



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 21, 2004

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

OR2004-3231

Dear Ms. Soldano:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 199944.

The Texas Department of Transportation (TxDOT) received a request for a management directed investigation and information regarding disciplinary action taken against three named individuals, representatives samples of which you provide in Exhibits B and C.¹ You claim that the requested information is excepted from disclosure under sections 552.101 and 552.116 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.116(a) of the Government Code provides the following:

(a) An audit working paper of ... the auditor of a state agency ... is excepted from [public disclosure]. If information in an audit working paper is also maintained in another record, that other record is not excepted from [public disclosure] by this section.

(b) In this section:

(1) "Audit" means an audit authorized or required by a statute of this state or the United States and includes an investigation.

¹We assume that the 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.

(2) "Audit working paper" includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

TxDOT has authority under the General Appropriations Act to conduct internal audits. General Appropriations Act, 77th Leg. Leg., R.S., ch. 1515, § 20, 2001 Tex. Gen. Laws 5411, 6115; *see* Transp. Code §201.108; *see also* Gov't Code ch. 2102 (providing general method for a government body to conduct an audit). You state that the information in Exhibit B "was compiled during the course of a formal audit conducted by a TxDOT internal auditor employed in the Audit Office." After reviewing the submitted information, we conclude that the information in Exhibit B consists of audit working papers for purposes of section 552.116 of the Government Code; therefore, TxDOT may withhold the information in Exhibit B.

Exhibit C of the requested information includes an investigation of an allegation of sexual harassment. Section 552.101 excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Under section 552.101, information may be withheld on the basis of common law privacy. The doctrine of 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 the public has no legitimate interest in it. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (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 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. *Ellen*, 840 S.W.2d 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.*

Within Exhibit C is the document, "Report of Investigation: Management Direct Investigation Case No. 04-M-C857." This document contains an adequate summary of the investigation into the alleged sexual harassment. An investigation summary is not confidential, and must be released to the requestor; however, information within the

summary that identifies the victim and witnesses is confidential, and must not be released. *See Ellen*, 840 S.W.2d at 525. We have marked the information in the summary that must be withheld. Because there is a investigation summary, the remaining information that relates to the investigation of sexual harassment in the investigation file is confidential under the doctrine of common law privacy, and must not be released under section 552.101. *See id.* We note that the information in the investigation file not relating to the sexual-harassment allegation is not excepted under section 552.101.

We note that section 552.117 may be applicable to some of the submitted information, which we have marked. Section 552.117 excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See Open Records Decision No. 530 at 5 (1989)*. Therefore, TxDOT may withhold information under section 552.117 on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. For those employees who timely elected to keep their personal information confidential, TxDOT must withhold the employees' home addresses and telephone numbers, social security numbers, and any information that reveals whether these employees have family members. TxDOT may not withhold this information under section 552.117 for those employees who did not make a timely election to keep the information confidential.

In summary, we hold that (1) the information in Exhibit B consists of audit working papers that may be withheld from release under section 552.116, (2) some of the information in Exhibit C may be excepted under section 552.117 if the employees timely elected to keep their personal information confidential, and (3) the names of the victim and witness to sexual harassment found in the summary of the investigation of alleged sexual harassment, as well as the other information found in Exhibit C, are confidential and must be withheld under section 552.101. The remaining information is public and 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,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/seg

Ref: ID# 199944

Enc. Submitted documents

c: Mr. John Dixon
2300 Marsh Lane #1412
Carrollton, Texas 75006
(w/o enclosures)