



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 7, 2009

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

OR2009-17290

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# 363487 (DART ORR# 6842).

Dallas Area Rapid Transit ("DART") received a request for information pertaining to specified incidents involving two named employees, as well as the report and investigator's notes regarding the requestor's sexual harassment claim against two named employees. You indicate DART does not have any information responsive to the request regarding the specified incidents involving two named employees.¹ You claim the submitted investigation summary and investigator notes are excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.²

¹The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

²We assume 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 those records contain substantially different types of information than that submitted to this office.

Initially, we note the submitted information is subject to section 552.022(a)(1) of the Government Code, which provides:

the following categories of information are public information and not excepted from required disclosure under [the Act] 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 investigation summary and investigator notes are a completed investigation. This information must be released under section 552.022(a)(1), unless the information is excepted from disclosure under section 552.108 or expressly confidential under other law. Section 552.103 of the Government Code is a discretionary exception to public disclosure that protects a governmental body's interests and may be waived. *See id.* § 552.007; *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 No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 is not “other law” that makes information confidential for the purposes of section 552.022. Therefore, DART may not withhold the submitted information under section 552.103. You claim, however, the information is excepted under section 552.101 of the Government Code. Because information subject to section 552.022(a)(1) may be withheld under section 552.101 of the Government Code, we will consider the applicability of this exception to 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. 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 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 formal investigation. *Crawford*, 129 S. Ct. at 849. You contend “this ruling makes clear that the information about who is filing a complaint or participates in an internal investigation under the anti-retaliation provisions are [sic] confidential [.]” Upon review, however, we find 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 under section 552.101 on that basis.

Section 552.101 also 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). 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 the public's interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held "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 along with the statement of the accused under *Ellen*, 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 supervisors are generally not witnesses for purposes of *Ellen*, except where their statements appear in a non-supervisory context. Because 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 consists of an investigation summary and investigator notes pertaining to alleged sexual harassment. The submitted investigation summary is an adequate summary of the investigation. Thus, the summary is not confidential; however, the remaining submitted information must be withheld under section 552.101 in conjunction with common-law privacy and the holding in *Ellen*. As for the summary, DART must withhold the witness-identifying information, which we have marked, under section 552.101 in conjunction with common-law privacy and the holding in *Ellen*. In this instance, the requestor is the alleged victim in the sexual harassment investigation and, therefore, has a special right of access to her identifying information in the summary.³ See Gov't Code

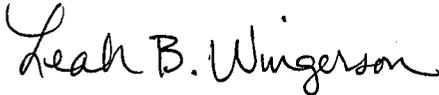
³Section 552.023(a) provides "[a] person or a person's authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person's privacy interests." Gov't Code § 552.023.

§ 552.023; Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual asks governmental body for information concerning herself). As you have claimed no other exceptions to disclosure, the remaining information in the summary must be released.⁴

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

Sincerely,



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/dls

Ref: ID# 363487

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁴Because the requestor has a right of access to some of this information that otherwise would be excepted from release under the Act, DART must again seek a decision from this office if it receives a request for this information from a different requestor.