



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 3, 2005

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

OR2005-00047

Dear Ms. Alexander:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 215972.

The Texas Department of Transportation (the "department") received a request for e-mail contact lists and telephone logs for several named department employees; the complete personnel files of several named department employees, including the personnel file of the requestor; and fifteen categories of information pertaining to compliance with department policy and disciplinary action taken against department employees, to include information related to several specified incidents involving named department employees, and disciplinary action taken against the requestor. You claim that the requested information is excepted from disclosure under sections 552.101, 552.116, 552.117, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

As a preliminary matter, we note you have not submitted copies or samples of the requested phone or e-mail logs to this office for review. You have also not submitted copies or

¹ We 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.

samples of information responsive to the request for records concerning three specified incidents involving disciplinary action against department employees specifically identified by name in the request. Furthermore, you have failed to provide any copies or samples of information pertaining to investigations involving the requestor or disciplinary action taken against the requestor, as specified in the request. We therefore assume that any information maintained by the department that is responsive to these portions of the request has been released to the requestor, to the extent it exists. If not, the department must release such information immediately. *See* Gov't Code §§ 552.006, .301, .302; Open Records Decision No. 664 (2000) (concluding that section 552.221(a) requires that information not excepted from disclosure must be released as soon as possible under the circumstances). With respect to the sample information you have submitted for review, we will address your claimed exceptions to disclosure.

We note that the information submitted as Exhibit B is subject to section 552.022 of the Government Code, which provides in pertinent part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the 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, excepted as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). Exhibit B consists of completed investigations made of, for, or by the department. While you contend that this information is excepted from disclosure under section 552.116 of the Government Code, we note that this section is a discretionary exception to disclosure that protects a governmental body's interests and is therefore not other law that makes information expressly confidential for purposes of section 552.022(a). *See generally* Open Records Decision No. 522 (1989) (discretionary exceptions in general). Thus, none of the information in Exhibit B may be withheld pursuant to section 552.116. However, sections 552.101 and 552.117 do constitute other law for purposes of section 552.022, and we will consider your arguments regarding these exceptions for the information in Exhibit B.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and encompasses the doctrine of common-law right of privacy, which excepts from disclosure information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person and (2) not of legitimate concern to the public. *Indus. Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial*

Foundation included 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. 540 S.W.2d at 683.

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 into allegations of sexual harassment. The investigation files in *Ellen* contained individual witness statements, an affidavit by the accused individual responding to the allegations, and the 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 a sexual harassment investigation, the summary must be released along with the statement of the accused, but the identities of the victims and witnesses must be redacted and their detailed statements must be withheld from 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.

The submitted investigations concern allegations of sexual harassment. We find that the investigations contain information that is analogous to the summary released in *Ellen*. In accordance with the holding in *Ellen*, the department must release the summaries, which we have marked. However, prior to releasing this document, in accordance with section 552.101 and the holding in *Ellen*, the department must redact the complainant and witness identifying information we have marked. The remaining documents in Exhibit B must likewise be withheld under section 552.101 in conjunction with common-law privacy pursuant to the holding in *Ellen*.

With respect to the remaining submitted information, we note that prior decisions of this office have determined that personal financial information not related to a transaction between an individual and a governmental body is generally not subject to a legitimate public interest and is therefore protected by common-law privacy. *See* Open Records Decision No. 600 (1992). We have marked personal financial information in the submitted sample personnel documents that must be withheld under section 552.101 and common-law privacy. *See id.* (designation of beneficiary of public employee's retirement benefits protected under common-law privacy).

You have also marked information in the submitted sample personnel documents that you contend is excepted from disclosure under section 552.117(a)(1) of the Government Code.

Section 552.117(a)(1) 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 timely elect to keep this information confidential pursuant to section 552.024. Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is received by the governmental body. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the department may only withhold information under section 552.117 on behalf of current or former officials or employees who elected to keep information confidential pursuant to section 552.024 prior to the date on which the request for this information was made. You have submitted documentation showing that the employee whose information appears in the submitted sample personnel documents elected to keep this information confidential prior to the date the department received the present request. Accordingly, we agree the department must withhold the home address, telephone number, and social security number information you have marked pursuant to section 552.117(a)(1).

Finally, the submitted sample personnel documents contain a driver's license number. Section 552.130 of the Government Code excepts information relating to a Texas motor vehicle driver's license, title, or registration. Gov't Code § 552.130. Provided the marked driver's license number pertains to a Texas driver's license, it must be withheld pursuant to section 552.130 of the Government Code.

In summary, we have marked information in Exhibit B and in the remaining submitted documents that must be withheld pursuant to section 552.101 of the Government Code in conjunction with common-law privacy. We have also marked information in the remaining submitted documents that must be withheld pursuant to section 552.117(a)(1) of the Government Code. Provided the driver's license number we have marked pertains to a Texas driver's license, the department must withhold it under section 552.130 of the Government Code. Otherwise, the driver's license number must be released. The remainder of the information at issue is not excepted from disclosure and must be released to the requestor.²

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 thirty calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within ten calendar days.

² Based on these findings, we do not reach your remaining claimed exception to disclosure.

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 ten 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 ten 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); *Tex. 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 ten calendar days of the date of this ruling.

Sincerely,



David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 215972

Enc: Submitted documents

c: Mr. David Eng
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Houston, Texas 77018
(w/o enclosures)