



March 27, 2001

Mr. James G. Nolan  
Supervising Attorney  
Legal Department - Information Release  
Texas Workforce Commission  
101 East 15<sup>th</sup> Street  
Austin, Texas 78778-0001

OR2001-1211

Dear Mr. Nolan:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 145308.

The Texas Workforce Commission (the "commission") received a request for all personnel records of a specified individual maintained by the commission since January 1, 1997. You state that all documents from the requestor's personnel file which are "clearly available" will be made available to the requestor on February 1, 2001. Therefore, we assume that you have already released to the requestor those documents that you believe are not excepted from disclosure under the Public Information Act (the "Act"). However, you claim that the rest of the requested information is excepted from disclosure under sections 552.101, 552.102, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You seek to withhold information in the personnel file from the requestor, including the requestor's own social security number. Section 552.023 of the Government Code provides an individual with a limited special right of access to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person's privacy interests. *See* Gov't Code § 552.023(a). A governmental body may not deny a person access to such information on the grounds that the information is considered confidential by privacy principles, but may assert as grounds for denial of access other provisions of the Act or other law that are not intended to protect the person's

privacy interests. *See* Gov't Code § 552.023(b); *see also* Open Records Decision No. 288 at 3-4 (1981), 481 (1987) (determining that common-law privacy does not provide basis for withholding information from its subject).

Therefore, all information in a personnel file of an employee of a governmental body generally is to be made available to that employee pursuant to section 552.023 of the Government Code. You must release the personnel file information to the requestor to the extent that the sole basis for withholding the information from the requestor is to protect the requestor's privacy. This would include the requestor's own social security number. However, you may withhold the personnel file information from the requestor to the extent that the bases for withholding the information concerns provisions of the Act or other law that are not intended to protect the requestor's privacy interests. We now examine the provisions of the Act or other law that are not intended to protect the requestor's privacy interests for the purpose of determining whether any of the personnel file information may be withheld from disclosure.

You claim that information in the personnel file is excepted from disclosure pursuant to section 552.102 of the Government Code. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Act. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Accordingly, we will consider your section 552.101 and section 552.102 claims together.

Section 552.101 excepts from public disclosure information that is considered confidential by law, either constitutional, statutory, or by judicial decision. You claim that personnel file information relating to identities of witnesses and their statements in connection with allegations that the requestor committed acts constituting violence in the workplace is excepted from disclosure pursuant to section 552.101 in conjunction with the common law right to privacy. For information to be protected by common law privacy it 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). The *Industrial Foundation* court held 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.

In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the court addressed the applicability of the right of common law privacy to the files of a sexual harassment investigation. 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.* When there is an adequate summary of the investigation, the summary must be released, but the identities of the victims and witnesses must be redacted and their detailed statements must be withheld from disclosure.

After reviewing the submitted documents, we do not believe that *Ellen* is applicable in this instance. *Ellen* addressed the applicability of common law privacy to information concerning investigations of sexual harassment allegations. You do not assert that the information pertains to allegations of sexual harassment. Nor does any of the information appear to be sexual harassment investigation reports. You assert that "violence in the workplace" is a type of sexual harassment, but you have not provided any support for this proposition or otherwise shown that the records concern an investigation of acts of sexual harassment. See *Nagel Manufacturing and Supply Company v. Ulloa*, 812 S.W.2d 78, 80-81 (Tex. App. - Austin 1991, writ denied). Moreover, *Ellen* did not consider whether the common law right to privacy protects information about an investigation of violence in the workplace. Therefore, we conclude that you may not withhold information pertaining to the identities of the witnesses or their statements under section 552.101 of the Government Code in conjunction with the common law right to privacy.

Section 552.101 of the Government Code also encompasses information protected by other statutes. You assert that some personnel file information pertains to employer tax file records and is, therefore, excepted from disclosure pursuant to section 301.081 of the Labor Code. Section 301.081 reads in part as follows:

- a) Each employing unit shall keep employment records containing information as prescribed by the commission and as necessary for the proper administration of this title. The records are open to inspection and may be copied by the commission or an authorized representative of the commission at any reasonable time and as often as necessary.
- b) The commission may require from an employing unit sworn or unsworn reports regarding persons employed by the employing unit as necessary for the effective administration of this title.
- c) Employment information thus obtained or otherwise secured may not be published and is not open to public inspection, other than to a public

employee in the performance of public duties, except as the commission considers necessary for the proper administration of this title.

Labor Code § 301.081. This office interpreted the predecessor provision of section 301.081(c) to apply to information the commission obtained from the records and reports that employers are required to file with the commission. *See* Open Records Decision No. 599 (1992) (construing former V.T.C.S. art. 5221b-9). You state that “[p]ortions of the requested documents contain references to employer tax files . . .” You do not assert that the documents submitted are employers’ records or reports that an employer is required to file with the commission pursuant to section 301.081. Nor do they appear to be so. Therefore, the submitted documents are not records protected from public disclosure pursuant to section 552.101 in conjunction with section 301.081 of the Labor Code.

However, we note that the submitted information contains commission tax account identification numbers. Pursuant to section 603 of title 20 of the Code of Federal Regulations, the account numbers constitute a “state employer identification number” within the definition of “wage information.” Federal regulations prohibit the disclosure of “wage information,” except to an authorized requesting agency under certain circumstances. *See* 20 C. F. R. § 603.5; *see also* Open Records Decision No. 599 at 6 (1992). Therefore, the commission tax account identification numbers contained within the submitted information are confidential by federal regulation. Accordingly, they are excepted from disclosure pursuant to section 552.101 of the Government Code and must be withheld from the requestor.

You also assert that the social security numbers contained within the submitted information may be excepted from disclosure pursuant to section 552.117 of the Government Code. Section 552.117 provides in part:

Information is excepted from [required public disclosure] if it is information that relates to the home address, home telephone number, or social security number, or that reveals whether the following person has family members:

- (1) a current or former official or employee of a governmental body, except as otherwise provided by Section 552.024.

Section 552.117 excepts from required public disclosure the home addresses, telephone numbers, social security numbers, or personal family member information of public employees who request that this information be kept confidential under section 552.024. Therefore, section 552.117 requires you to withhold this information if a current or former employee or official requested that this information be kept confidential under section 552.024. *See* Open Records Decision Nos. 622 (1994), 455 (1987). You state that the employees noted in the submitted documents made an election under section 552.024 to keep their social security numbers confidential. However, this information may not be

withheld if the current or former employee made the request for confidentiality under section 552.024 *after* the request for information at issue was made. Whether a particular piece of information is public must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). You have not shown when each of these employees made the election under section 552.024. Therefore, the commission is required to withhold the social security numbers contained in the submitted documents from disclosure under section 552.117 *only if* the employee requested confidentiality under section 552.024 before the request for information at issue was made.

You also claim that the social security numbers are excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with the 1990 amendments to the federal Social Security Act. *See* 42 U.S.C. § 405(c)(2)(C)(viii)(I). A social security number is excepted from disclosure under the 1990 amendments to the federal Social Security Act if it was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994). You state that the social security numbers at issue were “not collected pursuant to a system of records in existence prior to 1974[.]” However, this is not the legal standard. You do not state that the social security numbers were obtained or are maintained pursuant to a provision of law enacted on or after October 1, 1990. Therefore, we have no basis for concluding that the social security numbers at issue are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the commission pursuant to any provision of law, enacted on or after October 1, 1990.

You also claim that the social security numbers are protected from disclosure pursuant to section 552.101 of the Government Code in conjunction with the Federal Privacy Act of 1974 (the “Privacy Act”). *See* 5 U.S.C. § 552b. The commission is not an agency covered by the Privacy Act. *See* Attorney General Opinion MW-95 (1979). Therefore, the requested information is not confidential pursuant to the Privacy Act.

In summary, pursuant to section 552.023 of the Government Code, you must provide the requestor with his social security number and other personnel file information that is solely protected from disclosure based on laws intended to protect his own privacy interests. You must also release to the requestor personnel file information relating to identities of witnesses and their statements in connection with allegations that the requestor committed acts constituting violence in the workplace, as that information is not excepted from disclosure under section 552.101 in conjunction with *Ellen*. You must provide the requestor with all personnel file information pertaining to references to employer tax file records. You must withhold the tax account identification numbers in those records since they are confidential pursuant to federal regulation. The social security numbers contained within the personnel file information must be withheld from disclosure pursuant to section 552.117 of the

Government Code if the employees associated with each social security number made an election under section 552.024 to have these numbers withheld from disclosure before the request for information at issue was made. The social security numbers may also be protected from disclosure pursuant to section 552.101 of the Government Code in conjunction with the federal Social Security Act if the numbers were obtained or maintained by the commission pursuant to any provision of law enacted on or after October 1, 1990. The social security numbers are not protected from disclosure pursuant to section 552.101 of the Government Code in conjunction with the federal Privacy Act since the commission is not an agency covered by the Privacy Act.

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).

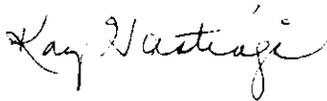
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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,



Kay H. Hastings  
Assistant Attorney General  
Open Records Division

KH/RJB/seg

Ref: ID# 145308

Encl. Submitted documents

cc: Mr. John R. Gray  
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(w/o enclosures)