



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 1, 2008

Ms. Carrie Parsons
Assistant General Counsel
Texas Department of Public Safety
P.O. Box 4087
Austin, Texas 78773-0001

OR2008-16327

Dear Ms. Parsons:

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# 328675.

The Texas Department of Public Safety (the "department") received two requests from the same requestor for information related to Administrative Inquiry 08-046. The department received an additional request from another requestor for information related to Administrative Inquiry 08-046 and Administrative Inquiry 08-054. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides, in relevant part:

(a) 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). The submitted information consists of two completed investigations made for or by the department, and thus are expressly public under section 552.022(a)(1). Although you claim this information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code, we note that these sections are discretionary exceptions under the Act that do not constitute "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. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). Accordingly, the department may not withhold the submitted information under section 552.103 or section 552.107 of the Government Code. However, section 552.101 of the Government Code is "other law" for purposes of section 552.022. Also, the Texas Supreme Court has held that the Texas Rules of Evidence are "other law" that makes information expressly confidential for the purposes of section 552.022. The attorney-client privilege, which you claim under section 552.107, is also found at Texas Rule of Evidence 503. Therefore, we will consider your assertion of the attorney-client privilege under Texas Rule of Evidence 503. We will also consider your arguments under section 552.101 of the Government Code.

Section 552.101 of the Government Code excepts from public 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 that is 1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and 2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (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 the submitted information in its entirety under common-law privacy. We agree that the submitted information contains information about department employees which is 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 information in its 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). We note, however, 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.

The submitted information pertains to sexual harassment investigations. Both reports contain adequate summaries of the investigations and the statements of the individuals accused. Thus, these summaries and statements are not confidential; however, information within these documents identifying the victims and witnesses are confidential under common-law privacy. Accordingly, the department must withhold this information in the summaries and statements, which we have marked, pursuant to section 552.101 of the Government Code in conjunction with common-law privacy.¹ *See Ellen*, 840 S.W.2d at 525.

We note, however, that the first requestor is the victim in Administrative Inquiry 08-046 and the second requestor is a witness in the same report. The second requestor is also the victim in Administrative Inquiry 08-054.² Section 552.023 of the Government Code provides that a governmental body may not deny access to a person on the grounds that the information is considered confidential under privacy principles. *See* Gov't Code § 552.023. Thus, each requestor has a special right of access to their own identifying information that we have marked under section 552.101 in conjunction with common-law privacy. *See id.*; Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning herself).

We note that section 552.117 of the Government Code may be applicable to the statements and the summaries.³ Section 552.117(a)(1) excepts from disclosure the current and former home addresses, telephone numbers, social security numbers, personal cellular telephone numbers, and family member information of current or former officials or employees of a

¹As our ruling is dispositive, we need not address your argument under Texas Rule of Evidence 503.

²We note that Administrative Inquiry 08-054 is not responsive to the first requestor's two requests for information.

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who did not timely request under section 552.024 that the information be kept confidential. Accordingly, to the extent the employees to whom the information pertains timely elected confidentiality for their information under section 552.024, the department must withhold the information we have marked under section 552.117(a)(1). We note that each requestor has a right of access to his or her own information pursuant to section 552.023. *See* Gov't Code § 552.023.

In summary, the department must withhold the information we have marked in the submitted summaries and statements of the accused individuals under section 552.101 of the Government Code in conjunction with common-law privacy, unless the requestors have a right of access to this information pursuant to section 552.023 of the Government Code. The department must also withhold the information we have marked under section 552.117 of the Government Code if the employees at issue timely elected confidentiality for their information under section 552.024 of the Government Code. The department must withhold the remaining information, which we have marked, under section 552.101 in conjunction with common-law privacy.⁴

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).

⁴We note, however, that if the department receives another request for this particular information from a different requestor, the department should again seek a decision from us before releasing this information.

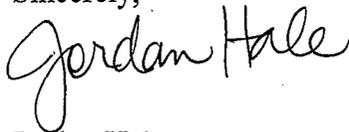
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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,



Jordan Hale
Assistant Attorney General
Open Records Division

JH/jb

Ref: ID# 328675

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)