



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 13, 2010

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

OR2010-06849

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# 379229.

The Texas Department of Transportation (the "department") received two requests for information pertaining to a specific sexual harassment investigation. Specifically, the first requestor seeks the following: 1) copies of e-mail correspondence to and from Thressa Ali, investigator with the office of general counsel; a copy of the first requestor's personnel file; a copy of the OCR report and related investigative documents resulting in the first requestor's termination; a copy of the disciplinary section found in the human resources manual. The second requestor seeks the following: 2) the final management directed investigation report; witness statements and follow-up statements; work papers, including but not limited to e-mail correspondence, telephone conversation notes, written notes, issues lists, presentations, etc.; investigation work program or documentation of the investigation objective and scope, including any paperwork that shows supervisor approval of the investigation work program. You state the department is releasing some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code. We have considered the

exceptions you claim and reviewed the submitted representative sample of information.¹ We have also received and considered comments from the first requestor. See 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. Section 552.101 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 and 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 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*, 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. 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).

¹We 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.

The submitted documents consist of a completed investigation into an allegation of sexual harassment. We find portions of the submitted documents constitute an adequate summary of the sexual harassment investigation. The submitted documents also include the statement of the accused individual. The summary and statement of the accused individual are not confidential in their entirety; however, information within the summary and statement identifying the victim and witnesses 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. In the summary and statement, we marked the identifying information of the victim and non-supervisory witnesses the department must withhold from the first requestor under section 552.101 in conjunction with common-law privacy. We note the second requestor is the alleged victim in this instance. Thus, because the second requestor has a right of access to information that would ordinarily be withheld on the basis of her own privacy interests, the department may not withhold her identifying information from her. *See Gov't Code* § 552.023; *see also* Open Records Decision No. 481 (1987). The department must, however, withhold the identifying information of non-supervisory witnesses from the second requestor under section 552.101 in conjunction with common-law privacy. The remaining records must be withheld under section 552.101 in conjunction with common-law privacy.²

Portions of the summary and statement of the accused contain information concerning the first requestor which may be subject to section 552.117 of the Government Code.³ This section excepts from public disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who timely request that such information be kept confidential under section 552.024. 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 officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Accordingly, if the first requestor timely elected to keep this information confidential pursuant to section 552.024, the department must withhold this information from the second requestor under section 552.117(a)(1). However, if the first requestor did not timely elect under section 552.024, the information we marked must be released. We note the summary and statement of the accused also contain references to the family members of other employees. Because of the redactions under section 552.101, however, this information no longer reveals the family member information of any specific employee.

²As our ruling is dispositive, we need not address your remaining arguments against disclosure of this 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).

In summary, with the exception of the marked summary and statement of the accused, the department must withhold the submitted information under section 552.101 of the Government Code in conjunction with common-law privacy. From the summary and statement of the accused, the department must withhold the information we marked under section 552.101 in conjunction with common-law privacy. If a timely election was made, the department must also withhold the information we marked in the summary and statement from the second requestor pursuant to section 552.117. The remaining information in the summary and statement of the accused 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, toll free, at (888) 672-6787.

Sincerely,



Jessica Eales
Assistant Attorney General
Open Records Division

JCE/eeg

Ref: ID# 379229

Enc. Submitted documents

c: Requestor
(w/o enclosures)