



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 1, 2004

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

OR2004-2647

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# 198501.

The Texas Department of Public Safety (the "department") received a request for a specified report and all records relating to the report. You claim that some or all of the requested information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and have reviewed the information you submitted.

Initially, we address the department's obligations under section 552.301 of the Government Code. This section 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(b) 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(e) 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; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ).

You concede that the department failed to comply with section 552.301(b) in requesting this decision. Therefore, the submitted 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. 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). As the department's claim under section 552.101 of the Government Code can provide a compelling reason for non-disclosure under section 552.302, we will address your arguments.

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). The common-law right to privacy protects the specific types of information that the Texas Supreme Court held to be intimate or embarrassing in *Industrial Foundation*. *See* 540 S.W.2d at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has since concluded that other types of information also are private under section 552.101. *See generally* Open Records Decision No. 659 at 4-5 (1999) (summarizing information attorney general has determined to be private).

You inform us that the submitted information relates to a Texas Ranger's investigation of allegations that a Hudspeth County correctional officer violated the civil rights of persons in custody and engaged in improper sexual activity with persons in custody. You note that the names of victims and witnesses of alleged sexual harassment were held to be protected by common-law privacy in *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—1992, writ denied). You contend that the identities of victims or witnesses contained in the submitted investigative documents are private under section 552.101. You also argue that the submitted videotape is "replete with the name and image of at least one of the victims" and must therefore be withheld from disclosure in its entirety under section 552.101 and common-law privacy.

Having considered your arguments, we first note that the information at issue in *Morales v. Ellen* related to an administrative investigation of alleged sexual harassment in the

workplace. *See* 840 S.W.2d at 522. The *Ellen* court noted there was evidence that no criminal investigation or prosecution resulted from the investigation. *See id.* at 526. In this instance, the Texas Ranger's investigation involved alleged criminal conduct. *See* Pen. Code § 39.04. We therefore find that the rationale of *Morales v. Ellen* is not applicable to the submitted information. Nevertheless, we conclude that the department must withhold the information contained in the submitted documents that identifies the crime victims. *See* Open Records Decision Nos. 393 (1983) (information that identifies or tends to identify sexual assault victim protected by privacy under statutory predecessor to Gov't Code § 552.101), 339 (1982) (same). Likewise, we conclude that those portions of the videotape that reveal the name or likeness of any of the crime victims must be withheld under section 552.101 and common-law privacy. If the department has no means of redacting that information, then the entire videotape must be withheld under section 552.101. We conclude that the rest of the submitted information is a matter of legitimate public interest. *See* Open Records Decision Nos. 562 at 8-10 (1990) (information relating to police officer who was suspect in criminal investigation would not be private under statutory predecessor to Gov't Code § 552.101), 447 at 6 (1986) (common-law privacy does not protect facts about public employee's misconduct in workplace or complaints made about employee's performance), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performances of governmental employees, particularly employees who hold positions as sensitive as those held by members of sheriff's department), 208 at (1978) (names of officers who were subject of internal affairs complaints and dispositions of complaints not private). Therefore, the department may not withhold any of the remaining information under section 552.101 in conjunction with common-law privacy.

We note that the remaining information includes the social security number of the individual who was the subject of the investigation. A social security number is confidential under section 552.101 in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if it was obtained or is maintained by a governmental body under any provision of law enacted on or after October 1, 1990.<sup>1</sup> *See* Open Records Decision No. 622 at 2-4 (1994). It is not apparent to this office that the social security number in question here is confidential under section 405(c)(2)(C)(viii)(I) of the federal law. You have cited no law, and we are aware of no law, enacted on or after October 1, 1990 that requires or authorizes the department to obtain or maintain a social security number. Thus, we have no basis for concluding that this social security number was obtained or is maintained under such a law and is therefore confidential under the federal law. We caution you, however, that chapter 552 of the Government Code imposes criminal penalties for the release of confidential information. *See* Gov't Code §§ 552.007, .352. Therefore, before releasing the social security number that we have marked, the department should ensure that it was not obtained and is not maintained under any provision of law enacted on or after October 1, 1990.

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<sup>1</sup>Section 552.101 also encompasses information that another statute makes confidential.

The remaining information also includes the suspect's Texas driver's license number. Section 552.130 of the Government Code exempts from required public disclosure information that relates to "a motor vehicle operator's or driver's license or permit issued by an agency of this state[.]" Gov't Code § 552.130(a)(1). The Texas driver's license number that we have marked must be withheld under section 552.130.

In summary: (1) the department must withhold the marked information that identifies the alleged crime victims under section 552.101 of the Government Code in conjunction with common-law privacy; (2) those portions of the videotape that reveal the name or likeness of a victim must also be withheld under section 552.101 and common-law privacy; if the department has no means of redacting those portions of the videotape, then the entire videotape must be withheld; (3) the department may be required to withhold the marked social security number under section 552.101 in conjunction with section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code; and (4) the department must withhold the marked Texas driver's license number under section 552.130. The rest of the submitted information must be released.

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).

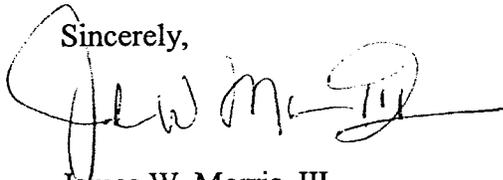
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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", written over a horizontal line.

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

JWM/sdk

Ref: ID# 198501

Enc: Submitted documents

c: Mr. Javier N. Maldonado  
Texas Lawyers' Committee  
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(w/o enclosures)