



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 9, 2004

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

OR2004-5637

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# 204862.

The Texas Department of Transportation (the "department") received a request for information related to the requestor's client, including "investigative files [and] a copy of the original complaint" as well as the client's personnel file. You claim that the requested information is excepted from disclosure under sections 552.101, 552.107, and 552.117 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

We note the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides as follows:

[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:

¹Although you also argue the attorney-client privilege under sections 552.101 and 552.111 of the Government Code, this office has concluded that section 552.107 is the appropriate exception. *See* Open Records Decision No. 676 (2002). Thus, we consider your attorney-client arguments under this exception.

(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, you state the submitted information “contains the final report of an internal civil rights 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. 630 at 4 (1994) (governmental body may waive 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 the submitted information under section 552.107 of the Government Code. However, we note that the Texas Supreme Court has held that the Texas Rules of Evidence constitutes “other law” for purposes of section 552.022 of the Government Code. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we will address your arguments under sections 552.101 and 552.117 of the Government Code and rule 503 of the Texas Rules of Evidence.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision,” including information that is encompassed by the common law right to privacy. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). Information is protected from disclosure under the common law right to privacy if (1) it contains highly intimate or embarrassing facts, the release of which would be highly objectionable to a reasonable person, and (2) it is not of legitimate concern to the public. *See id.* at 685.

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.*

When there is an adequate summary of an investigation, the summary and any statements of the person under investigation must be released, but the identities of the victims and witnesses must be redacted and their detailed statements must be withheld from

²We note that the department does not raise section 552.108.

disclosure. However, when no adequate summary exists, detailed statements regarding the allegations must be released, but the identities of witnesses and victims must still be redacted from the statements.

In this instance, the submitted information is a completed investigation of sexual harassment allegations. We find the "Report of Investigation," dated March 4, 2004, constitutes an adequate summary of the sexual harassment investigation. Therefore, we conclude that, under *Ellen*, the department must release only the "Report of Investigation," with redactions of the identifying information of the victim and witnesses; the department must withhold the remainder of the submitted information. The department must also release the statement of the accused; however, under *Ellen*, the identifying information of the victim and witnesses must be redacted from such a statement.³ *See id.* We have marked the information the department must withhold from the Report of Investigation and statement of the accused under section 552.101 in conjunction with common-law privacy.⁴

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

³Some of the documents marked for release contain or consist of confidential information that is not subject to release to the general public. *See* Gov't Code § 552.352. However, the requestor in this instance has a special right of access to the information. *Id.* § 552.023. Because some of the information is confidential with respect to the general public, if the department receives a future request for this information from an individual other than the person whose information is at issue or the person's authorized representative, the department should again seek our decision.

⁴As section 552.101 is dispositive, we do not address your remaining claims.

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/sdk

Ref: ID# 204862
Enc. Submitted documents

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(w/o enclosures)