



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 28, 2007

Mr. Scott A. Kelly
Deputy General Counsel
Texas A&M System
200 Technology Way Suite 2079
College Station, Texas 77845-3424

OR2007-15602

Dear Mr. Kelly:

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# 295997.

The Texas Forest Service (the "service") received a request for information relating to an investigation that involved the requestor. You state that some of the requested information will be released. You have submitted information that the service seeks to withhold under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we address your statement that two of the submitted documents, Exhibits C-1 and C-2, were created for the purpose of responding to this request for information. You explain that the service created Exhibits C-1 and C-2 by redacting portions of documents that existed when the service received this request for information. We note that the Act "does not mandate the creation of new documents." Open Records Decision No. 555 at 1 (1990). Moreover, the Act "does not permit a governmental body to provide a requestor with a new document on which only the disclosable requested information has been consolidated and retyped." Open Records Decision No. 606 at 3 (1992). Instead, a governmental body must "release a copy of an actual requested record, with any confidential or nondisclosable information excised." *Id.*; see also Gov't Code § 552.228 (governmental body must provide "suitable copy" of public information); Open Records Decision No. 633 (1995) (information not removed from scope of Act because governmental body has copied it into another record, either in same language or in compiled, edited, summarized, improved, or otherwise altered

form). Accordingly, we conclude that Exhibits C-1 and C-2 are not responsive to this request for information, and we do not address the public availability of those documents.

Next, we address the service's obligations under section 552.301 of the Government Code. Section 552.301(b) requires a governmental body to ask for the attorney general's decision and claim its exceptions to disclosure not later than the tenth business day after the date of its receipt of the written request for information. *See* Gov't Code § 552.301(b). If a governmental body fails to comply with section 552.301, the requested information is presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold any of the information. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ). In this instance, the service has not demonstrated that this decision was requested within the ten-business-day period prescribed by section 552.301(b). *See* Gov't Code § 552.308(a) (prescribing requirements for proof of timeliness of action by common or contract carrier). Therefore, the requested information is presumed to be public under section 552.302. This statutory presumption can generally be overcome when the information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). Because the service's claim under section 552.101 can provide a compelling reason for non-disclosure, we will address your arguments.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses common-law privacy, which protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. *See 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 applied common-law privacy to an investigation of alleged sexual harassment. The investigation files at issue in *Ellen* contained third-party witness statements, an affidavit in which the individual accused of the misconduct responded to the allegations, and the conclusions of the board of inquiry that conducted the investigation. *See* 840 S.W.2d at 525. The court upheld the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the disclosure of such documents sufficiently served the public's interest in the matter. *Id.* The court also held that "the public does 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 under *Ellen*, but the identities of the victims of and witnesses to the alleged sexual harassment must be redacted, and their detailed statements must be withheld from disclosure. *See also* 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 must ordinarily be released, except for information

that would identify the victims and witnesses. In either case, the identity of the individual accused of sexual harassment is not protected from public disclosure. 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 inform us that the information at issue is related to an investigation of alleged sexual harassment. Based on your representation and our review of the information, we find that it falls within the scope of *Ellen*. We also find that the information includes an adequate summary of the investigation and a statement by the person accused of sexual harassment. We have marked those documents. The service must release the summary and the statement, except for the names of the alleged sexual harassment victim and a witness in the investigation.¹ We also have marked that information. The service must withhold the names of the victim and witness, along with the rest of the investigative information that we have marked, under section 552.101 of the Government Code in conjunction with common-law privacy.

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

¹We note that the documents to be released include information relating to the requestor that the service might be required to withhold from the public under section 552.117 of the Government Code. However, because section 552.117 protects personal privacy, the requestor has a right of access to the information in question under section 552.023 of the Government Code. *See* Gov't Code § 552.023(a); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself). Should the service receive another request for these same records from a person who would not have a right of access to this requestor's private information, the service should resubmit these records and request another decision. *See* Gov't Code § 552.301(a), .302.

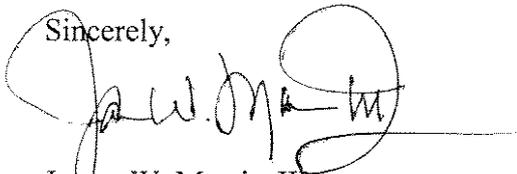
will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to 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,

A handwritten signature in black ink, appearing to read 'James W. Morris, III', written over a horizontal line.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/ma

Ref: ID# 295997

Enc: Submitted documents

c: Mr. Bobby Young
c/o Mr. Scott A. Kelly
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(w/o enclosures)