



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 13, 2006

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

OR2006-01432

Dear Ms. Alexander:

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# 244027.

The Texas Department of Transportation (the "department") received a request for (1) information relating to corruption, misappropriation, or similar types of misconduct involving department employees or contract workers during a specified time interval; and (2) the comprehensive balance of all department accessible accounts as of the date of the request. You indicate that a prior open records letter ruling is applicable to some of the requested information. You have submitted a representative sample of information that you claim is excepted from disclosure under sections 552.101, 552.116, and 552.117 of the Government Code. We have considered your arguments and have reviewed the submitted information.¹ We note that none of the submitted information appears to be responsive to the request for the comprehensive balance of all accessible accounts. We therefore assume that the department has released any other types of information that are responsive to this request,

¹This letter ruling assumes that the submitted representative samples of information are truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the department to withhold any information that is substantially different from the submitted information. See Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

to the extent that such information existed when the department received the request.² If not, then any such information must be released immediately. *See* Gov't Code §§ 552.221, .301, .302; Open Records Decision No. 664 (2000).

Initially, we address your statement that the present request for information involves the same requestor and most of the same subject matter as the request that resulted in Open Records Letter No. 2006-00107 (2006). You indicate that the prior ruling addresses the public availability of some of the information that is responsive to the present request. You do not inform us of any change in the relevant law, facts, and circumstances on which the prior ruling is based. Therefore, to the extent that Open Records Letter No. 2006-00107 encompasses any information that is responsive to the present request, the department must dispose of any such information in accordance with the prior ruling. *See* Gov't Code § 552.301(a); Open Records Decision No. 673 at 6-7 (2001) (listing elements of first type of previous determination under Gov't Code § 552.301(a)).

To the extent that the prior ruling is not applicable to the information that is responsive to the present request, we next address your claimed exceptions to disclosure. Section 552.116 of the Government Code provides as follows:

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, or a joint board operating under Section 22.074, Transportation Code, 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, the charter or an ordinance of a municipality, an order of the commissioners court of a county, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.

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

²We note that the Act does not require the department to release information that did not exist when it received this request or create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

(A) intra-agency and interagency communications; and

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

Gov't Code § 552.116.³ You state that the information submitted as Exhibit B consists of audit working papers. You inform us that this information relates to audits performed by internal auditors of the department under the authority of chapter 2102 of the Government Code and other state law. You also state that the final audit reports will be released. Based on your representations and our review of the information at issue, we conclude that the department may withhold all of the information in Exhibit B under section 552.116 of the Government Code.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov't Code § 552.101. You raise section 552.101 in conjunction with 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 highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. See *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). 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 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, however, 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.*

You are concerned that information contained in Exhibit F may be private under *Morales v. Ellen* or on other grounds. We note that the information in Exhibit F relates to public employees and their conduct in the workplace. As this office has often stated, the public has a legitimate interest in such information. Having considered your arguments, we find that none of the information in Exhibit F is protected by common law privacy. We therefore conclude that the department may not withhold any of the information in Exhibit F under section 552.101 of the Government Code. See, e.g., Open Records Decision Nos. 405 at 2 (1983) (manner in which public employee performed his or her job cannot be said to be of minimal public interest), 444 at 4 (1986) (public employee's personnel file information will

³As amended by Act of May 17, 2005, 79th Leg., R.S., ch. 202, § 1, 2005 Tex. Sess. Law Serv. (Vernon).

generally be available to public regardless of whether it is highly intimate or embarrassing), 470 at 4 (1987) (job performance does not generally constitute public employee's private affairs).

Lastly, we address section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024. Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or employee of a governmental body who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who did not make a timely request for confidentiality under section 552.024.

You believe that information that you have marked in Exhibit F is excepted from disclosure under section 552.117(a)(1). Having considered your arguments and reviewed the information in question, we find that most of the information that you seek to withhold under section 552.117 is not attributable to an identified employee of the department. Therefore, the department may not withhold any of that information under this exception. We have marked one item of information that the department must withhold under section 552.117(a)(1) if the employee whom it concerns timely requested confidentiality for the information under section 552.024.

In summary: (1) to the extent that Open Records Letter No. 2006-00107 encompasses any information that is responsive to the present request, the department must dispose of any such information in accordance with the prior ruling; (2) the department may withhold the information in Exhibit B under section 552.116 of the Government Code; and (3) the department must withhold the information that we have marked in Exhibit F under section 552.117(a)(1) if the employee whom it concerns timely requested confidentiality for the information under section 552.024. 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).

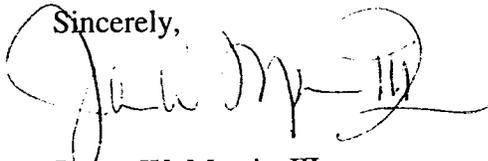
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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); *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 Office of the Attorney General 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. 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/krl

Ref: ID# 244027

Enc: Submitted documents

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