



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

April 29, 2003

Mr. James M. Frazier, III
Assistant General Counsel
Texas Department of Criminal Justice
P.O. Box 4004
Huntsville, Texas 77342

OR2003-2867

Dear Mr. Frazier:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 180186.

The Texas Department of Criminal Justice (the "department") received two written requests from a department employee. The first request seeks, among other things, records pertaining to a certain EEO investigation¹, and the second request seeks records pertaining to a "Pre-Hearing Administrative Review." You contend that portions of the requested information are excepted from required disclosure pursuant to sections 552.101 and 552.117 of the Government Code.²

Initially, we note that the records pertaining to both of the requests are expressly made subject to section 552.022 of the Government Code. This section provides several categories of information that are not excepted from required disclosure unless they "are expressly confidential under other law." In pertinent part, section 552.022 provides as follows:

¹We assume the department has released the other information sought in this request. If it has not, it must do so at this time. See Gov't Code §§ 552.301, .302.

²Although you raised additional exceptions in your initial briefs to this office, you no longer argue that those exceptions are applicable in this instance.

(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 not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The submitted records consist of completed investigations, which are expressly public under section 552.022(a)(1). Therefore, the department may withhold this information only if the information is confidential under other law or the information comes within the protection of section 552.108 of the Government Code.³ Because you contend that portions of the information at issue are confidential for purposes of sections 552.101 and 552.117(3) of the Government Code, we will consider your claims.

We first address the extent to which the records sought in the first request are subject to required public disclosure. The EEO investigation concerns an allegation of sexual harassment. Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision,” including information that is encompassed by the common-law right to privacy. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information is protected from disclosure under the common-law right to privacy if (1) it contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) it is not of legitimate concern to the public. *See id.* at 685

In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the court applied the common-law right to privacy addressed in *Industrial Foundation* to an investigation of allegations of sexual harassment. The investigation files at issue in *Ellen* contained third-party witness statements, an affidavit in which the individual accused of the misconduct responded to the allegations, and the conclusions of the board of inquiry that conducted the investigation. *See* 840 S.W.2d at 525. The court upheld the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the disclosure of such documents sufficiently served the public's interest in the matter. *Id.* The court further held, however, that “the public does 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.* Therefore, when there is an adequate summary of an investigation, the summary and any statements of the person under investigation must be released, but the identities of the victims and

³We note that you have not raised section 552.108 in this instance.

witnesses must be redacted and their detailed statements must be withheld from disclosure. However, when no adequate summary exists, detailed statements regarding the allegations must be released, but the identities of witnesses and victims must still be redacted from the statements.

In accordance with *Ellen*, this office typically has required the release of a document analogous to the conclusions of the board of inquiry in *Ellen*, but has held that a governmental body must withhold both the identities of victims and witnesses of alleged sexual harassment and any information that would tend to identify such a victim or witness. In this instance, the submitted information consists of statements by the victim of the alleged sexual harassment, statements of witnesses, the statement of the accused, a summary of the department's investigation, and other supporting documents. Upon careful review of the submitted information, we believe that the "Inter-Office Communication," dated September 10, 2002, is analogous to the conclusions of the board of inquiry, the release of which was upheld in *Ellen*. Accordingly, we conclude that the department must release the "Inter-Office Communication" and the statement of the accused to the requestor. In doing so, however, the department must withhold the identities of the witnesses, other than the accused, and information that would tend to identify the witnesses. *See Ellen*, 840 S.W.2d at 525. However, because the requestor is also the victim of the alleged harassment, the requestor has a special right of access, beyond that of the general public, to the requestor's identifying information in these documents. *See Gov't Code § 552.023(a)*. We have marked the information that the department must withhold in these documents pursuant to section 552.101 of the Government Code in accordance with *Ellen*. The department must also withhold the remaining submitted information from the EEO investigation in accordance with *Ellen*.

You also contend that portions of the EEO investigation to be released are excepted from required public disclosure under section 552.117(3) of the Government Code. Section 552.117(3) requires the department to withhold "information that relates to the home address, home telephone number, or social security number . . . or that reveals whether [a department employee] has family members." Accordingly, the department must withhold these categories of information within the "Inter-Office Communication" accused pursuant to section 552.117(3). We have marked the documents accordingly. *But see Gov't Code § 552.023*.

We now address the extent to which the records pertaining to the "Pre-Hearing Administrative Review" are excepted from required public disclosure. Unlike the EEO investigation, the "Pre-Hearing Administrative Review" does not concern allegations of sexual harassment. Consequently, an analysis under *Ellen* is inappropriate here. Therefore, the department may not withhold any portion of this investigation report pursuant to section 552.101 in conjunction with *Ellen*. However, we have marked some information that must be withheld pursuant to common-law privacy because it would reveal the identities of witnesses in the EEO investigation. We have also marked other information that the

department must withhold pursuant to section 552.117(3), as well as section 552.130(a)(2) of the Government Code, which makes confidential information relating to “a motor vehicle title or registration issued by an agency of this state.” *But see* Gov’t Code § 552.023. The remaining information contained in the “Pre-Hearing Administrative Review” must be released to the requestor.

In summary, the department must release the “Inter-Office Communication,” dated September 10, 2002, and the statement of the accused contained in the EEO investigation, except for the information contained those documents that we have marked in accordance with *Ellen* and section 552.117(3); the remaining documents in the EEO investigation must be withheld in accordance with *Ellen*. The only information contained in the “Pre-Hearing Administrative Review” that is excepted from required public disclosure is the information we have marked as coming within the protection of sections 552.101, 552.117(3), and 552.130; the remaining information from this investigation must be released to the requestor.⁴

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

⁴We note that because the requestor has a special right of access to much of the submitted information, the department must request another decision from this office if the department receives a subsequent request for this information from a different individual.

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,



V.G. Schimmel
Assistant Attorney General
Open Records Division

VGS/RWP/seg

Ref: ID# 180186

Enc: Marked documents

bc: (w/o enclosures)