordance with the holding in *Ellen*, the department must release the marked summary redacting information that identifies the alleged victim and witnesses; the remaining information in this case file is excepted from disclosure. We note that some of the listed witnesses are the alleged victim's supervisors. Supervisors are not witnesses for purposes of *Ellen*, and thus, the supervisors' identities may not be withheld under section 552.101 and common-law privacy. Accordingly, we have marked the information in case number SC.15.0175.04.HQ that must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy under *Ellen*.

We note that the remaining submitted cases constitute criminal investigations of sexual assault and official oppression. Although these investigations relate to allegations of sexual harassment, they do not constitute sexual harassment investigations in the employment context for the purposes of *Ellen*. In addition, we find there is a legitimate public interest in the details of a criminal investigation. Therefore, the identities of the witnesses in these cases are not confidential under the doctrine of common-law privacy, and may not be withheld under section 552.101. However, the identifying information of the victims of sexual assault and sexual harassment is confidential under common-law privacy. See ORD Nos. 393, 339. Accordingly, the department must withhold the identifying information of these victims contained in the submitted cases. We also note that although some of the victims have elected to use pseudonyms, the submitted information contains other identifying information of these individuals that must be withheld under common-law privacy. We have attempted to mark the victims' identifying information contained in the submitted information; however, because of the use of pseudonyms and the fact that individuals listed as victims in some reports are only named as witnesses in other reports, we are unable to determine whether some of the information in the submitted records constitutes identifying information. Thus, beyond the information that we have marked, the department must withhold any additional information, including photographs, that identifies a victim of sexual assault or sexual harassment in the submitted information. The department has failed to establish the remaining information consists of intimate or embarrassing information of no legitimate concern to the public, and thus, common-law privacy is not applicable to the remaining information.

Next, you assert that case number 04-1238 is excepted from disclosure under section 552.108(a)(2). Section 552.108(a)(2) excepts from disclosure information concerning an investigation that did not result in conviction or deferred adjudication. See Gov't Code § 552.108(a)(2). You state that the case pertains to a concluded investigation that did not result in conviction or deferred adjudication. Based on your representations, and our review, we find that section 552.108(a)(2) is applicable in this instance. Thus, with the

exception of basic information you may withhold case number 04-1238 under section 552.108(a)(2).

We note, however, that section 552.108 does not except from disclosure basic information about an arrest, an arrested person, or a crime. Gov't Code § 552.108(c). Such basic information refers to the information held to be public in *Houston Chronicle Publishing 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). See Open Records Decision No. 127 (1976) (summarizing types of information considered to be basic information). Basic information includes the identity and description of the complainant. Although you indicate that you will release all basic information pertaining to the submitted cases, as noted above, information tending to identify a sexual assault victim is protected by common-law privacy and must be withheld pursuant to section 552.101 of the Government Code. See *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 683-85. Thus, the department must withhold the complainant's identifying information, which we have marked, and release the rest of the basic information in report 04-1238. The remainder of the report 04-1238 may be withheld under section 552.108(a)(2) of the Government Code.

We note that case SC.15.0175.04 contains personal information pertaining to current and former department employee's. Thus, we determine that the department must withhold the department employees' home addresses, home telephone numbers, and social security numbers in pursuant to section 552.117(a)(3) of the Government Code in accordance with the previous determination issued in Open Records Letter No. 2005-01067. See Open Records Decision No. 673 at 7-8 (2001) (listing elements of second type of previous determination under Gov't Code § 552.301(a)). We note that section 552.117 also encompasses personal cellular telephone numbers, provided that the cellular phone service is not paid for by a governmental body. See Open Records Decision No. 506 at 5-6 (1988) (Gov't Code § 552.117 not applicable to cellular mobile phone numbers paid for by governmental body and intended for official use). Thus, the department must also withhold the personal cellular telephone numbers of current and former employees in report SC.15.0175.04.HQ under section 552.117(a)(3).

We note that the remaining information consists of law enforcement records. Thus, the information at issue is held by the department in its investigative capacity as a law enforcement entity, and not as the employer of the individuals at issue. Accordingly, section 552.117 is not applicable to the personal information in these investigations; however, this information may be excepted under section 552.1175 of the Government Code, which provides in relevant part:

(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 a former Texas Department of Criminal Justice employee], 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.

Gov't Code § 552.1175(b). If the individuals at issue are current or former Texas Department of Criminal Justice employees who elected to restrict access to this information in accordance with section 552.1175(b), then the department must withhold their personal information under section 552.1175. Otherwise, the department must release the information. We have marked information in report number 04-1667 as a representative sample of the information that must be withheld by the department under section 552.1175.

We note that the submitted information contains Texas motor vehicle record information. Section 552.130 of the Government Code exempts from disclosure information relating to a Texas motor vehicle driver's license and information relating to a Texas motor vehicle title or registration. Gov't Code § 552.130. We have marked the Texas motor vehicle record information that the department must withhold under section 552.130 of the Government Code.

The remaining information also contains an e-mail address that is excepted from disclosure under section 552.137 of the Government Code, which requires a governmental body to withhold the e-mail address of a member of the general public, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure. *See* Gov't Code § 552.137 (b). You do not inform us that the owner of the e-mail address has affirmatively consented to release. Therefore, the department must withhold the e-mail address we have marked under section 552.137.

Finally, we note that some of the materials may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, the department must withhold the information marked under section 552.101 in conjunction with section 560.003 of the Government Code. The department must withhold the identifying information of sexual assault victims and the other information we have marked under section 552.101 in conjunction with common-law privacy. With the

exception of basic information, the department may withhold case number 04-1238 under section 552.108(a)(2); however, the department must withhold the basic information that we have marked pursuant to section 552.101 of the Government Code in conjunction with common-law privacy. The department must withhold the personal information of current and former department employees in SC.15.0175.04.HQ under section 552.117(a)(1) in accordance with the previous determination issued in Open Records Letter No. 2005-01067. If the Texas Department of Criminal Justice employees in the remaining law enforcement records elected to restrict access to their personal information in accordance with section 552.1175(b), then the department must withhold their personal information under section 552.1175; otherwise, the department must release their personal information. The department must withhold the Texas motor vehicle record information marked under section 552.130 and the email address marked under section 552.137 of the Government Code. The remaining information must be released in accordance with applicable copyright law.¹

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).

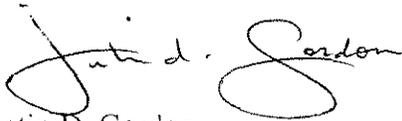
¹We note that the submitted information contains a social security number. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

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,

A handwritten signature in black ink that reads "Justin D. Gordon". The signature is written in a cursive style with a large, looping "G" at the end.

Justin D. Gordon
Assistant Attorney General
Open Records Division

JDG/eeg

Ref: ID# 280928

Enc. Submitted documents

c: Mr. Steve McGonigle
Dallas Morning News
c/o John C. West
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(w/o enclosures)