



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

March 26, 2003

Ms. Pamela Smith
Assistant General Counsel
Texas Department of Public Safety
P.O. Box 4087
Austin, Texas 78773-0001

OR2003-2058

Dear Ms. Smith:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 178399.

The Texas Department of Public Safety (the "department") received a request for records pertaining to internal affairs investigation number A1102-014, and personnel and disciplinary information relating to four named department employees. You state that most of the responsive information will be released to the requestor. You claim, however, that portions of the requested information are excepted from disclosure under sections 552.101 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client

privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Fourth, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state that the document submitted as Exhibit A is a memorandum prepared by an attorney in the department’s Office of General Counsel. You also state that the document contains the attorney’s legal analysis of certain facts and legal advice regarding a personnel matter, and was communicated in the furtherance of the attorney’s rendition of professional legal services to the department. Based on your representations and our review, we determine that the department has demonstrated that the attorney-client privilege applies to Exhibit A. We therefore determine that the department may withhold Exhibit A pursuant to section 552.107(1) of the Government Code.

We note that you have marked information in Exhibit B that may be excepted from disclosure under section 552.117 of the Government Code. Section 552.117(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Section 552.117(2) excepts from disclosure the home address, home telephone number, social security number, and the family member information of a peace officer as defined by article 2.12 of the Code of Criminal Procedure. We are unable to determine from the information provided whether the employees at issue are still licensed peace officers. If the employees at issue are licensed peace officers, the department must withhold the information we have marked under section 552.117(2). If the employees are no longer licensed peace officers, and if the employees elected to keep personal information confidential pursuant to section 552.024 prior to the date of the present request, then the department must withhold

the marked information under section 552.117(1) of the Government Code. If, however, the employees are not licensed peace officers and did not make a timely election pursuant to section 552.024, the department may not withhold this information under section 552.117 of the Government Code.

We note, however, that if the employees are not licensed peace officers and did not timely elect to keep their social security numbers confidential pursuant to section 552.024, the social security numbers may be confidential under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See Open Records Decision No. 622 (1994)*. These amendments make confidential social security numbers and related records that are obtained or maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that social security numbers in the submitted documents 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 Public Information Act imposes criminal penalties for the release of confidential information. Prior to releasing social security numbers, the department should ensure that the social security numbers were not obtained and are not maintained by the department pursuant to any provision of law, enacted on or after October 1, 1990.

You have also marked a Texas driver's license number in the submitted documents. Section 552.130 of the Government Code provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]

(2) a motor vehicle title or registration issued by an agency of this state[.]

You must withhold the marked Texas driver's license number under section 552.130.

Next, you argue that some of the information in Exhibit B is excepted under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses the doctrine of common-law privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of 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). You

state that portions of the information at issue pertain to an investigation into allegations 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.*

The information submitted as Exhibit B contains an internal affairs investigation of one of the department employees at issue, and a prior investigation of allegations of sexual harassment. You advise that the internal affairs investigation contains documents that make reference to the submitted sexual harassment investigation. Upon review, we find that the documents comprising the sexual harassment investigation contain an adequate summary of the investigation, which we have marked. Therefore, you must withhold the submitted sexual harassment investigation file except for the marked 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 and must be withheld. *Id.* Contrarily, the public interest in the statement and the identity of the alleged harasser outweighs any privacy interest the alleged harasser may have in that information; therefore, the university may not withhold this information under section 552.101. The public has no legitimate interest in the details of the victims' and witnesses' personal statements, and they may not be disclosed. *Id.* With respect to the other internal affairs investigation submitted in Exhibit B, you must withhold the marked identities of victims and witnesses under section 552.101 in conjunction with common-law privacy. The remainder of the other internal affairs investigation in Exhibit B is not protected by privacy and must be released.

In summary, the department may withhold Exhibit A pursuant to section 552.107 of the Government Code. We have marked information that the department must withhold under section 552.117(2) of the Government Code if the employees at issue are licensed peace officers. If the employees are not licensed peace officers, and if the employees elected to keep personal information confidential pursuant to section 552.024, then the marked information must be withheld under section 552.117(1) of the Government Code. Social security numbers may be confidential under section 552.101 in conjunction with federal law. A Texas driver's license number must be withheld under section 552.130 of the Government Code. We have marked information that the department must withhold under

section 552.101 of the Government Code in conjunction with common-law privacy. The remainder of the submitted information 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 Dep't of Pub. 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. We note that a third party may challenge

this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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 "Dr. Saldivar", with a long horizontal flourish extending to the right.

David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 178399

Enc: Submitted documents

c: Ms. Nanci Wilson
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(w/o enclosures)