



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

December 30, 2003

Ms. Jennifer Soldano
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR2003-9344

Dear Ms. Soldano:

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# 193420.

The Texas Department of Transportation (the "department") received a request for "a complete copy of [the requestor's] client's personnel file along with any other documents reviewed or generated during the investigation underlying his termination." You claim that the requested information is excepted from disclosure under sections 552.101, 552.107, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information, some of which consists of representative samples.¹

Initially, we note that the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides as follows:

¹We assume that 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 that those records contain substantially different types of information than that submitted to this office.

[T]he 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). In this instance, the submitted information consists of a completed internal investigation. Thus, the department must release the information, unless it is expressly confidential under other law or excepted from disclosure under section 552.108.² Section 552.107, a discretionary exception under the Act, does not constitute "other law" that makes information confidential. *See* Open Records Decision Nos. 676 at 6 (2002) (section 552.107 is not other law for purposes of section 552.022), 630 at 4 (1994) (governmental body may waive statutory predecessor to section 552.107(1)); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the department may not withhold any portion of the submitted information under section 552.107 of the Government Code. However, we will address your arguments under sections 552.101 and 552.117 of the Government Code.

Section 552.101 of the Government Code 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. For information to be protected from public disclosure under common-law privacy, the information must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). 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

²The department does not raise section 552.108 as an exception to disclosure.

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.

The submitted records contain information that we find to be analogous to the summary released in *Ellen*. In accordance with the holding in *Ellen*, the department must release the summary, which we have marked. However, in accordance with the common-law privacy principles discussed in *Ellen*, the department must redact the information in the summary that tends to identify the victim and witnesses before releasing these documents. We agree that most of the information that you have marked in these documents must be withheld under section 552.101 in conjunction with common-law privacy; however, we have marked for release a small amount of information that you marked as private. We have also marked some additional information in these documents that is private and must be withheld under section 552.101. We note *Ellen* requires release of a statement of the accused. *See id.* Though you have not submitted such a statement to this office for review, we assume such a statement exists. Under *Ellen*, the identifying information of the victim and witnesses must be redacted from a statement of the accused. *See id.* All other submitted information must be withheld under section 552.101 of the Government Code in accordance with the common-law privacy concerns expressed in *Ellen*, except as further discussed below.

Additionally, we note that the records otherwise marked for release contain information subject to section 552.117 of the Government Code. Section 552.117(a)(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. 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 department must withhold personal information under section 552.117(a)(1) 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 department received the present request for information. For those employees who timely elected to keep their personal information confidential, the department must withhold the information that we have marked under section 552.117(a)(1). The department may not withhold this information under section 552.117(a)(1) for those employees who did not make a timely election to keep the information confidential.

In summary, the department must release the adequate summary of the sexual harassment investigation, except for the identifying information of the victim and witnesses, as well as some additional marked information, all of which must be withheld under section 552.101 in conjunction with common-law privacy. For those employees who timely elected to keep their personal information confidential, the department must withhold the information that we have marked under section 552.117(a)(1). The department may not withhold this information under section 552.117(a)(1) for those employees who did not make a timely

election to keep the information confidential. The remaining submitted information must be withheld from disclosure under section 552.101 in conjunction with common-law privacy.

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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/jh

Ref: ID# 193420

Enc. Submitted documents

c: Mr. Jason M. Willett
Hinds & Willett
510 West Main Street
Waxahachie, Texas 75165
(w/o enclosures)