



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 28, 2003

Mr. James L. Hall
Assistant General Counsel
Texas Department of Criminal Justice
P.O. Box 4004
Huntsville, Texas 77342-4004

OR2003-6093

Dear Mr. Hall:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 186771.

The Texas Department of Criminal Justice (the "department") received two requests for the requestor's grievance file and for her EEO files. You claim that some of the requested information is excepted from disclosure under sections 552.101 and 552.117 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted. We assume that the department has released any other information that is responsive to these requests, to the extent that such information existed on the dates of the department's receipt of these requests. If not, then the department must release any such information at this time. *See* Gov't Code §§ 552.301, .302; Open Records Decision No. 664 (2000). We note that chapter 552 of the Government Code does not require the department to release information that did not exist when it received this request or to create responsive information. *See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ *dism'd*); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

Initially, we must consider whether the department has complied with section 552.301 of the Government Code in requesting this decision. Section 552.301 prescribes procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301 requires the governmental body to ask for the attorney general's decision and state the exceptions to disclosure that it claims not later than the tenth business day after the date of its receipt of the written request

for information. *See* Gov't Code § 552.301(b). Section 552.301 also requires the governmental body to submit to the attorney general, not later than the fifteenth business day after the date of its receipt of the request, (1) written comments stating why the governmental body's claimed exceptions apply to the information that it seeks to withhold; (2) a copy of the written request for information; (3) a signed statement of the date on which the governmental body received the request, or evidence sufficient to establish that date; and (4) the specific information that the governmental body seeks to withhold or representative samples of the information if it is voluminous. *See id.* § 552.301(e)(1)(A)-(D). If a governmental body does not request an attorney general decision as prescribed by section 552.301, the information requested in writing is presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold the information. *See id.* § 552.302.

In this instance, you state that the requestor submitted a request for "a copy of my grievance file" on June 6, 2003. You also inform us that the requestor added the words "And EEO Files" to the request on June 17, 2003. Thus, you indicate that the requestor submitted separate requests for information on June 6 and on June 17, 2003. You submitted the department's request for this decision under section 552.301(b) and some of the materials prescribed by section 552.301(e) on June 26, 2003. You submitted the balance of the materials prescribed by section 552.301(e) on June 27, 2003. With regard to the June 17, 2003 request for the EEO files, the department has complied with section 552.301 of the Government Code. However, to the extent that any of the submitted information is responsive to the June 6, 2003 request for the grievance file, the department has not complied with section 552.301 in requesting this decision. Thus, to the extent that the submitted information is responsive to the June 6 request for the grievance file, any such information is presumed to be public and must be released under section 552.302, unless there is a compelling reason to withhold any of the information from the public. *See also Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ).

The presumption that information is public under section 552.302 can generally be overcome when the information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). In this instance, you contend that some of the submitted information is excepted from disclosure under sections 552.101 and 552.117. As these exceptions can provide compelling reasons for non-disclosure under section 552.302, we will address your claims with regard to all of the submitted information under sections 552.101 and 552.117.

Section 552.101 of the Government Code excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses the common-law right to privacy. Information must be withheld from the public under section 552.101 in conjunction with common-law privacy when the information is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) of no

legitimate public interest. See *Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). 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 alleged 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.*

Thus, if there is an adequate summary of an investigation of alleged sexual harassment, the investigation summary must be released under *Ellen*, but the identities of the victims and witnesses of the alleged sexual harassment must be redacted, and their detailed statements must be withheld from disclosure. See also Open Records Decision Nos. 393 (1983), 339 (1982). If no adequate summary of the investigation exists, then all of the information relating to the investigation ordinarily must be released, with the exception of information that would tend to identify the victims and witnesses. In either case, the identity of the individual accused of sexual harassment is not protected from public disclosure. Common-law privacy does not protect information about a public employee's alleged misconduct on the job or complaints made about a public employee's job performance. See Open Records Decision Nos. 438 (1986), 405 (1983), 230 (1979), 219 (1978).

You inform us that the submitted information relates to five investigations of alleged sexual harassment, four of which have been completed. We find that the analysis in *Ellen* is applicable to the submitted information. We also find that the submitted documents contain adequate summaries of the four completed investigations, as well as statements obtained in those investigations from the individuals who were accused of sexual harassment. However, the summaries and statements reveal the identities of witnesses to the alleged sexual harassment. We have marked the information in the summaries and statements that identifies the witnesses. The department must withhold that information, along with the rest of the documents that relate to the four completed investigations, under section 552.101 in conjunction with common-law privacy. The documents that relate to the fifth investigation do not contain an adequate summary of that investigation, and none of the documents that relate to that investigation contains any information that the department must withhold under section 552.101 in conjunction with common-law privacy.

We note that the summaries and statements of the completed investigations and the documentation of the fifth investigation also identify the victim of the alleged sexual harassment. Under other circumstances, the department also would be required to withhold

the victim's identity under section 552.101 in conjunction with common-law privacy. In this instance, however, the requestor was the victim of the alleged sexual harassment in all five investigations, and she therefore has a special right of access to the information that implicates her own privacy interests. *See* Gov't Code § 552.023; Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual asks governmental body for information concerning herself).¹ Information to which the requestor has a right of access under section 552.023 may not be withheld from her under section 552.101 in conjunction with common-law privacy.

The submitted documents also contain information that the department must withhold under section 552.117 of the Government Code. We note that the Seventy-eighth Legislature amended section 552.117 to except from required public disclosure the present and former home addresses and telephone numbers, social security number, and family member information of "a current or former employee of the [department] or of the predecessor in function of the department or any division of the department, regardless of whether the current or former employee complies with Section 552.1175." *See* Act of May 28, 2003, 78th Leg., R.S., S.B. 1388, § 1 (to be codified at Gov't Code § 552.117(a)(3)); *see also id.* § 4 (providing for immediate effectiveness of bill on receipt of vote of two-thirds majority of all members elected to each house). Thus, the present and former home addresses and telephone numbers, social security number, and family member information of a current or former employee of the department must be withheld from the public under section 552.117(a)(3). We have marked social security numbers and family member information that the department must withhold under section 552.117(a)(3). We note that the requestor also has a special right of access to her own social security number under section 552.023 of the Government Code, and thus that information may not be withheld from her under section 552.117(a)(3).

In summary, the department must withhold the marked information that is excepted from disclosure under section 552.101 of the Government Code in conjunction with common-law privacy. The department also must withhold the marked information that is excepted from disclosure under section 552.117(a)(3). The rest of the submitted information must be released.²

¹Section 552.023(a) provides that "[a] person or a person's authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person's privacy interests."

²Should the department receive another request for the information that relates to these investigations from a person who would not have a right of access to any of the private information, the department should resubmit this same information and request another decision.

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).

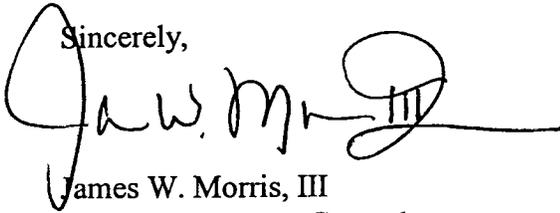
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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 "J.W. Morris, III". The signature is fluid and cursive, with a large initial "J" and a long horizontal stroke at the end.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 186771

Enc: Submitted documents