



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

May 14, 2003

Mr. Stephen L. Crain
Atlas & Hall, L.L.P.
P.O. Box 3725
McAllen, Texas 78502

OR2003-3253

Dear Mr. Crain:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 181060.

The McAllen Independent School District (the "District"), which you represent, received a request for any and all documents related to allegations of sexual harassment incidents. You assert the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.117, and 552.135 of the Government Code.¹ We have reviewed the representative sample of information you submitted and we have considered the exceptions you claim.²

Initially, we note your contention that most of the submitted information is not responsive to the request. The Act requires a governmental body to make a good faith effort to relate a request for information to the information the governmental body holds. Open Records Decision No. 561 at 8 (1990). A governmental body should help the requestor to clarify the

¹ The District has submitted a copy of the requested information with numerous redactions. In the future, the District must submit the information in an unredacted form for this office's review. Gov't Code § 552.301.

² We assume the representative sample of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach and, therefore, does not authorize the withholding of any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

request by advising the requestor of the types of information available. Gov't Code § 552.222(b). In this instance, the requestors seek documents "related to any sexual harassment in which the requestors are named as targets or victims[.]" You indicate that the District has sought clarification from the requestors; however, as of the date of your brief, the requestors have not responded. After reviewing the submitted information, we believe that the information relates to the incidents described by the requestors. See Gov't Code § 552.001 (requiring the Office of the Attorney General to construe the Act liberally in favor of open government).

Also, as you acknowledge, you did not claim section 552.103 as an exception to required disclosure in your initial letter to this office. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply not later than the tenth business day after the date of receiving the written request. The District received the request for information on February 26, 2003. Therefore, the District should have claimed any applicable exceptions by March 12, 2003. However, you explain that the District can still assert its claim under section 552.103 because the District sought clarification from the requestors, and thereby tolled the ten-business-day time period in which it can raise applicable exceptions. See Gov't Code § 552.222 (providing that a governmental body may ask the requestor to clarify the request if the information requested is unclear to the governmental body); Open Records Decision No. 663 at 5 (1999) (providing that ten-day period is tolled during the clarification process). Yet, you do not provide us with the date on which you sought clarification from the requestor. Accordingly, we are unable to determine whether the ten-business-day time period to request a decision was tolled prior to its expiration. Consequently, we are unable to conclude that the District complied with the requirements of section 552.301(b).

According to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the information is public and must be released. A government body must release information presumed public, unless it 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). Normally, when some other source of law makes the information confidential or the information impacts third party interests, a compelling interest exists. Open Records Decision No. 150 at 2 (1977). Section 552.103, a discretionary exception under the Act, does not qualify as a compelling reason to withhold information from the public. See Open Records Decision Nos. 663 (1999) (governmental body may waive Gov't Code § 552.103); see also Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the District may not withhold the submitted information under section 552.103 of the Government Code.

Next, we address your assertions of sections 552.101 and 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 *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This provision encompasses the doctrine of common-law privacy. Accordingly, we address your claims under sections 552.101 and 552.102 together.

For information to be protected from public disclosure under common-law privacy, the information must meet the criteria set out in *Industrial Foundation*. See *id.* Common-law privacy protects information when (1) it contains highly intimate or embarrassing facts, the release of which would be highly objectionable to a reasonable person, and (2) the public has no legitimate interest in the disclosure of the information. *Id.* at 685; Open Records Decision No. 611 at 1 (1992).

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. *Id.* 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.

Upon review, we believe the submitted information constitutes an investigative file of sexual harassment allegations. Further, under an *Ellen* analysis, we find no adequate summary regarding these allegations. Thus, as no adequate summary exists, the District must release the submitted information to the requestors. See *id.* However, based on *Ellen*, the District must withhold the identities of the victim and witnesses of the harassment from disclosure. See *id.* The District has redacted many names from the submitted information; the District may not withhold all of these names. As we stated, the District must withhold only the identifying information of the complainant and the witnesses to the alleged sexual

harassment.³ The District may not withhold the names and other identifying information of supervisors, those who conducted the hearings, or any other person who was not a witness. Further, we do not believe handwriting constitutes victim-identifying information. However, we agree the District must withhold the audiotape in its entirety because the complainant's voice is identifying information. Also, we note *Ellen* provides no protection to those accused of sexual harassment. See *Ellen*, 840 S.W.2d at 525; see also Open Records Decision Nos. 405 at 2-3 (1983) (public has interest in manner in which public employee performs his job), 329 at 2 (1982) (information relating to complaints against public employees and discipline resulting therefrom is not protected under former section 552.101 or 552.102), 208 at 2 (1978) (information relating to complaint against public employee and disposition of the complaint is not protected under either the constitutional or common-law right of privacy). Therefore, the District may not withhold the identifying information of those accused of sexual harassment under *Ellen*.

Next, we note the potential applicability of section 552.117 of the Government Code to the submitted information. Section 552.117(1) excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024. Gov't Code § 552.117(1). Whether section 552.117 protects information from disclosure depends on when the request for information is made. See Open Records Decision No. 530 at 5 (1989). Therefore, the District must withhold information under section 552.117 on behalf of a current or former official or employee only if the individual made a request for confidentiality under section 552.024 prior to the date on which the District received the present request for information. If the employee timely elected to keep his or her personal information confidential, then the District must withhold it under section 552.117(1) of the Government Code.⁴ The District may not withhold this information under section 552.117 if the individual did not make a timely election to keep the information confidential.

In summary, the District must release a redacted version of the submitted information to the requestors in accordance with section 552.101 of the Government Code and *Ellen*. The District must withhold the identifying information of the victim and witnesses of the alleged sexual harassment under *Ellen*, including the audiotape in its entirety. The District must withhold the information subject to section 552.117 of the Government Code of those individuals who are not protected by *Ellen*, but have made a proper election to keep such information confidential under section 552.024 of the Government Code.

³ We note your assertion of section 552.135 of the Government Code to protect the identity of the victim. However, as *Ellen* provides protection for this information, we do not address your claim under section 552.135.

⁴ We note, under *Ellen*, the identifying information of the victim and witnesses of the alleged sexual harassment are already confidential. See *Ellen*, 840 S.W.2d at 525.

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 cursive script that reads "Christen Sorrell". The signature is written in black ink and is positioned below the word "Sincerely,".

Christen Sorrell
Assistant Attorney General
Open Records Division

CHS/seg

Ref: ID# 181060

Enc: Submitted documents

c: Mr. George Padilla
Ms. Sylvia DeLeon
c/o Atlas & Hall, L.L.P.
P.O. Box 3725
McAllen, Texas 78502
(w/o enclosures)