



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 21, 1998

Colonel Jack L. Slayton
State Judge Advocate General
Adjutant General's Department
P.O. Box 5218
Austin, Texas 78763-5218

OR98-2259

Dear Colonel Slayton

You have asked whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 118109.

The Adjutant General's Department (the "Adjutant General") received a request for a copy of the investigations conducted concerning a named individual. The written request states that the requestor "will accept information without the Privacy Act and third party information." You assert that the records requested are excepted from disclosure in their entirety under sections 552.101 and 552.102 of the Government Code. You also assert that certain marked portions are excepted from disclosure by section 552.111 of the Government Code.

We note initially the requestor's note that he is willing to accept information without "the Privacy Act and third party information." Although you explain that the investigation records at issue are state records subject to the Texas Open Records Act rather than federal records subject to the Privacy Act of 1974, you believe that the requestor is not seeking the types of information which are generally protected under the Privacy Act. *See* 5 U.S.C. § 552a. It is not clear to this office whether the requestor actually seeks to obtain information of the type that is not made confidential under the federal Privacy Act or if the requestor was simply mistaken as to what law applies to release of the investigation records. We note that section 552.222(b) of the Government Code provides that a governmental body may ask a requestor to clarify a request if there is confusion as to the information which is being sought. We agree, however, that the Adjutant General is not required to provide records to the requestor which are not sought by the requestor.

The test to determine whether information is private and excepted from disclosure under common-law privacy provisions, which are encompassed in sections 552.101 or section 552.102 of the Government Code, is whether the information is (1) highly intimate or embarrassing to a reasonable person and (2) of no legitimate public concern. *Industrial Found. 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.). You assert that the records in their entirety are excepted from disclosure on the basis of privacy. 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 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.* The court also 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.* at 525. The court also held that the public possess a legitimate interest in full disclosure of the facts surrounding employee discipline in this type of situation. *Id.* at 525. We believe that there is a legitimate public interest in the identity of public employees accused of sexual harassment in the workplace and the details of the complaint, regardless of the outcome of the investigation. See Open Records Decision Nos. 470 at 4 (1987) (public has legitimate interest in job performance of public employees); 423 at 2 (1984) (scope of public employee privacy is generally narrow).

We have reviewed the documents at issue. As *Ellen* discusses, the public has a legitimate interest in this investigation, but not in the identities of the victims and witnesses to the alleged harassment. Thus, you must redact the identities of any victims and witnesses to the alleged harassment. We will address your other concerns regarding release of the remaining portions of the records.

You assert that section 552.111 is applicable to portions of the records, as marked. Section 552.111 excepts interagency and intraagency communications from disclosure only to the extent that they contain advice, opinion, or recommendation for use in the governmental body's policymaking process. Open Records Decision No. 615 at 5 (1993). A governmental body's policymaking functions do not encompass general personnel matters such as the investigation and disciplining of an employee. *Id.* Section 552.111 also does not except from disclosure purely factual information. Section 552.111 does except from required public disclosure preliminary drafts of documents related to policymaking matters, since drafts represent the advice, opinion, and recommendation of the drafter as to the form and content of the final documents. See Open Records Decision No. 559 (1990). The information you have marked is not excepted from disclosure under section 552.111.

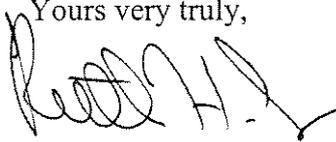
We also note that your letter references the Privacy Act of 1974 as it relates to addresses of public employees. Sections 552.024 and 552.117 of the Government Code

provide that a public employee can opt to keep private the employee's home address, home telephone number, social security number, or information that reveals whether the individual has family members. The Government Code provides that this information must be withheld from disclosure if, as of the time of the request for the information, the employee had elected to keep the information private. Open Records Decision Nos. 530 at 5 (1989), 482 at 4 (1987), 455 (1987). Thus, if you determine that this type of information is responsive to the request, as discussed previously, it may be confidential under section 552.117.

The information at issue, except as discussed above, must be disclosed.

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 questions about this ruling, please contact our office.

Yours very truly,



Ruth H. Soucy
Assistant Attorney General
Open Records Division

RHS/ch

Ref: ID# 118109

Enclosures: Submitted documents

cc: Mr. Harvey Gough
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(w/o enclosures)