



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 14, 2006

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

OR2006-06287

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# 251835.

The Texas Department of Transportation (the "department") received a request for 1) all questions, answers, notes, documents and reports pertaining to investigations by three entities concerning the requestor and other individuals during a specified time period; and 2) numerous categories of personnel information related to six named individuals. You claim that the requested information is excepted from disclosure under sections 552.101, 552.116, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that you have not submitted information responsive to the second part of the request concerning personnel information for the six named individuals. Therefore, to the extent any additional responsive information existed on the date the department received this request, we assume it has been released. If you have not released any such records, you must release them to the requestor at this time. *See Gov't Code §§ 552.301(a), .302.; see also Open Records Decision No. 664 (2000) (noting that if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible under circumstances).*

You seek to withhold the information submitted as Exhibit B under section 552.116 of the Government Code. This exception 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:

(A) intra-agency and interagency communications; and

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

Gov't Code § 552.116. You state that Exhibit B consists of audit working papers. You inform this office that the information in Exhibit B was compiled during a formal audit authorized by section 201.108 of the Transportation Code and performed by an internal auditor of the department pursuant to section 2102.007 of the Government Code. *See* Transp. Code § 201.108 (pertaining to the authorization of an internal auditor); *see also* Gov't Code § 2102.007 (providing general method for a government body to conduct an audit). You also state, and provide documentation showing, that you have released the final audit report. *See* Gov't Code § 552.022(a)(1) (a completed audit by a governmental body is subject to required public disclosure). Based on your representations and our review, we conclude that the information in Exhibit B constitutes audit working papers that are excepted from disclosure under section 552.116.

We now turn to the information submitted as Exhibit C. 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 request that this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). However, information that is responsive to a request may not be withheld from disclosure under section 552.117(a)(1) if the employee did not request confidentiality for this information in accordance with section 552.024 or if the request for confidentiality under section 552.024 was not made until after the request for information was received by the governmental body. Whether a particular piece of information is public must be determined at the time the request is received by the governmental body. *See* Open Records Decision No. 530 at 5 (1989). We generally agree with the department's markings. If the employees at issue timely elected to

keep their personal information confidential, the department must withhold most of the information you have marked in Exhibit C under section 552.117(a)(1) of the Government Code. However, a small portion of the information you have marked is not excepted from disclosure under section 552.117(a)(1) and has been marked for release. The department may not withhold any information in Exhibit C under section 552.117(a)(1) if the employees did not make timely election to keep their information confidential.

You also assert that portions of Exhibit C are excepted from disclosure under common law privacy. 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. Section 552.101 also encompasses the common law right to privacy. Common law privacy protects information that 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). To demonstrate the applicability of common law privacy, both prongs of this test must be demonstrated. *Id.* at 681-82. The information you have marked to be withheld under common law privacy pertains to a public employee's alleged use of narcotics while on the job and his supervisor's response to the allegations. This office has ruled that information pertaining to a public employee's alleged misconduct on the job or complaints made about a public employee's job performance is not protected by privacy. Furthermore, there is a legitimate public interest any investigations concerning such misconduct. *See Open Records Decision Nos.* 562 at 10 (1990), 470 (1987) (public employee's job performance does not generally constitute his private affairs), 455 (1987) (public employee's job performances or abilities generally not protected by privacy), 329 at 2 (1982) (information relating to complaints against public employees and discipline resulting therefrom not protected under statutory predecessor to section 552.101). Therefore, the information you have marked is not protected under common law privacy and must be released.

In summary, the department may withhold Exhibit B pursuant to section 552.116 of the Government Code. If the employees at issue timely elected to keep their personal information confidential, the department must withhold the marked information in Exhibit C under section 552.117(a)(1) of the Government Code. The department may not withhold any information in Exhibit C under section 552.117(a)(1) if the employees did not make timely election to keep their information confidential. The remaining submitted information 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, 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,



Candice M. De La Garza
Assistant Attorney General
Open Records Division

CMD/krl

Ref: ID# 251835

Enc. Submitted documents

c: Ms. Barbara Davis
RR 1 Box 272A
Bon-Weir, Texas 75928
(w/o enclosures)