



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 14, 2009

Mr. Hyattye O. Simmons
General Counsel
Dallas Area Rapid Transit
P. O. Box 660163
Dallas, Texas 75266-0163

OR2009-14491

Dear Mr. Simmons:

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# 358425.

Dallas Area Rapid Transit ("DART") received a request for a specified complaint made by a named individual.¹ You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. You seek to withhold the submitted information under section 552.101 in conjunction with the ruling in *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*, 129 S. Ct. 846 (2009). In *Crawford*, the U. S. Supreme Court held that the anti-retaliation provision of section 704(a) of Title VII of the 1964 Civil Rights Act also protects employees who answer questions during an employer's internal investigation into discrimination, rather than just when employees complain on their own or take part in a

¹You state DART sought and received clarification from the requestor regarding the request. See Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used).

formal investigation. *Crawford*, 129 S. Ct. at 849. You contend that “this ruling makes clear that information about who is filing a complaint or who participates in an internal investigation under the anti-retaliation provisions are [sic] confidential[.]” Upon review, however, we find that the *Crawford* decision did not address the confidentiality of individuals who make complaints. *Id.* at 846. Therefore, because *Crawford* does not make information confidential for purposes of the Act, the submitted information may not be withheld on that basis.

Section 552.101 also encompasses the doctrine of common-law privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). 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 an internal discrimination complaint form and its attachment pertaining to mental and emotional discrimination and sexual harassment allegations because “release [would publicize] the private affairs of [the employees involved.]” However, upon review we disagree and find that the submitted information pertains directly to public employees’ work conduct. Accordingly, we find there is a legitimate public interest in this information.

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 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).

Upon review of the information at issue, we find that it does not contain an adequate summary of the sexual harassment investigation. Because there is no adequate summary of the investigation, it must generally be released. However, the submitted information contains the identity of the alleged sexual harassment victim. Accordingly, we conclude that DART must withhold the information we have marked pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy and the holding in *Ellen*. The remaining information is not intimate or embarrassing and is of legitimate public interest. Thus, none of the remaining information at issue may be withheld pursuant to section 552.101 in conjunction with common-law privacy under *Ellen*.

You also raise section 552.137 of the Government Code, which 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). The submitted e-mail address does not appear to be a type excluded by subsection (c). Accordingly, unless the owner of the e-mail address has consented to its release, DART must withhold the e-mail address we marked under section 552.137.

In summary, DART must withhold the information we have marked under section 552.101 in conjunction with common-law privacy and the holding in *Ellen*. DART must withhold the e-mail address we marked under section 552.137, unless the owner of the e-mail address has consented to its release. The remaining information must be released.²

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,

²We note the requestor has a special right of access to some of the information being released in this instance. Gov't Code § 552.023 (person or person's authorized representative has a special right of access to records that contain information relating to the person that are protected from public disclosure by laws intended to protect that person's privacy interests). Because such information may be confidential with respect to the general public, if DART receives another request for this information from a different requestor, DART must again seek a ruling from this office.

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, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in cursive script that reads "Paige S. Lay".

Paige S. Lay
Assistant Attorney General
Open Records Division

PL/eeg

Ref: ID# 358425

Enc. Submitted documents

cc: Requestor
(w/o enclosures)