



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 21, 2009

Mr. Antonio Mendoza
Assistant Criminal District Attorney
Hidalgo County
100 North Closner, Room 303
Edinburg, Texas 78539

OR2009-11839

Dear Mr. Mendoza:

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# 352969.

Hidalgo County (the "county") received a request for information related to all sexual harassment complaints filed and sexual harassment settlements reached during a specified time period. You claim that the requested information is excepted from disclosure under sections 552.101 and 552.102 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the county has not fully complied with the requirements of section 552.301 of the Government Code in seeking this open records decision. Section 552.301 prescribes the procedures that a governmental body must follow when seeking to withhold responsive information from public disclosure. Specifically, the governmental body must seek a ruling from this office and state its claimed exceptions to disclosure within ten business days of receiving the written request. *See Gov't Code* § 552.301(a), (b). In addition, 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 an open records 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. *Id.* § 552.301(e)(1)(A)-(D). You state that the county received the present request for information on May 12, 2009. However, you did not request a ruling or submit a copy or representative sample of the information requested until June 15, 2009. You state that you reached an agreement with the requestor “to extend the deadline date [for requesting a ruling] until June 15, 2009[,]” pursuant to section 552.221(d) of the Government Code. We note, that while section 552.221 does allow a governmental body that does not seek to withhold responsive information from disclosure to negotiate with the requestor the date and hour the information will be made available, it does not grant a governmental body additional time to seek an open records decision and submit the information at issue in accordance with section 552.301. *See id.* § 552.221(d). Furthermore, although you indicate the county requested an extension from the requestor in order to collect the responsive information and comply with the Act, the deadlines contained in section 552.301 are fixed by statute and cannot be altered by agreement. *See Open Records Decision No. 541 at 3 (1990)* (“[T]he obligations of a governmental body under the [predecessor to the Act] cannot be compromised simply by its decision to enter into a contract. *See Attorney General Opinion JM-672 (1987); Open Records Decision No. 514 (1988).*”). Thus, we find that the county failed to comply with both its ten- and fifteen-business-day deadlines.

Pursuant to section 552.302 of the Government Code, a governmental body’s failure to comply with section 552.301 results in the legal presumption the information is public and must be released, unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *Open Records Decision No. 319 (1982)*. Normally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where an exception designed to protect the interest of a third party is applicable. *See Open Records Decision No. 150 at 2 (1977)*. You claim the submitted information is confidential under sections 552.101 and 552.102 of the Government Code. Because sections 552.101 and 552.102 can provide compelling reasons to overcome the presumption of openness, we will consider whether or not the submitted information is excepted under the Act.

You assert the submitted information is excepted under section 552.101 of the Government Code, which excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses the doctrine of common-law privacy. Section 552.102(a) of the Government Code excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref’d n.r.e.), the court ruled that the test to be applied to information claimed to be protected under

section 552.102(a) is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976) for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101. Accordingly, we address the county's section 552.102(a) claim in conjunction with its common-law privacy claim under section 552.101 of the Government Code.

Common-law privacy 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.*, 540 S.W.2d at 685. The types of information considered intimate or 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. *Id.* 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 "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. We note that supervisors are generally not witnesses for purposes of *Ellen*, except where their statements appear in a non-supervisory context. In addition, 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).

The submitted information does not contain adequate summaries of the sexual harassment investigations at issue. Thus, the information at issue must generally be released, with the identities of the victims and witnesses redacted. Portions of the submitted information, which we have marked, identify alleged victims and witnesses of sexual harassment. The

information we have marked in the investigation files must be withheld under common-law privacy. *See Ellen*, 840 S.W.2d at 525. As you raise no further exceptions, the remaining information must be released.

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,



Tamara Wilcox
Assistant Attorney General
Open Records Division

TW/dls

Ref: ID# 352969

Enc. Submitted documents

c: Requestor
(w/o enclosures)