



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

April 7, 1998

Mr. Wil Galloway  
General Counsel  
Texas Department of Agriculture  
P.O. Box 12847  
Austin, Texas 78711

OR98-0893

Dear Mr. Galloway:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 114248.

The Texas Department of Agriculture (the "department") received a request for "any memoranda internal or external prepared by or for Texas Agriculture Commissioner Rick Perry" and "any internal memoranda prepared by the senior agriculture staff members and exempt employees."<sup>1</sup> You contend that some of the requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.107, and 552.111 of the Government Code. You have submitted a representative sample of the documents at issue to this office for review.<sup>2</sup>

Initially, we note that you received the request for information on January 20, 1998, but that you invoked section 552.103 for the first time on February 11, 1998 in a faxed memorandum. Government Code section 552.301(a) states that a governmental body must raise exceptions to disclosure not later than tenth business day after receiving a written request for information. Section 552.103 is a discretionary exception, and the failure to timely raise section 552.103 results in the waiver of its protection. *See* Open Records Decision Nos. 551 (1990) (section 552.103 is

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<sup>1</sup>The requestor is also seeking several other categories of information. The department has made much of this information available to the requestor. In addition to the memoranda at issue here, the department has also sought a ruling from this office as to whether information relating to loans guaranteed by the Texas Agricultural Finance Authority may be disclosed to the requestor. This matter has been assigned ID# 114247 and is being handled separately.

<sup>2</sup>We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

discretionary). Because you did not invoke section 552.103 until more than ten business days after you received the request for information, we must conclude that you have waived your section 552.103 interest in the requested documents.

You have divided the submitted documents into Attachments 1 through 3. You claim that the documents in Attachment 1 are excepted from disclosure under sections 552.101 and 552.102. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Section 552.102 excepts information in personnel files only if it meets the test articulated under section 552.101 for common-law invasion of privacy. *Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.). Accordingly, we will consider your section 552.101 and section 552.102 claims together.

For information to be protected from public disclosure by the common-law right of privacy under section 552.101, the information must meet the criteria set out in *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Id.* at 685. The court considered intimate and embarrassing information such as that 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. Having reviewed the information in Attachment 1, we find that most of it is not protected by the common-law right to privacy. See Open Records Decision Nos. 473 (1987) (public has legitimate interest in job performance of public employees), 470 (1987) (public employee's job performance does not generally constitute his private affairs).

One document in Attachment 1 does contain information that is protected by the common-law right to privacy. This document relates to an alleged incident of sexual harassment. 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. *Ellen*, 840 S.W.2d 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 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.* We find that the public has a legitimate interest in the document dealing with sexual harassment, but not in the identity of the alleged victim. Therefore, we conclude that the alleged victim's identity must be redacted from the document dealing with sexual harassment before the department releases the document to the requestor. We have marked the document accordingly. With the exception of the information we

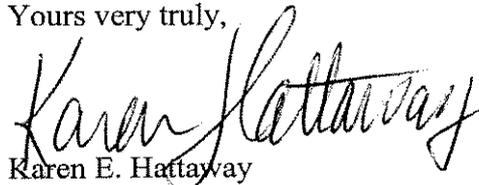
have marked in this document, the department must release all of the information in Attachment 1 to the requestor.

You contend that the documents in Attachment 2 are excepted from disclosure pursuant to section 552.111. Section 552.111 excepts "an 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 reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts 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 matter; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 (1993) at 5-6. In addition, section 552.111 does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Id.* at 4-5. We have marked the portions of Attachment 2 that constitute advice, opinion, or recommendation relating to the department's policymaking processes. The department may withhold this information under section 552.111. The remaining information in Attachment 2 is severable factual information that must be released to the requestor.

Finally, you argue that Attachment 3 is excepted from disclosure under section 552.107. Section 552.107(1) protects information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107(1) excepts from public disclosure only "privileged information," that is, information that reflects the client's confidential communications to the attorney and the attorney's legal advice or opinions. Open Records Decision No. 574 (1990) at 5-7. Section 552.107(1) does not, however, protect purely factual information. *Id.* It appears that Attachment 3 consists entirely of confidential client communications. Thus, we conclude that the department may withhold Attachment 3 from disclosure in its entirety pursuant to section 552.107(1).

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,



Karen E. Hattaway  
Assistant Attorney General  
Open Records Division

Ref: ID# 114248

Enclosures: Marked documents

cc: Ms. Sarah Walter  
P.O. Box 650218  
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(w/o enclosures)