



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 10, 2009

Ms. Jeri Yenne
Criminal District Attorney
Brazoria County
111 East Locust, Suite 408A
Angleton, Texas 77515

OR2009-17489

Dear Ms. Yenne:

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# 363892.

Brazoria County (the "county") received a request for several categories of information pertaining to allegations or complaints against a named individual and certain county policies.¹ You claim that the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.²

Initially, you inform this office that a portion of the submitted information is currently at issue in a lawsuit pending against the Office of the Attorney General: *Jeri Yenne, Criminal Dist. Attorney of Brazoria County, Tex. v. Greg Abbott, Attorney Gen. of Tex.*, No. D-1-GV-08-002599 (345th Dist. Ct., Travis County, Tex.). We will not address whether the

¹As you have not submitted a copy of the request, we take our description from your brief.

²We 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 at issue in the lawsuit is excepted under the Act, but will instead allow the trial court to determine whether this information must be released to the public.

Next, you inform us that some of the requested information was the subject of previous requests for information, in response to which this office issued Open Records Letter Nos. 2008-16321 (2008) and 2009-14553 (2009). In Open Records Letter No. 2008-16321, in relevant part, we ruled that the county need not release the information that had been deleted from the file allocation table of the hard disks and had not been recovered, but that, with the exception of e-mail addresses which must be withheld under section 552.137 of the Government Code, the county must release the information which had been recovered from the hard disks. Furthermore, in Open Records Letter No. 2009-14553, in relevant part, we ruled that some of the information at issue is not subject to the Act, and other information must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy, section 552.117 of the Government Code, and section 552.137 of the Government Code, and the remaining information at issue must be released. *See* Open Records Decision No. 673 (2001) (explaining circumstances under which the first type of previous determination exists). As you do not inform us that the laws, facts and circumstances have changed for this information since the issuance of Open Records Letter Nos. 2008-16321 and 2009-14553, you must continue to rely on those rulings as previous determinations with regard to the information ruled upon in Open Records Letter Nos. 2008-16321 and 2009-14553. To the extent you have submitted or recovered information that is not encompassed by our rulings in Open Records Letter No. 2008-16321 and 2009-14553, we will address your arguments.

Next, we must address the county's obligations under the Act. Pursuant to section 552.301(e) of the Government Code, the governmental body is required to submit to this office within fifteen business days of receiving the request a copy of the written request for information, as well as a signed statement or sufficient evidence showing the date the governmental body received the written request. *See* Gov't Code § 552.301(e). As of the date of this letter, however, you have not submitted to this office a copy of the written request for information, or a signed statement or sufficient evidence showing the date the county received the written request. Consequently, we find the county failed to comply with the requirements of section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *City of Dallas v. Abbott*, 279 S.W.3d 806, 811 (Tex. App.—Amarillo 2007, pet. granted); *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). A compelling reason exists when third-party interests are at stake or when information is confidential under other law. Open Records

Decision No. 150 (1977). Section 552.103 of the Government Code is discretionary in nature; it serves only to protect a governmental body's interests and may be waived. 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); see also Open Records Decision No. 522 (1989) (discretionary exceptions in general). As such, it does not constitute a compelling reason to withhold information for purposes of section 552.302. In failing to comply with section 552.301, the county has waived its claim under section 552.103; therefore, the county may not withhold the remaining requested information under section 552.103. However, sections 552.101 and 552.117 of the Government Code can provide compelling reasons for non-disclosure; therefore, we will consider the applicability of these exceptions to the information at issue.³

We note the submitted information includes documents that have been filed with a court. Section 552.022(a)(17) of the Government Code provides for required public disclosure of "information that is also contained in a public court record," unless the information is expressly confidential under other law. Gov't Code § 552.022(a)(17). We note that information that has been filed with a court is not protected by common-law privacy. See *Star-Telegram v. Walker*, 834 S.W.2d 54 (Tex. 1992) (common-law privacy not applicable to court-filed document). Therefore, the court-filed documents, which we have marked, must be released to the requestor.

Section 552.101 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 doctrine of common-law privacy, which protects information that (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). The types of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683.

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. *Id.* 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

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

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 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). However, when no adequate summary exists, detailed statements regarding the allegations must be released, but the identities of witnesses and victims must still be redacted from the statements. We note that supervisors are generally not witnesses for purposes of *Ellen*, except where their statements appear in a non-supervisory context.

The submitted information contains an adequate summary of an investigation into alleged sexual harassment. Thus, the summary is not confidential. However, information within the summary identifying the alleged victims is generally confidential under common-law privacy and must be withheld pursuant to section 552.101 of the Government Code. *See Ellen*, 840 S.W.2d at 525. You state that the requestor in this instance is the attorney for one of the alleged sexual harassment victims; therefore, information identifying that victim is not excepted under section 552.101 and common-law privacy. *See* Gov't Code § 552.023 (person has special right of access to information excepted from public disclosure under laws intended to protect person's privacy interest as subject of the information); *see also* Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when person or person's representative asks governmental body for information concerning that person). However, portions of the submitted summary, which we have marked, identify other alleged victims of sexual harassment. You inform us that the requestor is also the attorney for three other complainants; however, you have not identified these complainants as the other victims at issue. Therefore, we must rule conditionally. To the extent the requestor represents the other alleged sexual harassment victims, the county may not withhold information pertaining to those victims on the basis of common-law privacy. *See* Gov't Code § 552.023. However, to the extent the requestor does not represent the other alleged victims, information identifying such victims must be withheld under section 552.101 in conjunction with common-law privacy. *See Ellen*, 840 S.W.2d at 525. Furthermore, as an adequate summary exists, the remaining information in the investigation file, which we have marked, must be withheld under section 552.101 in conjunction with common-law privacy. *See id.*

We note that the submitted summary contains information subject to section 552.117(a)(1) of the Government Code. 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* Gov't Code §§ 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 county 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. In this instance, we have marked the information within the submitted summary that is generally subject to section 552.117. You do not inform this office that the county employee whose information we have marked elected to keep his personal information confidential before the county received the instant request for information. Therefore, we must rule conditionally. If the individual whose personal information we have marked timely elected to withhold such information under section 552.024, the marked information must be withheld under section 552.117(a)(1). If the individual at issue did not timely elect confidentiality, the marked information may not be withheld under section 552.117(a)(1).

In summary, (1) we decline to issue a decision regarding the information at issue in the pending litigation between the county and our office, but will instead allow the trial court to determine whether this information must be released to the public; (2) the county must continue to rely on Open Records Letter Nos. 2008-16321 and 2009-14553 as previous determinations with regard to the information at issue in those rulings; (3) the county must release the information we have marked under section 552.022(a)(17) of the Government Code; (4) to the extent the requestor does not represent the alleged victims at issue, the county must withhold the information identifying such individuals, which we have marked, in the submitted summary under section 552.101 of the Government Code in conjunction with common-law privacy; (5) the county must withhold the remaining information in the investigation file under section 552.101 in conjunction with common-law privacy; and (6) if the individual whose information we have marked timely elected to withhold such information under section 552.024, the county must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The remaining information at issue must be released to the requestor.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

⁴We note that the information being released contains confidential information to which the requestor has a right of access. See Gov't Code § 552.023(a); ORD 481 at 4. Therefore, if the county receives another request for this particular information from a different requestor, then the county must again seek a decision from this office.

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 black ink, appearing to read "Chris Sterner", written in a cursive style.

Christopher D. Sterner
Assistant Attorney General
Open Records Division

CDSA/eeg

Ref: ID# 363892

Enc. Submitted documents

c: Requestor
(w/o enclosures)