



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

March 12, 1996

Mr. Craig Smith
Deputy General Counsel
Texas Workers' Compensation Commission
Southfield Building, MS-4D
4000 South IH-35
Austin, Texas 78704-7491

OR96-0315

Dear Mr. Smith:

You ask whether certain information is subject to required public disclosure pursuant to chapter 552 of the Government Code. Your request was assigned ID# 37865.

The Texas Workers' Compensation Commission (the "commission") received a request from a former commission employee seeking information relating to an alleged incident of workplace violence at the commission. You ask whether the information requested is exempted from required public disclosure pursuant to sections 552.101, 552.108, and 552.111 of the Government Code.

We first address your assertion that section 552.101 in conjunction with section 402.092 of the Texas Labor Code exempts the requested information from required public disclosure. Section 552.101 exempts from required public disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. Section 402.092 provides:

- (a) Information maintained in the investigation files of the commission is confidential and may not be disclosed except:
- (1) in a criminal proceeding;
 - (2) in a hearing conducted by the commission;
 - (3) on a judicial determination of good cause; or
 - (4) to a governmental agency, political subdivision, or regulatory body if the disclosure is necessary or proper for

the enforcement of the laws of this or another state or of the United States.

....

- (d) For purposes of this section, "investigation file" means any information compiled or maintained by the commission with respect to a commission investigation authorized by law.

....

This statute makes confidential the commission's investigation files concerning compliance with Texas workers' compensation laws. However, the commission's own investigation of an internal personnel matter is not an investigation into worker's compensation laws. *See* Open Records Letter No. 95-1508 (1995). Thus, section 402.092 does not make confidential these internal records.

You also assert that the requested information, including the names of witnesses and their detailed statements, is excepted from required public disclosure under section 552.101 in accordance with the ruling in *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.-El Paso 1992, writ denied). The information at issue here is distinguishable from that case. *Ellen* concerned allegations of sexual harassment in the workplace. None of the documents submitted for our review concern allegations of sexual harassment. Therefore, the requested information may not be withheld under *Ellen*.

We also address whether these witnesses' identities and statements must be protected under section 552.101 in conjunction with the common-law right to privacy. For information to be protected from public disclosure under the common-law right of privacy, the information must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 (1992) at 1. This office has previously held that a common-law right of privacy does not protect facts about a public employee's misconduct on the job or complaints made about his performance. *See* Open Records Decision Nos. 438 (1986), 219 (1978), 230 (1979). Moreover, we find no information contained in the information provided to this office that is highly intimate and embarrassing. We conclude that you may not withhold any of the requested information under section 552.101 of the Government Code.

We next address your assertion that section 552.108 of the Government Code excepts the information requested from required public disclosure. Section 552.108

excepts from disclosure (a) records of a law enforcement agency or prosecutor that deal with the detection, investigation, or prosecution of crime and (b) internal records or notations of a law enforcement agency or prosecutor that are maintained for internal use in matters relating to law enforcement or prosecution. Section 552.108 generally applies to records of a law-enforcement agency or prosecutor. However, in certain circumstances, an agency that is not a law-enforcement agency may claim section 552.108. See Open Records Decision No. 493 (1988). This office has determined that if an investigation by an administrative agency reveals possible criminal conduct that the agency intends to report or already has reported to the appropriate law-enforcement agency, section 552.108 will apply to the information gathered by the administrative agency if its release would unduly interfere with law enforcement. *Id.* You do not indicate that you intend to report or already have reported the incident the subject of this request to the appropriate law-enforcement agency, nor have you demonstrated how release of this information would unduly interfere with law enforcement. Consequently, we conclude that you may not withhold any of the requested information under section 552.108 of the Government Code.¹

Finally, we address your assertion that section 552.111 excepts two marked sections of the requested information from required public disclosure. Section 552.111 excepts “[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” In Open Records Decision No. 615 (1993), this office concluded that section 552.111 excepts from required public disclosure only those internal communications consisting of advice, recommendations, opinions, and other material *reflecting the policymaking processes* of the governmental body. An agency’s policymaking functions, however, do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. *Id.* at 5. The sections you have marked do not contain advice, recommendations, or opinions that reflect *policymaking*. They appear, rather, to indicate opinion and recommendation solely in regard to a particular personnel matter. We conclude that you may not withhold the requested information under section 552.111 of the Government Code.

In summary, you must release all of the requested information to the requestor. We note, however, that several documents reveal the home addresses of government employees. If these employees have made the election under section 552.024 that this

¹You claim that public disclosure of the commission’s personnel policies would “reveal the Commission’s internal deliberative processes,” citing *A & T Consultants, Inc. v. Sharp*, 904 S.W.2d 668 (Tex. 1995) as authority for your interpretation of section 552.108. In *A & T Consultants*, the Texas Supreme Court held that the Comptroller could withhold from disclosure audit papers pursuant to section 552.108 to protect the Comptroller’s interest in enforcing the tax laws. *Id.* at 677. We refuse to extend *A & T Consultants* to the commission’s interest in enforcing its personnel policies. See Open Records Decision Nos. 434 (1986) at 2, 287 (1981) at 2 (whether information falls within section 552.108 must be determined on a case-by-case basis).

information be kept confidential, the commission must withhold that information under section 552.117 of the Government Code. We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read "Todd Reese", with a long horizontal flourish extending to the right.

Todd Reese
Assistant Attorney General
Open Records Division

RTR/ch

Ref: ID# 37865

Enclosures: Submitted documents