



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 19, 2006

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

OR2006-12333

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#262383.

The Texas Department of Transportation (the "department") received two requests from the same requestor for specified records pertaining to project No. RMC-613380001, Kimble County, San Angelo District, at South Llano River Bridge on Hwy Loop 481.¹ You state that the department will redact social security numbers pursuant to section 552.147 of the Government Code.² You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.111, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.³

¹The department sought clarification on the first request, received on June 28, 2006. *See* Gov't Code § 552.222(b) (stating that if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used).

²We note that section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

³We 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.

Initially, we must address the department's obligations under section 552.301 of the Government Code, with regard to the June 28th request. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply not later than the tenth business day after the date of receiving the written request. Gov't Code § 552.301(b). You assert the department received the first request for information on June 28, 2006. The department then sought clarification from the requestor. Upon receiving clarification from the requestor, the department indicates that the requestor made an additional request for information, received by the department on August 2, 2006. See Gov't Code § 552.222 (if request for information is unclear, governmental body may ask requestor to clarify request); see also Open Records Decision No. 31 (1974) (when presented with broad requests for information rather than for specific records, governmental body may advise requestor of types of information available so that request may be properly narrowed).

When a governmental body requests a clarification under section 552.222 of the Government Code, the deadlines of section 552.301(b) are tolled until the governmental body receives a response to its clarification request. See Open Records Decision No. 663 at 5 (1999). You do not inform us when the department sought clarification of the request for information received on June 28, 2006. Thus, we are unable to determine exactly how long the department's deadlines under section 552.301 were tolled by its request for clarification. Consequently, the department failed to comply with section 552.301(b) of the Government Code, with respect to the June 28th request.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the information is public. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. Gov't Code § 552.302; see also *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness); Open Records Decision No. 319 (1982). Generally speaking, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). You raise sections 552.101 and 552.117 for information responsive to the clarified June 28th request. Because these sections can provide compelling reasons to withhold information, we will address your claims regarding these exceptions.

Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information made confidential by other statutes. Section 552.101 of the Government Code encompasses the doctrine of common-law privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *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 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 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. In either case, the identity of the individual accused of sexual harassment is not protected from public disclosure. We note that, because supervisors are not witnesses for purposes of *Ellen*, supervisors' identities may not generally be withheld under section 552.101 in conjunction with common-law privacy and the holding in *Ellen*.

In this instance, Exhibit E relates to sexual harassment investigations. Because there is no adequate summary of the investigations, the documents relating to the sexual harassment investigations must generally be released with the identities of the witnesses and victims redacted. Consequently, the department must only withhold the identifying information of the alleged victims and witnesses, which we have marked in Exhibit E, under section 552.101 of the Government Code in conjunction with common-law privacy and *Ellen*. None of the remaining information may be withheld under section 552.101 on this basis.

Section 552.117 of the Government Code 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 request that this information be kept confidential under section 552.024. Gov't Code § 552.117. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). You state that the employees at issue have made requests for confidentiality under section 552.024 prior to the date on which the request for this information was received. Therefore, the department must withhold the marked information in Exhibit D under section 552.117 of the Government Code.

We now turn to the department's arguments regarding the information responsive to the August 2, 2006 request for information. We note that Exhibits B and C consist of inspector's daily log reports which are subject to section 552.022 of the Government Code.

Under section 552.022(a)(1) of the Government Code, a completed report, audit, evaluation, or investigation made of, for, or by a governmental body is expressly public unless it either is excepted under section 552.108 of the Government Code or is expressly confidential under other law. Gov't Code § 552.022(a)(1). Therefore, the department may only withhold these inspection reports if they are confidential under other law or excepted from disclosure under section 552.108 of the Government Code. Although you argue that the information is excepted under sections 552.103 and 552.111 of the Government Code, these sections are discretionary exceptions and, as such, are not other law for purposes of section 552.022. See *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 665 at 2 n.5 (discretionary exceptions generally), 542 at 4 (1990) (statutory predecessor to section 552.103 subject to waiver), 470 at 7 (1987) (statutory predecessor to section 552.111 may be waived). Accordingly, no portion of either Exhibit B or Exhibit C may be withheld under section 552.103 or section 552.111 of the Government Code. As you raise no further exceptions against the disclosure of Exhibit B, this information must be released.

However, the department also contends that portions of Exhibit C are excepted from disclosure under section 409 of title 23 of the United States Code, which provides as follows:

Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

23 U.S.C. § 409. Federal courts have determined that section 409 of title 23 of the United States Code excludes from evidence data compiled for purposes of highway and railroad crossing safety enhancement and construction for which a state receives federal funding, in order to facilitate candor in administrative evaluations of highway safety hazards and to prevent federally-required record-keeping from being used for purposes of private litigation. See *Harrison v. Burlington N. R.R.*, 965 F.2d 155, 160 (7th Cir. 1992); *Robertson v. Union Pac. R.R.*, 954 F.2d 1433, 1435 (8th Cir. 1992). We agree that section 409 of title 23 of the United States Code is other law for purposes of section 552.022(a) of the Government Code. See *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001); see also *Pierce County v. Guillen*, 123 S.Ct. 720 (2003) (upholding constitutionality of section 409 of title 23 of the United States Code, relied upon by county in denying request under state's Public Disclosure Act).

You state that the information you have marked in Exhibit C is “used to evaluate the safety of signs, signals, barricades, pavement markings, and other traffic control devices.” You also inform us that Loop 481 is part of the National Highway System under section 103 of title 23 of the United States Code, and is therefore a federal-aid highway within the meaning of section 409 of title 23 of the United States Code. Furthermore, the department indicates that section 409 of title 23 of the United States Code would protect the submitted information from discovery in civil litigation. Based on your representations and our review, we conclude that the department may withhold the information it has marked in Exhibit C pursuant to section 409 of title 23 of the United States Code.

In summary, the department must only withhold the identifying information of the alleged victims and witnesses, which we have marked in Exhibit E, under section 552.101 of the Government Code in conjunction with common-law privacy and *Ellen*. The department must withhold the marked information in Exhibit D under section 552.117 of the Government Code. The department may withhold the marked information in Exhibit C pursuant to section 409 of title 23 of the United States Code. The remaining 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,



Holly R. Davis
Assistant Attorney General
Open Records Division

HRD/eb

Ref: ID# 262383

Enc. Submitted documents

c: Mr. Jaime Sanchez
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