



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 24, 2007

Mr. George E. Hyde  
Denton, Navarro, Rocha & Bernal  
2517 North Main Avenue  
San Antonio, Texas 78212

OR2007-07382A

Dear Mr. Hyde:

When this office determines that an error was made in the decisional process under sections 552.301 and 552.306 of the Government Code and that the error resulted in an incorrect decision, we will correct the previously issued ruling. We have determined that an error was made in issuing Open Records Letter No. 2007-07382 (2007) on June 12, 2007; therefore, we hereby withdraw the prior ruling. This decision is substituted for Open Records Letter No. 2007-07382 and serves as the correct ruling.

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# 280848.

Bandera County (the "county"), which you represent, received a request for information pertaining to a sexual harassment allegation against the county that resulted in an Equal Employment Opportunity Commission ("EEOC") investigation. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, 552.117, and 552.137 of the Government Code, and protected under Federal Rule of Civil Procedure 26, Federal Rule of Evidence 501, Texas Rule of Civil Procedure 192.5, and Texas Rule of Evidence 503.<sup>1</sup> We have considered your arguments and reviewed the submitted information. We have also considered comments submitted by the requestor. *See*

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<sup>1</sup>Although you raise section 552.101 of the Government Code in conjunction with rule 503, rule 192.5, rule 26(b)(3), and rule 1.05, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Thus, we will not address your claim that the submitted information is confidential under section 552.101 in conjunction with any of these rules.

Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note that Exhibit 4 was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2007-06458 (2007). As we have no indication that the law, facts, and circumstances on which the prior ruling was based have changed, the county must continue to rely on that ruling as a previous determination and withhold or release Exhibit 4 in accordance with Open Records Letter No. 2007-06458.<sup>2</sup>

We must next address the county's obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(e-1) provides the following:

A governmental body that submits written comments to the attorney general under Subsection (e)(1)(A) shall send a copy of those comments to the person who requested the information from the governmental body. If the written comments disclose or contain the substance of the information requested, the copy of the comments provided to the person must be a redacted copy.

The county sent to the requestor a copy of its written comments submitted to this office pursuant to section 552.301(e)(1)(A). The county's brief with its written comments is twelve pages long. It released to the requestor the introductory page of the brief, which listed the exceptions to disclosure under the Act asserted by the county. The county also released the signature and signatory paragraph of the attorney representing the county on page eleven of the brief, and the address of the requestor on page twelve. The county redacted the remaining ten pages of information.

Section 552.301(e)(e-1) does not allow a government body to redact more than "the *substance* of the information requested." *Id.* (emphasis added). However, the redacted information in this case consists of the county's arguments to withhold the submitted information under the raised exceptions. For example, in the redacted brief sent to the requestor, the county asserts section 552.101 of the Government Code, but it removed the portion of the brief that reveals the specific confidentiality statutes asserted by the county in conjunction with section 552.101. The county also removed the portion of its arguments as to why exactly it anticipated litigation for purposes of section 552.103 of the Government Code.

The requestor argues that the county failed to comply with section 552.301(e-1) by redacting too much information from the brief. We agree, and find that the county redacted

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<sup>2</sup>See Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

information from the copy that does not disclose or contain the substance of the information requested; therefore, we conclude that the county failed to comply with the procedural requirements of section 552.301(e-1) of the Government Code.

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 requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ); Open Records Decision No. 319 (1982). A compelling reason exists when third-party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). Sections 552.103, 552.107, and 552.111 are discretionary exceptions to disclosure that protect the governmental body's interests and may be waived; therefore, in failing to comply with section 552.301, the county has waived its claim under these sections. *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. 677 at 10 (2002) (attorney work product privilege under section 552.111 may be waived), 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). The submitted fee bills are subject to section 552.022(a)(17) of the Government Code, and the Texas Supreme Court has determined that Texas Rule of Civil Procedure 192.5 and Texas Rule of Evidence 503 are "other law" for purposes of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). However, these rules, as well as Federal Rule of Civil Procedure 26 and Federal Rule of Evidence 501, are discovery privileges, and this office has determined that discovery privileges do not constitute compelling reasons to overcome the presumption of openness under section 552.302; therefore, the county may not withhold information in the submitted fee bills pursuant to rules 192.5, 503, 26, or 501. *See* Open Records Decision Nos. 677 at 10-11, 676 at 6 (2002); *see also* Open Records Decision No. 575 at 2 (1990) (discovery privileges not encompassed by statutory predecessor to section 552.101). However, section 552.101 of the Government Code can provide a compelling reason to overcome this presumption; therefore, we will address your arguments under this exception.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses the doctrine of common-law privacy, which protects information that (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The types 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. *Id.* 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 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. *Id.* 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.* 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 and witnesses of the alleged sexual harassment must be redacted, and their detailed statements must be withheld from disclosure. *See* Open Records Decision Nos. 393 (1983), 339 (1982). However, 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).

The submitted information contains an adequate summary of an investigation into alleged sexual harassment. The summary is thus not confidential; however, information within the summary identifying the victim and a witness is confidential under common-law privacy and must be withheld pursuant to section 552.101 of the Government Code. *See Ellen*, 840 S.W.2d at 525. The remaining information in the investigation file is confidential under common-law privacy. *See id.* Information in the remaining documents is also confidential under common-law privacy. We have marked the information that the county must withhold under section 552.101 in conjunction with common-law privacy.<sup>3</sup>

Section 552.101 encompasses information protected by other statutes. You assert that the remaining information is excepted under section 552.101 in conjunction with the EEOC Compliance Manual. This manual contains the EEOC's policy statement on alternative dispute resolution, approved July 17, 1995, and states in part the following:

[m]aintaining confidentiality is an important part of any successful ADR program. Subject to the limited exceptions imposed by statute or regulation, confidentiality in any ADR proceeding must be maintained *by the parties*, EEOC employees who are involved in the ADR proceeding, and any outside neutral or other ADR staff[.]

EEOC Comp. Man. (CCH) at 2-3 (emphasis added). While you assert that the EEOC is authorized under section 2000e-12(a) of title 42 of the United States Code to issue procedural

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<sup>3</sup>As we are able to resolve this under common-law privacy, we do not address your other arguments for exception of this information.

regulations, we note that the EEOC's Compliance Manual is not a federal regulation adopted pursuant to statute, but is a statement of policy. *See* 42 U.S.C. § 2000e-12(a); Attorney General Opinion. No. DM-40 at 1, n. 1 (1991). Accordingly, we conclude that section 552.101 does not encompass the compliance manual; therefore, the remaining information is not excepted under section 552.101 on this basis.

You assert that the remaining information is confidential under section 574(b) of title 5 of the United States Code, which provides in part “[a] party to a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any dispute resolution communication[.]” You inform us that the submitted information pertains to a sexual harassment allegation that resulted in negotiations between the county and the alleged victim, including an offer and counter-offer to settle the claim. You argue that the information related to these negotiations is confidential under section 574; however, we find you have failed to establish that these negotiations constitute a dispute resolution proceeding for purposes of section 572(a) of title 5 of the United States Code. *See* 5 U.S.C. § 572(a) (providing for the use of dispute resolution proceedings in the administrative process). Accordingly, the submitted information may not be withheld under section 552.101 in conjunction with section 574(b) of title 5 of the United States Code.

Section 552.101 also encompasses sections 2000e-5 and 2000e-8 of title 42 of the United States Code. Section 2000e-5 provides in relevant part the following:

Whenever a charge is filed by or on behalf of a person claiming to be aggrieved . . . alleging that an employer . . . has engaged in an unlawful employment practice, the [EEOC] shall serve a notice of the charge . . . and shall make an investigation thereof. . . . Charges shall not be made public *by the [EEOC]*. If the [EEOC] determines after such investigation that there is reasonable cause to believe that the charge is true, the [EEOC] shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public *by the [EEOC], its officers or employees*, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than \$1,000 or imprisoned for not more than one year, or both[.]

42 U.S.C. § 2000e-5 (emphasis added). Similarly, section 2000e-8(e) provides the following:

It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this subchapter involving such information. Any officer or employee of the Commission who shall make public in any manner whatever any information in violation of this subsection shall be guilty, of a

misdemeanor and upon conviction thereof, shall be fined not more than \$1,000, or imprisoned not more than one year.

42 U.S.C. § 2000e-8(e). This office has held that sections 2000e-5(b) and 2000e-8 only restrict disclosure by those who enforce the Equal Employment Opportunity Act and do not make information in the hands of the state reporting agency confidential. *E.g.*, Open Records Decision Nos. 245 at 2 (1980) (City of Rio Hondo may not withhold information under section 2000e-5 or 2000e-7 of title 42 of the United States Code), 155 at 2 (1977) (City of Austin may not withhold information under section 2000e-5), 59 at 2 (1974) (Dallas County may not withhold information under section 2000e-8); *see also Whitaker v. Carney*, 778 F. 2d 216 (1985) (title VII proscribes release of information only when held by EEOC or EEOC employees, and not when held by employer). The remaining information is maintained by the county and not by employees of the EEOC; therefore, we conclude that the county may not withhold the information at issue pursuant to section 552.101 of the Government Code in conjunction with section 2000e-5 or 2000e-8(e) of title 42 of the United States Code.

You indicate that the remaining information is excepted under section 552.101 in conjunction with the federal Freedom of Information Act ("FOIA"), chapter 552 of title 5 of the United States Code. However, in Attorney General Opinion MW-95 (1979), this office determined that FOIA does not apply to records held by a Texas agency or its political subdivision. Furthermore, this office has stated in numerous opinions that information in the possession of a governmental body of the State of Texas is not confidential or excepted from disclosure merely because the same information is or would be confidential under one of FOIA's exceptions. *See* Open Records Decision Nos. 496 at 4 (1988), 124 at 1 (1976). Accordingly, the county may not withhold the remaining information pursuant to section 552.101 in conjunction with FOIA.

You also argue that the submitted information is confidential under sections 1601.20, 1601.22, and 1601.26 of title 29 of the Code of Federal Regulations.<sup>4</sup> Section 1601.20 provides the following:

(a) [p]rior to the issuance of a determination as to reasonable cause the [EEOC] may encourage the parties to settle the charge on terms that are mutually agreeable. District Directors, Field Directors, Area Directors, Local Directors, the Director of the Office of Field Programs, the Director of Field Management Programs, or their designees, shall have the authority to sign any settlement agreement which is agreeable to both parties. When the [EEOC] agrees in any negotiated settlement not to process that charge further, the [EEOC]'s agreement shall be in consideration for the promises made by the other parties to the agreement. Such an agreement shall not affect the processing of any other charge, including, but not limited to, a Commissioner

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<sup>4</sup>Section 552.101 also encompasses the Code of Federal Regulations.

charge or a charge, the allegations of which are like or related to the individual allegations settled.

(b) [i]n the alternative, the [EEOC] may facilitate a settlement between the person claiming to be aggrieved and the respondent by permitting withdrawal of the charge pursuant to § 1601.10.

29 C.F.R. § 1601.20. Although section 1601.20 discusses the EEOC's involvement in settlement agreements, this section does not expressly make any information confidential. *See* Open Records Decision No. 478 at 2 (1987) (statutory confidentiality requires express language making information confidential or stating that information shall not be released to the public). Accordingly, the county may not withhold the remaining information under section 552.101 in conjunction with section 1601.20 of title 29 of the Code of Federal Regulations.

Section 1601.22 provides the following:

[n]either a charge, nor information obtained during the investigation of a charge of employment discrimination under the ADA or title VII, nor information obtained from records required to be kept or reports required to be filed pursuant to the ADA or title VII, shall be made matters of public information *by the [EEOC]* prior to the institution of any proceeding under the ADA or title VII involving such charge or information. This provision does not apply to such earlier disclosures to charging parties, or their attorneys, respondents or their attorneys, or witnesses where disclosure is deemed necessary for securing appropriate relief. This provision also does not apply to such earlier disclosures to representatives of interested Federal, State, and local authorities as may be appropriate or necessary to the carrying out of the [EEOC]'s function under title VII or the ADA, nor to the publication of data derived from such information in a form which does not reveal the identity of charging parties, respondents, or persons supplying the information.

29 C.F.R. § 1601.22 (emphasis added). Upon review, we find that section 1601.22 prohibits employees of the EEOC from releasing any information pertaining to a discrimination complaint unless a complainant files a lawsuit to remedy the discriminatory practice. *See also* 42 U.S.C. § 2000e-8(e). This prohibition does not extend to an employer's disclosure of information relating to a claim of employment discrimination. ORD 155 at 2. Therefore, the remaining information may not be withheld under section 552.101 in conjunction with section 1601.22 of title 29 of the Code of Federal Regulations.

Section 1601.26 provides the following:

(a) [n]othing that is said or done during and as part of the informal endeavors of the [EEOC] to eliminate unlawful employment practices by informal

methods or conference, conciliation, and persuasion may be made a matter of public information by the [EEOC], its officers or employees or used as evidence in a subsequent proceeding without the written consent of the persons concerned. This provision does not apply to such disclosures to the representatives of Federal, State or local agencies as may be appropriate or necessary to the carrying out of the [EEOC]'s functions under title VII or the ADA: *Provided, however*, That the [EEOC] may refuse to make disclosures to any such agency which does not maintain the confidentiality of such endeavors in accord with this section or in any circumstances where the disclosures will not serve the purposes of the effective enforcement of title VII or the ADA.

(b) Factual information obtained by the [EEOC] during such informal endeavors, if such information is otherwise obtainable by the [EEOC] under section 709 of Title VII, for disclosure purposes will be considered by the [EEOC] as obtained during the investigatory process.

29 C.F.R. § 1601.26 (emphasis in original). Upon review, we find that section 1601.26 prohibits employees of the EEOC from releasing any information pertaining to the EEOC's informal endeavors to eliminate unlawful employment practices. This prohibition does not extend to an employer's disclosure of such information. ORD 155 at 2. Therefore, the remaining information may not be withheld under section 552.101 in conjunction with section 1601.26 of title 29 of the Code of Federal Regulations.

Section 552.101 also encompasses section 154.073 of the Texas Civil Practice and Remedies Code. Section 154.073(a) provides in relevant part the following:

[A] communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding.

Civ. Prac. & Rem. Code § 154.073(a). Upon review, we find that the county has not established that the remaining information includes communications relating to a civil or criminal dispute made by a participant in an alternative dispute resolution procedure. *See* Gov't Code § 552.301(e)(1)(A) (governmental body claiming exception to disclosure bears the burden to explain how and why the claimed exception is applicable to the information at issue). Therefore, the county may not withhold the remaining information under section 552.101 in conjunction with section 154.073(a) of the Civil Practices and Remedies Code.

Finally, we note that the remaining information includes an e-mail address. Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental

body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov’t Code § 552.137(a)-(c). Section 552.137 does not apply to a government employee’s work e-mail address because such an address is not that of the employee as a “member of the public,” but is instead the address of the individual as a government employee. The e-mail address at issue does not appear to be of a type specifically excluded by section 552.137(c), and you do not inform us that a member of the public has affirmatively consented to its release. Therefore, the county must withhold the e-mail address we have marked under section 552.137.

To conclude, the county must withhold the information we have marked under section 552.101 in conjunction with common-law privacy and section 552.137 of the Government Code. The county must release the remaining information, including the submitted fee bills.

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,



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Assistant Attorney General  
Open Records Division

JLC/jh

Ref: ID# 280848

c: Mr. Roger Sullivan  
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(w/o enclosures)