ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 25, 2007

Mr. James M. Frazier, III
Assistant General Counsel
Texas Department of Criminal Justice
P.O. Box 4004
Huntsville, Texas 77342

OR2007-12459

Dear Mr. Frazier:

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# 289924.

The Texas Department of Criminal Justice (the "department") received a request for the requestor's "master personnel file, disciplinary file, eeo file, master medical file and any other documentation referring to [the requestor] by administration."[1] You claim that the requested information is excepted from disclosure under sections 552.101, 552.107, 552.108, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that some of the submitted information is subject to section 552.022 of the Government Code, which provides in pertinent part:

> (a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:
>
> (17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(17). The submitted information includes information filed with a court that is subject to section 552.022(a)(17). This information, which we have marked,

[1]The department informs us it sought and received clarification from the requestor regarding a portion of her request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

is expressly public unless confidential under "other law." Although you also argue that the court-filed document should be withheld on the basis of common law privacy, information that is otherwise confidential under common law privacy may not be withheld in a court-filed document. *See Star-Telegram v. Walker*, 834 S.W.2d 54 (Tex. 1992) (sexual assault victim's privacy right not violated by release of information in public court document). Accordingly, the department may not withhold the submitted court-filed documents based on section 552.101 in conjunction with 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 encompasses federal statutes. The submitted information contains an I-9 form (Employment Eligibility Verification), which is governed by section 1324a of Title 8 of the United States Code. This section provides that an I-9 form and "any information contained in or appended to such form, may not be used for purposes other than for enforcement of this chapter" and for enforcement of other federal statutes governing crime and criminal investigations. *See* 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). Release of the form in this instance would be "for purposes other than for enforcement" of the referenced federal statutes. Accordingly, we conclude that the I-9 form is confidential and may only be released in compliance with the federal laws and regulations governing the employment verification system.

Section 552.101 also encompasses information made confidential by other statutes. Chapter 411 of the Government Code deems confidential criminal history information ("CHRI") generated by the National Crime Information Center or by the Texas Crime Information Center. CHRI means "information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions." Gov't Code § 411.082(2). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety ("DPS") maintains, except that the DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov't Code § 411.083. Upon review of the submitted information, we find that the information we have marked constitutes CHRI for the purposes of chapter 411. Therefore, the department must withhold the information we have marked under section 552.101 of the Government Code. We note that a person may access her own CHRI from DPS. *Id.* § 411.083(3).

Section 552.101 also encompasses chapter 560 of the Government Code, which provides that a governmental body may not release fingerprint information except in certain limited circumstances. *See id.* §§ 560.001 (defining "biometric identifier" to include fingerprints), 560.002 (prescribing manner in which biometric identifiers must be maintained

and circumstances in which they can be released), 560.003 (biometric identifiers in possession of governmental body exempt from disclosure under the Act). You do not inform us, and the submitted information does not indicate, that section 560.002 permits the disclosure of the submitted fingerprint information. Therefore, the department must withhold this information, which we have marked, under section 552.101 in conjunction with section 560.003 of the Government Code.

Section 552.101 also encompasses the doctrine of common law privacy, which protects information if it (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 type 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. This office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is excepted from required public disclosure under common law privacy. *See* Open Records Decision Nos. 600 (1992), 545 (1990). We have marked personal financial information that must be withheld under section 552.101 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 further 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.*

When there is an adequate summary of an investigation, the summary and any statements of the person under investigation must be released, but the identities of the victims and witnesses must be redacted. The rest of the investigation must be withheld from disclosure. However, when no adequate summary exists, the entire file must be released, but the identities of witnesses and victims must still be redacted. 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, the submitted information includes two sexual harassment investigations with adequate summaries of these investigations, as well as statements of the accused in one investigation. Thus, the department must release the summaries and statements of the accused after redaction of the victims' and witnesses' identifying information. However, we note that the requestor is an alleged victim in one of the investigations. Section 552.023 of the Government Code gives a person or a person's authorized representative a "special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person's privacy interests." Gov't Code § 552.023. Therefore, the requestor has a special right of access to her identifying information. The remainder of these investigations must be withheld under section 552.101 in conjunction with common law privacy. *See id.* In addition, the department has submitted lists of all sexual harassment cases from 1995 and 1996. The department must withhold the information identifying alleged sexual harassment victims, other than the requestor, from these lists under section 552.101 in conjunction with common law privacy.

Section 552.107(1) protects information that comes within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. *See* TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *See In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App. – Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a

communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You have marked the information that the department seeks to withhold on the basis of the attorney-client privilege. You contend that the marked information constitutes an attorney-client communication that was made in connection with the rendition of professional legal services to the department. You also indicate that the communication in question was intended to be and remains confidential. Based on your representations and our review of the information at issue, we conclude that the department may withhold the information that you have marked under section 552.107(1).

The department claims that some of the information it has submitted is excepted from disclosure under section 552.108(b)(1) of the Government Code. This section excepts from public disclosure "[a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution . . . if . . . release of the internal record or notation would interfere with law enforcement or prosecution[.]" Gov't Code § 552.108(b)(1); *see also City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet. h.) (Gov't Code § 552.108(b)(1) protects information that, if released, would permit private citizens to anticipate weaknesses in police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate state laws).

Section 552.108(b)(1) protects information that would reveal law enforcement techniques. *See, e.g.*, Open Records Decision Nos. 531 (1989) (release of detailed use of force guidelines would interfere with law enforcement), 456 (1987) (release in advance of information regarding location of off-duty police officers would interfere with law enforcement), 413 (1984) (release of sketch showing security measures to be used at next execution would interfere with law enforcement), 409 (1984) (information regarding certain burglaries protected if it exhibits pattern that reveals investigative techniques), 341 (1982) (release of certain information would interfere with law enforcement because disclosure would hamper Texas Department of Public Safety's efforts to detect forgeries of drivers' licenses), 143 (1976) (disclosure of specific operations or specialized equipment directly related to investigation or detection of crime may be excepted). Section 552.108(b)(1) is not applicable, however, to generally known policies and procedures. *See* Open Records Decision Nos. 531 at 2-3 (1989) (Penal Code provisions, common law rules, and constitutional limitations on use of force not protected), 252 at 3 (1980) (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known).

A governmental body that claims section 552.108(b)(1) must sufficiently explain how and why release of the information at issue would interfere with law enforcement and crime

prevention. *See* Open Records Decision Nos. 562 at 10 (1990), 531 at 2 (1989). The department seeks to withhold a fire evacuation plan map under this exception. The department contends that release of this information would compromise prison security. Based on your arguments and our review of the information at issue, we find that the department may withhold the information the department has marked under section 552.108(b)(1).

We also note that section 552.117 of the Government Code is applicable to some of the submitted information.[2] Section 552.117(a)(3) excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former employee of the department or of the predecessor in function of the department or any division of the department, regardless of whether the current or former employee complies with section 552.1175 of the Government Code. In Open Records Letter No. 2005-01067 (2005), we issued a previous determination that authorizes the department to withhold information under section 552.117(a)(3) without the necessity of requesting a decision from this office under the Act. *See* Gov't Code § 552.301(a); Open Records Decision No. 673 at 7-8 (2001).

The department must withhold the information that we have marked under section 552.117(a)(3) and the previous determination issued in Open Records Letter No. 2005-01067. Because section 552.117 protects personal privacy, the department may not withhold information that relates to the requestor on the basis of this exception.[3] Gov't Code § 552.023(a); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning herself).

Section 552.130 of the Government Code, which you also raise, excepts from disclosure information that relates to

> (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state;
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> (2) a motor vehicle title or registration issued by an agency of this state; or

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[2]Unlike other exceptions to disclosure, this office will raise section 552.117 on behalf of a governmental body, as this exception is mandatory and may not be waived. *See* Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

[3]We 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. The requestor has a right, however, to her own social security number. *See generally* Gov't Code § 552.023(b) (governmental body may not deny access to person to whom information relates, or that person's representative, solely on grounds that information is considered confidential by privacy principles).

> (3) a personal identification document issued by an agency of this state or a local agency authorized to issue an identification document.

Gov't Code § 552.130(a). We note that, because this exception also protects personal privacy, the requestor has a right of access to her own Texas motor vehicle record information. *See id.* § 552.023(a); ORD 481 at 4. Because the Texas motor vehicle record information in the remaining information belongs to the requestor, it may not be withheld on this basis.

We note that some of the remaining information is confidential under section 552.136 of the Government Code. Section 552.136(b) states that "[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining "access device"). We have marked bank account numbers that the department must withhold under section 552.136.

In summary, the department must withhold the submitted I-9 form under section 552.101 of the Government Code in conjunction with federal law. The department must also withhold the information we have marked under section 552.101 in conjunction with section 411.083 of the Government Code, section 560.003 of the Occupations Code, and common law privacy. The department may withhold the information you have marked under sections 552.107 and 552.108 of the Government Code. The department must withhold the information we have marked under sections 552.117(a)(3) and 552.136 of the Government Code. The remaining 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

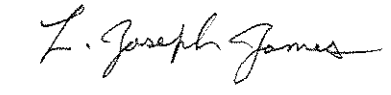
will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to 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,



L. Joseph James
Assistant Attorney General
Open Records Division

LJJ/eeg

Ref: ID# 289924

Enc. Submitted documents