



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 11, 2009

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

OR2009-08047

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# 345735.

The Texas Department of Transportation (the "department") received a request for investigations involving the requestor. You state the department will release some of the requested information to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.117, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹ We have considered comments submitted by the requestor. Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

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 common-law privacy, which protects

¹We 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.

information that contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and is not of legitimate concern to the public. See *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Information pertaining to the work conduct and job performance of public employees is subject to a legitimate public interest and is, therefore, generally not protected from disclosure under common-law privacy. See Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute employee's private affairs), 455 (1987) (public employee's job performance or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employee), 423 at 2 (1984) (scope of public employee privacy is narrow).

In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the court addressed the applicability of common-law privacy to information relating to an investigation of alleged 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. See 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.* 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 sexual harassment, the summary must be released along with the statement of the person accused of sexual harassment, but the identities of the victims and witnesses must be redacted and their detailed statements must be withheld from disclosure. If no adequate summary of the investigation exists, then detailed statements regarding the allegations must be released, but the identities of victims and witnesses must be redacted from the statements. In either event, the identity of the individual accused of sexual harassment is not protected from public disclosure. We note that supervisors are generally not witnesses for purposes of *Ellen*, except where their statements appear in a non-supervisory context.

Exhibit B consists of a completed investigation into allegations of sexual harassment and other claims. We find that the submitted Report of Investigation constitutes an adequate summary of the sexual harassment investigation. Exhibit B also includes statements of the accused individuals. The summary and statements of the accused individuals are not confidential; however, information within the summary and statements that identify and witnesses must be redacted and the rest of the sexual harassment investigation must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy. See *Ellen*, 840 S.W.2d at 525. We have marked the information the department must withhold from the Report of Investigation and statements of the accused individuals

under section 552.101 in conjunction with common law privacy. We note that the requestor is the alleged victim in this instance. Section 552.023 of the Government Code gives a person a special right of access to information that is excepted from public disclosure under laws intended to protect that person's privacy interest as subject of the information. *See* Gov't Code § 552.023. Thus, the requestor has a special right of access to his information, and the department may not withhold that information under section 552.101 in conjunction with common-law privacy. The remaining information in Exhibit B, which we have marked, must be withheld under section 552.101 in conjunction with common-law privacy.²

You raise section 552.117 of the Government Code for portions of the remaining information within Exhibit B. Section 552.117(a)(1) 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 of the Government Code. *See id.* §§ 552.117(a)(1), .024. 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). The department may only withhold information under section 552.117(a)(1) on behalf of a former or current employee who has made a request for confidentiality under section 552.024 prior to the date on which the request for information was made. You state that the individuals whose information is at issue elected to keep their private information confidential prior to the date the department received the current request for information. Thus, with the exception of the information we have marked for release, the department must withhold the information you have marked, and the additional information we have marked, under section 552.117(a)(1) of the Government Code.

You claim that the information you have marked within Exhibit C is excepted under section 552.107(1) of the Government Code, which protects information coming within the attorney-client privilege. Section 552.107 of the Government Code protects information coming 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. 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. 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. *In re Tex. Farmers Inc. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in

²As our ruling is dispositive, we need not address your remaining argument against disclosure for this information.

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. TEX. R. EVID, 503(b)(1)(A)-(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. Finally, the attorney-client privilege applies only to a confidential communication, 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. *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 state that the information labeled as Exhibit C consists of a communication between a department attorney and department staff that was made for the purpose of providing legal advice to the department. You have identified the parties to the communication. You indicate that this communication was intended to be confidential and that the department has maintained its confidentiality. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information at issue. Thus, the department may withhold the information you have marked within Exhibit C under section 552.107 of the Government Code.

In summary, with the exception of the Report of Investigation and statements of the accused individuals, the department must withhold the information we have marked in Exhibit B under section 552.101 in accordance with the holding in *Ellen*. However, the identifying information of the witnesses, which we have marked, must be redacted from the Report of Investigation and statements of the accused individuals under section 552.101 in conjunction with common law privacy. Further, with the exception of the information we have marked for release, the department must withhold the information you have marked, and the additional information we have marked, under section 552.117(a)(1) of the Government Code. The department may withhold the information you have marked within Exhibit C under section 552.107 of the Government Code. The remaining information must be released.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Christina Alvarado
Assistant Attorney General
Open Records Division

CA/rl

Ref: ID# 345735

Enc. Submitted documents

cc: Requestor
(w/o enclosures)