



February 1, 2001

Mr. James L. Hall
Assistant General Counsel
Texas Department of Criminal Justice
P.O. Box 4004
Huntsville, Texas 77342

OR2001-0400

Dear Mr. Hall:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 143808.

The Texas Department of Criminal Justice (the "department") received a request for "EEO" investigations concerning policy and procedural violations of several department Internal Affairs employees. You claim that the requested information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we note that pursuant to section 552.301(e), 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. You did not, however, submit to this office a copy of the written request for information.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to submit to this office a copy of the written request for information results in the legal presumption that the information is public and must be released. Information that is presumed public 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 Gov't Code § 552.302); Open Records Decision No. 319 (1982). Protection of the privacy interests of third parties is a compelling reason that overcomes the presumption of openness. Open Records Decision Nos. 473 (1987), 71 (1975). As you assert that the requested information is confidential pursuant to section 552.101 of the Government Code and common law privacy, we will address your arguments for withholding this information.

Before we address the issue of common law privacy, we note that the submitted investigation files appear to be made expressly public by section 552.022 of the Government Code. The Seventy-sixth Legislature amended section 552.022 of the Government Code to make certain information expressly public, and therefore not subject to discretionary exceptions to disclosure. Section 552.022 now states in relevant part:

- (a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and are not excepted from required disclosure under this chapter unless they are expressly confidential under other law.

Gov't Code § 552.022. One such category of expressly public information under section 552.022 is "a completed report, audit evaluation, or investigation made of, for, or by a governmental body, except as provided by [s]ection 552.108" Gov't Code § 552.022(a)(1). The submitted information consists of three investigation files that appear to have been completed. Therefore, as prescribed by section 552.022, these investigation files must be released to the requestor unless they are confidential under other law, including common law privacy.

Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 also encompasses the doctrines of common law and constitutional privacy. For information to be protected by common law privacy it must meet the criteria set out in *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The *Industrial Foundation* 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. 540 S.W.2d at 685.

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.*

You assert that with regard to case numbers 00000309, 00000697, and 00000310, the statements of the respondents contained in each file at Tab C-2, and the "Fact finding Inquiry Memorandum" [sic] associated with each case found at Tab B of each file, are public information. You assert, however, that the names of the complainant and witnesses contained within these documents, as well as the remainder of the submitted information, are excepted under common law privacy. We agree, and have marked the information contained within the documents to be released which must be withheld under common law privacy and section 552.101.

We note in this regard that one of the witnesses appears to be the requestor. Section 552.023 gives a person or a person's authorized representative a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from disclosure by laws intended to protect that person's privacy interest. Therefore, pursuant to section 552.023, the information regarding the requestor should not be redacted from the information to be released.

Finally, we note that within the documents to be released in Tabs C-2 and B of each file is information that is protected under section 552.117 of the Government Code. Section 552.117(3) excepts from public disclosure information relating to the home address, home telephone number, and social security number of an employee of the department, as well as information revealing whether that employee has family members. We have marked the information to be withheld under section 552.117(3).

To summarize, the department must release the statements of the respondents contained in each file at Tab C-2, and the "Fact finding Inquiry Memorandum" associated with each case found at Tab B of each file. Pursuant to section 552.101 of the Government Code and common law privacy, the name of the complainant and the names of witnesses must be redacted from the documents to be released. Further, certain information contained in the documents to be released must be withheld under section 552.117. Pursuant to section 552.023, the information pertaining to the requestor should not be redacted from the information to be released. The department must withhold the remainder of the submitted information under common law privacy and section 552.101 of the Government Code.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for

contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael A. Pearle". The signature is written in a cursive, flowing style.

Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/seg

Ref: ID# 143808

Encl. Submitted documents

cc: Mr. Robert Guard
1702 FM 980, #22
Huntsville, Texas 77320
(w/o enclosures)