



December 17, 2001

Ms. Janice Mullenix
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR2001-5905

Dear Ms. Mullenix:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 156169.

The Texas Department of Transportation (the “department”) received a request for various documents relating to the employment of the requestor, including information pertaining to a sexual harassment investigation. You tell us that you will release most of the responsive information to the requestor, but claim that a portion of the requested information is excepted from disclosure under sections 552.101, 552.107 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that section 552.022 of the Government Code makes certain information expressly public, and therefore not subject to discretionary exceptions to disclosure. Section 552.022 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). We find that a portion of the information you have submitted is subject to section 552.022(a)(1). Therefore, as prescribed by section 552.022, this information pertaining to a completed investigation must be released to the requestor unless it is confidential under other law.

Investigations of sexual harassment are subject to section 552.101 of the Government Code. This section excepts from required public disclosure information that is considered confidential by law, either constitutional, statutory, or by judicial decision. Information may be withheld under section 552.101 in conjunction with the common-law right to privacy if (1) the information contains highly intimate or embarrassing facts about a person's private affairs such that release of the information would be highly objectionable to a reasonable person, and (2) the information is of no legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The court addressed the applicability of the common law privacy doctrine to files of an investigation of allegations of sexual harassment in *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied). 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. *Id.* The *Ellen* court held that as information pertinent to the sexual harassment charges and investigation had been released to the public in summary form, the legitimate interests of the public had been satisfied. *Id.*

Based on *Ellen* and prior decisions of this office, *see, e.g.*, Open Records Decision Nos. 393 (1983), 339 (1982), a governmental body must withhold the identities of alleged victims and witnesses to alleged sexual harassment as well as any information which would tend to identify a witness or victim. Note, however, that the common law right of privacy does not protect facts about a public employee's alleged misconduct on the job or complaints made about his performance. Open Records Decision Nos. 438 (1986), 230 (1979), 219 (1978). Therefore, the identity of the alleged offender may not be withheld from public disclosure.

Where documents responsive to a request for information contain an adequate summary of a sexual harassment complaint investigation, that summary must be released, with victim and witness identifying information redacted. The remainder of the investigation materials, including the victim and witness statements, must generally be withheld.

We find that the sexual harassment investigation materials, which in this case comprises all of the submitted information in Exhibits B and C, include documents that constitute an adequate summary of this investigation. (See blue flag). Therefore, you must withhold the information in Exhibits B and C with the exception of the documents that we have marked as constituting a summary, which must be disclosed pursuant to *Ellen*. 840 S.W.2d at 525. However, the identities of the victims and witnesses to the alleged sexual harassment are

protected by common-law privacy. Therefore, the information you have marked must be redacted from the summary documents. *Id.*

With regard to the information in submitted Exhibit D, you assert that this information is excepted under section 552.107. Section 552.107(1) excepts 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 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. Open Records Decision No. 574 at 5 (1990). Section 552.107(1) does not except purely factual information from disclosure. *Id.* Section 552.107(1) does not except from disclosure factual recounting of events or the documentation of calls made, meetings attended, and memos sent. *Id.* at 5. Upon review of the information you have marked in Exhibit D, we conclude that this information is protected by the attorney-client privilege, and therefore may be withheld under section 552.107(1). As we resolve your request for this information under section 552.107, we need not address your argument under section 552.111.

To summarize, the department must withhold all of the information in Exhibits B and C under section 552.101 and common-law privacy, with the exception of three pages we have marked as an adequate summary. The identities of the victim and witnesses must be withheld from the summary to be released. The information you have marked in Exhibit D may be withheld under section 552.107(1). The remainder of Exhibit D must be released to the requestor.

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 Texas Building and Procurement 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,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/seg

Ref: ID# 156169

Enc. Submitted documents

c: Mr. Weldon Moser
4812 Johnson Road #123
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(w/o enclosures)