



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 3, 2008

Ms. Holly C. Lytle  
Assistant County Attorney  
El Paso County  
500 East San Antonio, Room 503  
El Paso, Texas 79901

OR2008-12075

Dear Ms. Lytle:

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# 320703.

El Paso County (the "county") received a request for information pertaining to investigations involving a named employee from January 2006 to the present. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.111, and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the attorney for the employee at issue. *See Gov't Code § 552.304* (interested party may submit comments stating why information should or should not be released).

Initially, we note that a portion of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides that

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:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). In this instance, most of the submitted information consists of a completed investigation into sexual harassment. Thus, this information must be released

under section 552.022(a)(1) unless it is expressly confidential under other law or excepted from disclosure under section 552.108. Section 552.111 of the Government Code is a discretionary exception to public disclosure that protects a governmental body's interests and may be waived. *See* Open Records Decision Nos. 522 at 4 (1989) (discretionary exceptions in general); 470 at 7 (1987) (statutory predecessor to section 552.111 subject to waiver). As such, section 552.111 of the Government Code is not "other law" that makes information confidential for the purposes of section 552.022. Accordingly, the county may not withhold the information that is subject to section 552.022 pursuant to section 552.111. However, sections 552.101 and 552.136 of the Government Code can provide compelling reasons to overcome this presumption; therefore, we will consider the county's arguments under sections 552.101 and 552.136 for all of the submitted information.

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. This section encompasses the common-law right of 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). This office has found that the public has a legitimate interest in the qualifications and work conduct of employees of governmental bodies. *See* Open Records Decision Nos. 562 at 10 (1990), 542 at 5 (1990); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). You seek to withhold a sexual harassment investigation file and subsequent retaliation complaint in their entirety because the charges of sexual harassment were not sustained, the parties at issue were not high level employees with the county, and the accused individual has not made any public statements. We agree that the submitted documents contain information about several county employees which may be considered intimate and embarrassing. However, because this information pertains to public employees' work conduct we find there is a legitimate public interest in this information. Therefore, the department may not withhold the submitted documents in their entirety under section 552.101 of the Government Code in conjunction with common-law privacy.

However, 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.*

Thus, if there is an adequate summary of an investigation of alleged sexual harassment, the investigation summary must be released under *Ellen*, along with the statement of the accused, 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). If no adequate summary of the investigation exists, then all of the information relating to the investigation ordinarily must be released, with the exception of information that would identify the victims and witnesses. We note that supervisors are not witnesses for purposes of *Ellen*, and thus, supervisors' identities may generally not be withheld under section 552.101 and common-law privacy. In addition, since 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, the identity of the individual accused of sexual harassment is not protected from public disclosure. See Open Records Decision Nos. 438 (1986), 405 (1983), 230 (1979), 219 (1978).

The submitted information contains an adequate summary of the investigation into the sexual harassment allegation and a statement of the accused. The summary and statement of the accused are not confidential under section 552.101 in conjunction with common-law privacy. However, information within the summary and statement of the accused that identifies the alleged victim and witnesses, other than the victim's supervisor, is confidential under common-law privacy and must generally be withheld pursuant to section 552.101 of the Government Code. See *Ellen*, 840 S.W.2d at 525. Therefore, pursuant to section 552.101 and the ruling in *Ellen*, the marked summary and statement of the accused are not confidential, but the remaining submitted information and the identifying information of the victim and the witnesses, which we have marked, must be withheld under section 552.101 in conjunction with common-law privacy. As our ruling is dispositive, we need not address your remaining argument against disclosure.

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3). If the governmental body does not file suit over 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 challenge 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,



Laura E. Ream  
Assistant Attorney General  
Open Records Division

LER/jb

Ref: ID# 320703

Enc. Submitted documents

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