



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 11, 1997

Ms. Linda Cloud
Deputy Executive Director
Texas Lottery Commission
P.O. Box 16630
Austin, Texas 78761-6630

OR97-2025

Dear Ms. Cloud:

You seek reconsideration of Open Records Letter No. 97-1355 (1997), in which this office determined that the Texas Open Records Act, Government Code chapter 552, required the Texas Lottery Commission (the "commission") to make certain information available to the requestor. We have assigned your request for reconsideration ID#108461.

The commission received a request for "[a]ny and all complaints alleging sexual harassment," by two different individuals, and information relating to a retailer incentive program. You have re-submitted the information which you contend is responsive to the request, as well as some new information which apparently did not exist at the time of the original request. You have labeled these submissions as Exhibits B through Z-3, with the Exhibits under category Z -- Z-1, Z-2, and Z-3 -- constituting the new information. In Open Records Letter No. 97-1355 (1997), based on the original submissions submitted as Exhibits B through Y, we concluded that portions of the submitted records could be withheld pursuant to sections 552.101 and 552.111, while the remaining information was not excepted from required disclosure.

In your request for reconsideration, you also raise section 552.102 as an applicable exception concerning information about the alleged perpetrators of the sexual harassment, because "the allegations were not able to be substantiated." Section 552.102(a) protects "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The test to determine whether information is private and excepted from disclosure under section 552.102 is encompassed in section 552.101 of the Government Code. *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 930 (1977); *Hubert v. Harte-Hanks Texas Newspapers Inc.*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.). Based on our determination, we conclude that we adequately addressed the interests protected by

section 552.102, through the section 552.101 and common-law privacy analysis in Open Records Letter No. 97-1355 (1997). Therefore, in this request for reconsideration, we need not specifically address your claims under section 552.102.

Initially, we note that in Open Records Letter No. 97-1355 (1997), we concluded that the information the commission submitted in response to the portion of the request regarding the "retailer incentive program," submitted as Exhibit X, could be withheld from required disclosure pursuant to section 552.111. In your request for reconsideration, you do not appear to seek reconsideration of our determination regarding the information responsive to the requestor's request for information about the "retailer incentive program." Therefore, in this ruling, we only address your arguments regarding the part of the request concerning sexual harassment allegations.

In support of your request for reconsideration, you have submitted Exhibit Z-1, which is "a memo dated May 12, 1997 and serves as a 'closure document to the file.'" You explain that "Exhibit Z-1 is not redacted and left intact so it can be fully examined, Exhibit Z-2 redacts the name of the accused as well as the names of any complaints [sic] and witnesses, Exhibit Z-3 redacts only the names of the complaints [sic] and witnesses." It is your contention that "[t]he Commission . . . should not be required to disclose the underlying investigative documents, because at the time of the Open Records Request, no summary document was in existence." Therefore, you believe that our office should reconsider our ruling in Open Records Letter No. 97-1355 (1997), and allow the commission to only release a redacted version of Exhibit Z-1, instead of the information we ruled to be public in our original ruling.

In Open Records Letter No. 97-1355 (1997), we addressed each of the arguments, which Ms. Kimberly L. Kiplin, the commission's Acting Executive Director, had raised on behalf of the commission. With regard to the information at issue, we concluded that the records, which were subject to common-law privacy and the *Ellen* decision, could be withheld pursuant to section 552.101, however, the remaining information relating to employee's allegations of sexual harassment at the workplace could not be withheld, because of the clear public interest in this information. Open Records Decision Nos. 470 (1987) at 4 (public has legitimate interest in job performance of public employees), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 (1984) at 2 (scope of public employee privacy is narrow).

We note that chapter 552 does not apply to information that does not exist, *see* Open Records Decision No. 555 (1990), nor does chapter 552 require governmental bodies to prepare new information in response to a request. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio, 1978, writ dism'd). By implication, we believe that a governmental body should be required to release public information that existed at the time an open records request was received. *See generally* Open Records Decision No. 606 (1992) ("the act requires a governmental body to release

a copy of an actual requested record, with any confidential or non-disclosable information excised.”). We have examined your request for reconsideration and decline to change the outcome of our original ruling. Therefore, we affirm our ruling in Open Records Letter No. 97-1355 (1997), and the information should be released in accordance with the original ruling. We further note that the commission may choose to release a copy of Exhibit Z-1 with the names and any other identifying information concerning the alleged victim and witnesses redacted pursuant to the *Ellen* decision and common-law privacy. See Gov’t Code § 552.007 (governmental body may choose to release all or part of information at issue that is not otherwise confidential by law).

We are resolving this matter with an 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 should not be relied upon as a previous determination regarding any other records. If you have any questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink that reads "Sam Haddad". The signature is written in a cursive style with a large, looping initial "S".

Sam Haddad
Assistant Attorney General
Open Records Division

SH/rho

Ref.: ID# 108461

Enclosures: Submitted documents

cc: Mr. Ken Herman
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(w/o enclosures)

