



OFFICE *of the* ATTORNEY GENERAL  
GREG ABBOTT

July 10, 2003

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

OR2003-4773

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# 183974.

The Texas Department of Public Safety (the "department") received a written request for the following information:

all documents relevant to an administrative investigation conducted by Terrell King, case number 0205-011-DSH, including, but not limited to, written statements, taped interviews, handwritten notes, summary of the investigation and recommendations concerning the findings of the investigation.

You state that some of the responsive information will be made available to the requestor. You contend, however, that the remaining information coming within the scope of the request is excepted from required disclosure pursuant to section 552.101 of the Government Code and rule 503 of the Texas Rules of Evidence.

We note at the outset that the release of the submitted records is governed by section 552.022 of the Government Code. Section 552.022 provides in pertinent 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 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) (emphasis added). The records you submitted to this office constitute a "completed investigation" for purposes of section 552.022(a)(1). Consequently, the department must release the submitted records unless they are expressly made confidential under other law or are excepted from disclosure under section 552.108 of the Government Code.<sup>1</sup> Because you contend that portions of the submitted records are excepted from required public disclosure under rule 503 of the Texas Rules of Evidence and section 552.101 of the Government Code, we will address these claims.

The Texas Supreme Court has held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will determine whether the submitted legal memorandum is confidential under rule 503. Rule 503(b)(1) provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

- (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
- (B) between the lawyer and the lawyer's representative;
- (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
- (D) between representatives of the client or between the client and a representative of the client; or
- (E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503.

---

<sup>1</sup> We note that you have not raised section 552.108 for the submitted information. *See* Gov't Code § 552.022(a)(1).

A communication is “confidential” if it is 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. *See id.* Therefore, in order for information to be withheld from disclosure under rule 503, a governmental body must: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ). Based on our review of your arguments and the submitted legal memorandum, we conclude that you have demonstrated that this document is encompassed by the attorney-client privilege and, therefore, may be withheld from disclosure pursuant to rule 503 of the Texas Rules of Evidence.

We now address your section 552.101 claim. Section 552.101 of the Government Code exempts from required public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision,” including the common-law right to privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy protects information if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, *and* it is of no legitimate concern to the public. *Id.* at 683-85.

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 investigatory files at issue in *Ellen* contained, among other things, individual witness and victim statements pertaining to the alleged sexual harassment. The court held that the names of witnesses and their detailed affidavits regarding allegations of sexual harassment were excluded from disclosure under the privacy doctrine as described in *Industrial Foundation* because “the public [did] not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements.” *Ellen*, 840 S.W.2d at 525. In determining that the identities of witnesses to sexual harassment were protected by common-law privacy, the court concluded that the information before the court

involves names of witnesses required to give information under threat of discipline, their statements regarding highly embarrassing, offensive and unprofessional conduct in the workplace, their dating and sexual relationships, the state of marriages and other highly personal material.

*Ellen*, 840 S.W.2d at 524, 525.

In this instance, however, after reviewing the documents you submitted to this office, we conclude that the subject investigation, although related to a separate investigation of sexual harassment, does not itself pertain to an allegation of sexual harassment. Consequently, the rationale in *Ellen* is inapplicable to the subject investigation as a whole. However, our review of the submitted documents reveals that the victim and some witnesses from the sexual harassment investigation are frequently identified as such in these documents. We therefore conclude that, in accordance with *Ellen*, the department must withhold those individuals' identities pursuant to common-law privacy in conjunction with section 552.101 of the Government Code. On the other hand, because the other witnesses in the subject investigation do not report any "highly embarrassing" information as contemplated in *Ellen*, we conclude that those witnesses' identities are not protected by common-law privacy and therefore must be released. We have marked the submitted documents accordingly.

You also contend that certain information contained in the submitted documents is also protected by common-law privacy because the information pertains to an individual's medical care. We note, however, that this information pertains to an individual whose identity is protected by common-law privacy as discussed above. The fact that this individual's identity is protected by common-law privacy adequately protects that individual's privacy interests. *Cf. Star-Telegram v. Doe*, 915 S.W.2d 471, 474-475 (Tex. 1995) (disclosure of certain facts that would enable "knowledgeable friends and acquaintances" to identify victim of sexual assault did not implicate victim's privacy interests where victim's name not disclosed to public). Consequently, the only portions of the submitted documents that must be withheld pursuant to common-law privacy are the identities of the victim of and witnesses to the sexual harassment referenced in the subject investigation.

Finally, we note that the submitted documents contain information that is made confidential under section 552.117(2) of the Government Code, which protects the home address, home telephone number, social security number, and family member information of "a peace officer as defined by Article 2.12, Code of Criminal Procedure, or a security officer commissioned under Section 51.212, Education Code." Unlike non-peace officer public employees, a peace officer need not affirmatively claim confidentiality for this information. Open Records Decision No. 488 (1988); *see also* Open Records Decision No. 506 (1988). We have marked the information that the department must withhold pursuant to section 552.117(2).

In summary, the submitted legal memorandum may be withheld pursuant to rule 503 of the Texas Rules of Evidence. The department must withhold the identities of the victim and witnesses from the sexual harassment investigation pursuant to section 552.101 in conjunction with the common-law right of privacy. The department must also withhold the

information we have marked as being excepted from public disclosure pursuant to section 552.117(2). The remaining 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 "Cindy Nettles". The signature is fluid and cursive, with the first name being more prominent.

Cindy Nettles  
Assistant Attorney General  
Open Records Division

CMN/RWP/sdk

Ref: ID# 183974

Enc: Submitted documents

c: Ms. Rhonda Cates  
Lyon, Gorsky, Baskett, Haring & Gilbert, L.L.P.  
2501 Cedar Springs, Suite 750  
Dallas, Texas 75201  
(w/o enclosures)