ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 30, 2009

Ms. Pamela Smith
Assistant General Counsel
Texas Department of Public Safety
P.O. Box 4087
Austin, Texas 78773-0001

OR2009-04129

Dear Ms. Smith:

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# 338361 (Department Request No. 09-0026).

The Texas Department of Public Safety (the "department") received a request for information relating to internal investigations involving specified employees and types of violations. You state you have released some of the requested information to the requestor. You state you have no information responsive to part two of the request.[1] You claim that the submitted information is excepted from disclosure under sections 552.101, 552.107 and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You assert investigation number C08-156 is not subject to disclosure because it is in "active use." Section 552.221 of the Government Code provides in relevant part the following:

[1] The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.— San Antonio 1978, writ dism'd); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

> (a) An officer for public information of a governmental body shall promptly produce public information for inspection, duplication, or both on application by any person to the officer. In this subsection, "promptly" means as soon as possible under the circumstances, that is, within a reasonable time, without delay.
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> . . .
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> (c) If the requested information is unavailable at the time of the request to examine because it is in active use or in storage, the officer for public information shall certify this fact in writing to the requestor and set a date and hour within a reasonable time when the information will be available for inspection or duplication.

Gov't Code § 552.221(a), (c). This office has interpreted section 552.221 to require prompt disclosure of information unless it is in "immediate active use." *See* Open Records Decision No. 225 at 3 (1979) (under former section 552.221, shorthand notes are in active use while typist is in the process of typing them out, but are not in active use "if there is no prospect that they will be immediately typed or further processed"), 57 at 4 (1974) (student directory information not in active use under former section 552.221 if copies of same information are provided to various college departments). Section 552.221 is a narrow exception to the rule of prompt production of information under the Act – it permits an agency to avoid only unreasonable disruption of its immediate business. Open Records Decision No. 121 at 3 (1976). Section 552.221, however, cannot be used to deny a requestor access to records. JM-757 at 4 (1987).

You assert investigation number C08-156 is in active use as the investigation is not complete. However, we disagree with the department's position that the file is in active use because the investigation has not been completed. *See, e.g.*, Open Records Decision Nos. 148 at 1 (1976) (recommendations and employment evaluations not in active use under former section 552.221 during entire time when faculty member's promotion is under consideration), 121 at 3 (university's financial records in custody of district attorney during criminal investigation not in active use under former section 552.221). The department also has not adequately explained how release of the investigation would disrupt the department's immediate business. Therefore, we find you have not established that investigation number C08-156 is in active use for purposes of section 552.221, and the department may not withhold it on that basis.

Next, we address the department's procedural obligations under the Act for investigation number C08-156. Pursuant to section 552.301(e) of the Government Code, a governmental body is required to submit to this office within fifteen business days of receiving the request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3)

a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See* Gov't Code § 552.301(e). You inform us that the department received this request on January 7, 2009. However, as of the date of this letter, you have not submitted to this office a copy or representative sample of investigation number C08-156. Consequently, in regard to this information, we find that the department failed to comply with the procedural requirements of section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302 ; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ); Open Records Decision No. 319 (1982). A compelling reason exists when third-party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). However, because you have not submitted investigation number C08-156 for our review, we have no basis for finding it confidential. Thus, to the extent the requested information exists, you must release it at this time. *See* Gov't Code §§ 552.301, .302; *see also* Open Records Decision No. 664 (2000) (noting that if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible under circumstances). If you believe the information is confidential and may not lawfully be released, you must challenge this ruling in court pursuant to section 552.324 of the Government Code.

We next note that the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides:

> 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:
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> > (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 consists of completed investigations made by or for the department. The department must release the completed investigations under section 552.022(a)(1) of the Government Code unless they are excepted from disclosure under section 552.108 of the Government Code or are expressly confidential under other law. Although you assert some of the submitted information is excepted under section 552.107(1) of the Government Code, this section is a discretionary exception to disclosure that protects the governmental body's interests and may be waived.

Open Records Decision No. 676 at 10-11 (2002) (attorney-client privilege under section 552.107 may be waived). As such, section 552.107(1) is not other law that makes information confidential for purposes of section 552.022. Therefore, the department may not withhold any of the submitted information under section 552.107(1). However, the attorney-client privilege is also found in rule 503 of the Texas Rules of Evidence. The Texas Supreme Court held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001); *see also* ORD 676. Accordingly, we will consider your assertion of this privilege under rule 503. You also raise sections 552.101 and 552.117 of the Government Code. Because sections 552.101 and 552.117 are other laws for section 552.022 purposes, we will also address the applicability of these exceptions to the information at issue.

You state the information in Attachment A should be withheld under the attorney-client privilege. Rule 503 of the Texas Rules of Evidence encompasses the attorney-client privilege and provides:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:
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> > (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
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> > (B) between the lawyer and the lawyer's representative;
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> > (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
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> > (D) between representatives of the client or between the client and a representative of the client; or
> >
> > (E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5). Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential

communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You state Attachment A consists of communications between attorneys for the department that pertain to the rendition of legal services to the department. You also state that the communications were intended to be and remain confidential. Based on your representations and our review of the information at issue, we agree Attachment A consists of privileged attorney-client communications the department may withhold under rule 503 of the Texas Rules of Evidence.

You claim a portion of the information in Attachment B is excepted from disclosure under section 552.101 of the Government Code. Section 552.101 excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information protected by the informer's privilege, which has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). The informer's privilege protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer's identity. Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978). The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 at 2 (1981); *see* Wigmore, Evidence § 2374, at 767 (McNaughton rev. ed 1961). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5 (1988).

You state that Attachment B identifies an informant who provided information regarding violations of the Texas Controlled Substances Act, chapter 481 of the Health and Safety Code. *See* Health & Safety Code §§ 481.001–.205. We note that violations of chapter 481 are punishable by criminal penalties. Based on your representations and our review, we conclude that the department has demonstrated the applicability of the common-law informer's privilege to a portion of the information at issue. However, in regard to the remaining information, you have not identified the alleged violation to which the investigation pertains, nor have you explained whether the alleged violations carries civil or criminal penalties. Accordingly, you have not demonstrated that the informer's privilege is

applicable to any portion of the remaining information. Thus, with the exception of the information we have marked for release, the department may withhold the information you have marked under section 552.101 in conjunction with the informer's privilege.

Section 552.101 also encompasses the doctrine of common-law privacy, which protects information that (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82.

In *Morales v. Ellen*, 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. *Morales v. Ellen*, 840 S.W.2d 519 (Tex.App.—El Paso 1992, writ denied). 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.* at 525. 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, the investigation summary must be released 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). 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 note that supervisors are generally not witnesses for purposes of *Ellen*, except where their statements appear in a non-supervisory context.

We note, however, that Attachment C-22 concerns allegations of a department employee harassing a member of the public, not a fellow employee or employees. Because Attachment C-22 does not concern sexual harassment in the employment arena, we find that *Ellen* is not applicable to Attachment C-22. Therefore, Attachment C-22 may not be withheld under section 552.101 in conjunction with common-law privacy and the court's holding in *Ellen*.

In addition, Attachments C-1 and C-5 do not contain adequate summaries of the respective investigations. Thus, the information pertaining to the sexual harassment investigations must generally be released, with the identities of the victims and witnesses redacted. Accordingly, the department must withhold the identifying information of victims and witnesses that we have marked under section 552.101 of the Government Code in conjunction with

common-law privacy under *Ellen*. The remaining information relating to Attachments C-1 and C-5 may not be withheld under section 552.101 on that basis.

We find that Attachments C-2, C-3, C-4, C-6 through C-21, as well as the investigation we have marked in Attachment B, are related to investigations of allegations of sexual harassment in the employment arena and contain adequate summaries of the investigations as well as statements by the persons accused of sexual harassment. The summaries and statements are, thus, generally not confidential under common-law privacy; however, information within the summaries and statements identifying the victims and witnesses are confidential under common-law privacy. *See Ellen*, 840 S.W.2d at 525. Thus, the department must release the summaries and statements, but withhold the information that identifies the victims and witnesses, which we have marked, under section 552.101 in conjunction with common-law privacy and the court's holding in *Ellen*. The department must withhold the remaining records of the sexual harassment investigations in Attachments C-2, C-3, C-4, C-6 through C-21, and the sexual harassment investigation in Attachment B, under section 552.101 in conjunction with common-law privacy and the court's holding in *Ellen*.

Common-law privacy also encompasses the specific types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation*. This includes 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. *See Indus. Found.* 540 S.W.2d at 683. This office has also found that the following types of information are excepted from required public disclosure under common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). This office has also concluded personal financial information not relating to a financial transaction between an individual and a governmental body is excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 600 (1992), 545 (1990) (deferred compensation information, mortgage payments, assets, bills, and credit history protected under common-law privacy), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). We have marked additional information that is highly intimate or embarrassing and not of legitimate public interest. The department must also withhold the information we have marked under section 552.101 in conjunction with common-law privacy.

You claim that some of the remaining information is excepted from disclosure under section 552.117(a)(2) of the Government Code. Section 552.117(a)(2) excepts from disclosure the current and former home addresses and telephone numbers, social security number, and family member information regarding a peace officer regardless of whether the officer elected under section 552.024 or section 552.1175 of the Government Code to keep

such information confidential.[2] The department must withhold the personal information we have marked under section 552.117(a)(2) of the Government Code. We note, however, in this instance, a portion of the requested information concerns officers who are no longer employed by the department. Nevertheless, if the former officers are currently peace officers as defined by article 2.12, then the department must withhold the information we have marked under section 552.117(a)(2) of the Government Code.

If the former officers are no longer peace officers, then the department may be required to withhold the personal information of the former officers, as well as the information of current and former employees, under section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former employee of a governmental body who requests that this information be kept confidential under section 552.024. Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee who did not timely request under section 552.024 that the information be kept confidential. Therefore, the department must withhold the information we have marked under section 552.117(a)(1) to the extent that the employees whose information is at issue timely requested confidentiality for that information under section 552.024.

We note that section 552.130 of the Government Code is applicable to some of the remaining information.[3] Section 552.130 excepts from disclosure information that "relates to . . . a motor vehicle operator's or driver's license or permit issued by an agency of this state [or] a motor vehicle title or registration issued by an agency of this state." Gov't Code § 552.130. In accordance with section 552.130, the department must withhold the Texas motor vehicle record information we have marked.

In summary, the department may withhold the information in Attachment A under rule 503 of the Texas Rules of Evidence. With the exception of the information we have marked for release, the department may withhold the information you have marked under section 552.101 of the Government Code in conjunction with the informer's privilege. The department must release Attachments C-1 and C-5 but withhold the victims' and witnesses'

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[2] "Peace officer" is defined by Article 2.12 of the Texas Code of Criminal Procedure.

[3] The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

identifying information, which we have marked, under section 552.101 in conjunction with common-law privacy and the holding in *Ellen*. The department must release the summaries and statements of the accused in Attachments C-2, C-3, C-4, C-6 through C-21, and the sexual harassment investigation in Attachment B, but withhold the victims' and witnesses' identifying information, as well as the remaining records of the sexual harassment investigations in these files, under section 552.101 in conjunction with common-law privacy and the court's holding in *Ellen*. The department must also withhold the additional information we have marked under section 552.101 in conjunction with common-law privacy. The department must withhold the information we have marked under section 552.117(a)(2) of the Government Code to the extent the individuals at issue are still peace officers as defined by article 2.12 of the Code of Criminal Procedure. If the former officers are not peace officers as defined by article 2.12 of the Code of Criminal Procedure, the department must withhold the marked personal information of the former officers, as well as the information of current and former department employees, under section 552.117(a)(1) of the Government Code to the extent that the employees timely requested confidentiality for that information under section 552.024. The department must withhold the Texas motor vehicle record information we have marked under section 552.130 of the Government Code. The remaining information must be released.

You also ask this office to issue a previous determination permitting the department to withhold information pursuant to rule 503 of the Texas Rules of Evidence. We decline to issue such a previous determination at this time. This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,

Chris Schulz
Assistant Attorney General
Open Records Division

CS/cc

Ref: ID# 338361

Enc. Submitted documents

cc: Requestor
(w/o enclosures)