



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 9, 2005

Mr. Michael P. Mondville
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Mr. John C. West
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Texas Department of Criminal Justice
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OR2005-05076

Dear Mr. Mondville and Mr. West:

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# 225752.

The Texas Department of Criminal Justice (the "department") received a request for all information held by the department that relates to the requestor. You inform us that the department has released some of the requested information.¹ You claim that other responsive information is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.117, 552.1175, and 552.134 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted.

¹You indicate that you have withheld information under section 552.117(a)(3) of the Government Code on the basis of the previous determination issued to the department in Open Records Letter No. 2005-01067 (2005) (authorizing department to withhold present and former home addresses and telephone numbers, social security numbers, and family member information of its current or former employees under Gov't Code § 552.117(a)(3), regardless of whether the current or former employee complies with Gov't Code § 552.1175).

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.” Gov’t Code § 552.101. 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 *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Common-law privacy encompasses the types of information that are 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 determined that other types of information also are private under section 552.101. See, e.g., Open Records Decision No. 659 at 4-5 (1999) (summarizing information attorney general has held to be private), 470 at 4 (1987) (illness from severe emotional job-related stress), 455 at 9 (1987) (prescription drugs, illnesses, operations, and physical handicaps), 343 at 1-2 (1982) (references in emergency medical records to drug overdose, acute alcohol intoxication, obstetrical/gynecological illness, convulsions/seizures, or emotional/mental distress). We have marked information that the department must withhold under section 552.101 of the Government Code in conjunction with common-law privacy.

In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the court applied the common-law right to privacy addressed in *Industrial Foundation* to an investigation of alleged sexual harassment. The investigation files at issue in *Ellen* contained third-party witness statements, an affidavit in which the individual accused of the misconduct responded to the allegations, and the conclusions of the board of inquiry that conducted the investigation. See 840 S.W.2d at 525. The court upheld the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the disclosure of such documents sufficiently served the public’s interest in the matter. *Id.* The court also held that “the public does 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.*

Thus, if there is an adequate summary of an investigation of alleged sexual harassment, the investigation summary must be released under *Ellen*, but the identities of the victims of and witnesses to the alleged sexual harassment must be redacted, and their detailed statements must be withheld from disclosure. See also Open Records Decision Nos. 393 (1983), 339 (1982). If no adequate summary of the investigation exists, then all of the information relating to the investigation must ordinarily be released, except for information that would identify the victims and witnesses. In either case, the identity of the individual accused of sexual harassment is not protected from public disclosure. Common-law privacy does not protect information about a public employee’s alleged misconduct on the job or complaints

made about a public employee's job performance. *See* Open Records Decision Nos. 438 (1986), 405 (1983), 230 (1979), 219 (1978).

Some of the submitted information relates to investigations of alleged sexual harassment. *Morales v. Ellen* is applicable to that information. Furthermore, the information in question includes adequate summaries of the investigations and statements of the individual accused of sexual harassment. Therefore, the department must release the investigation summaries and the statements of the accused individual, except for the marked portions of the summaries and statements that reveal the identities of the victims of the alleged sexual harassment and the witnesses in the investigations. The department must withhold the victim and witness information, as well as the rest of the information that relates to the sexual harassment investigations, under section 552.101 of the Government Code in conjunction with common-law privacy under *Morales v. Ellen*. We have marked that information accordingly.

Next, we address section 552.108 of the Government Code. This section excepts from public disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information that the governmental body seeks to withhold. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986).

The department seeks to withhold information relating to case number OIG 04-1260 under section 552.108(a)(1). The department informs us that case number OIG 04-1260 is an open criminal case that has been presented for possible prosecution. Based on this representation, we find that section 552.108(a)(1) is applicable to the information relating to case number OIG No. 04-1260. *See Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases).

We note that section 552.108 does not except from disclosure “basic information about an arrested person, an arrest, or a crime.” Gov’t Code § 552.108(c). Section 552.108(c) refers to the basic front-page information held to be public in *Houston Chronicle*. The department must release basic information with regard to case number OIG 04-1260, including a detailed description of the offense, even if this information does not literally appear on the front page of an offense or arrest report. *See Houston Chronicle*, 531 S.W.2d at 186-87; Open Records Decision No. 127 at 3-4 (1976) (summarizing types of information deemed public by *Houston Chronicle*). The department may withhold the rest of the submitted information that relates to case number OIG 04-1260 under section 552.108(a)(1).

The department also raises section 552.134 of the Government Code. This exception relates to inmates of the department. Section 552.134 states that “[e]xcept as provided by Subsection (b) or by Section 552.029 [of the Government Code], information obtained or maintained by the [department] is excepted from [required public disclosure] if it is information about an inmate who is confined in a facility operated by or under a contract with the department.” Gov’t Code § 552.134(a). Section 552.029 of the Government Code provides that notwithstanding section 552.134, eight specified categories of “information about an inmate who is confined in a facility operated by or under a contract with [the department are] subject to required disclosure[.]” These eight categories of information include

(8) basic information regarding the death of an inmate in custody, an incident involving the use of force, or an alleged crime involving the inmate.

Gov’t Code § 552.029(8). Thus, the legislature explicitly made section 552.134 subject to section 552.029.

We note that some of the documents that were submitted by the Office of General Counsel (“OGC”) contain inmate information that is excepted from disclosure under section 552.134(a). We have marked that information. We also find that section 552.134(a) is applicable to the rest of the information that was submitted by the Office of the Inspector General (“OIG”). We note, however, that some of that information relates to incidents involving a use of force or an alleged crime involving an inmate. Basic information about those incidents is subject to disclosure under section 552.029(8). The basic information that must be released under section 552.029(8) includes the time and place of the incident, the names of inmates and of department employees who were involved, a brief narrative of the incident, a brief description of any injuries sustained by anyone involved, and information regarding any criminal charges or disciplinary actions that were filed as a result of the incident. The rest of the information submitted by the OIG is excepted from disclosure under section 552.134.²

Lastly, we address section 552.117 of the Government Code. In Open Records Letter No. 2005-01067 (2005), we issued a previous determination that authorizes the department to withhold the present and former home address and telephone number, social security number, and family member information of a current or former employee of the department under section 552.117(a)(3) without the necessity of again requesting an attorney general decision with regard to the applicability of that exception. *See* Gov’t Code § 552.301(a); Open

²As section 552.134 is applicable to this information, we do not address the OIG’s other arguments under sections 552.103 and 552.108 of the Government Code. With regard to those exceptions, we note that the information that is subject to disclosure under section 552.029(8) corresponds to basic front-page information under section 552.108(c). Likewise, section 552.103 does not generally except from disclosure the basic information that must be released under section 552.108(c). *See* Open Records Decision No. 597 (1991).

Records Decision No. 673 at 7-8 (2001) (delineating elements of second type of previous determination under Gov't Code § 552.301(a)). We have marked employee social security numbers that the department must withhold under section 552.117(a)(3) in accordance with Open Records Letter No. 2005-01067 (2005). We note that the requestor has a special right of access to his own social security number. *See* Gov't Code § 552.023(a); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself).

In summary: (1) the department must withhold the information that is confidential under section 552.101 of the Government Code in conjunction with common-law privacy under *Industrial Foundation*; (2) except for those portions of the investigation summaries and the statements of the accused individual that must be released, the department must withhold the information that relates to the sexual harassment investigations under section 552.101 in conjunction with common-law privacy under *Morales v. Ellen*; (3) except for basic information under section 552.108(c), the department may withhold the information that relates to case number OIG 04-1260 under section 552.108(a)(1); (4) except for the information that is subject to disclosure under section 552.029(8), the information submitted by the OGC and the OIG that relates to inmates of the department is excepted from disclosure under section 552.134; and (5) the department must withhold the marked social security numbers under section 552.117(a)(3). The rest of the submitted information must be released. As we are able to make these determinations, we do not address your other arguments against disclosure.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the

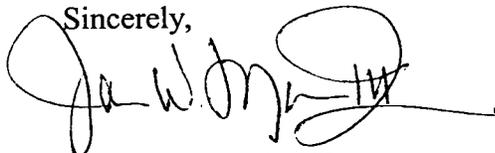
Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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 10 calendar days of the date of this ruling.

Sincerely,



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

JWM/sdk

Ref: ID# 225752

Enc: Submitted documents

c: Mr. Colas Miller
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