



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 24, 2010

Mr. James Mu  
Assistant General Counsel  
Office of the General Counsel  
Texas Department of Criminal Justice  
P.O. Box 4004  
Huntsville, Texas 77342-4004

OR2010-07513

Dear Mr. Mu:

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# 380854.

The Texas Department of Criminal Justice (the "department") received a request for all materials in the department's case files in relation to the requestor's client's equal employment opportunity charge. You claim the submitted information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides in relevant part:

the following categories of information are public information and not excepted from required disclosure under this chapter 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 information consists of documents that are part of a completed investigation and thus subject to section 552.022(a)(1). Although you raise sections 552.103 and 552.107 of the Government Code for the submitted information, these sections are discretionary exceptions to disclosure that are intended to protect only the interests of the governmental body 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); Open Records Decision Nos. 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential), 676 at 10 (2002) (attorney-client privilege under section 552.107(1) may be waived); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, sections 552.103 and 552.107 do not constitute "other law" that makes information confidential. Accordingly, we conclude the department may not withhold any of the submitted information under sections 552.103 and 552.107. However, the Texas Supreme Court has held the Texas Rules of Evidence are "other law" that makes information expressly confidential for the purposes of section 552.022. We will therefore consider the applicability of rule 503 of the Texas Rules of Evidence to the information you have marked as attorney-client privileged. Furthermore, we note sections 552.101 and 552.117 of the Government Code are "other law" for section 552.022 purposes.<sup>1</sup> Accordingly, we will also consider the applicability of sections 552.101 and 552.117 to the submitted information.

Rule 503(b)(1) provides the following:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

- (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
- (B) between the lawyer and the lawyer's representative;
- (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
- (D) between representatives of the client or between the client and a representative of the client; or

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<sup>1</sup>The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if 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).

Accordingly, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must do the following: (1) show the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. *See* ORD 676. Upon a demonstration of all three factors, the entire communication is confidential under rule 503 provided the client has not waived the privilege or the communication does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 4527 (Tex. App.—Houston [14<sup>th</sup> Dist.] 1998, no pet.) (privilege attaches to complete communication, including factual information).

You state the document labeled as "Inter-Office Communications" constitutes a communication between the department's Office of the General Counsel and Human Resources Department for the purpose of providing legal advice to the department. You also state this communication was made in confidence and has maintained its confidentiality. Based on your representations and our review of the information, we agree the document labeled "Inter-Office Communications" is protected by the attorney-client privilege. We therefore conclude the department may withhold this information pursuant to rule 503 of the Texas Rules of Evidence.

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 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). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. This office has found personal financial information not relating to a financial transaction between an individual and a governmental body is generally intimate and embarrassing. *See* Open Records Decision Nos. 600 (1992), 545 (1990) (attorney general has found kinds of financial information not excepted from public disclosure by common-law privacy to be generally those regarding receipt of governmental

funds or debts owed to governmental entities), 523 (1989) (information related to an individual's mortgage payments, assets, bills, and credit history is excepted from disclosure under the common-law right to privacy).

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 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 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 supervisors are generally not witnesses for purposes of *Ellen*, except where their statements appear in a non-supervisory context.

In this instance, we find the remaining information relates to a sexual harassment investigation. The remaining documents do not contain an adequate summary of the investigation. Thus, the information at issue must generally be released, with the identities of the victim and witnesses redacted. We note because the requestor's client is the alleged victim, information identifying the victim in this case is not excepted under section 552.101 and common-law privacy. See Gov't Code § 552.023 (person or person's authorized representative 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 asks governmental body for information concerning the herself). However, a portion of the remaining information, which we have marked, identifies witnesses of sexual harassment. The information we have marked in the remaining documents must be withheld under section 552.101 in conjunction with common-law privacy. See *Ellen*, 840 S.W.2d at 525. The department must also withhold the personal financial information not belonging to the requestor, which we have marked, under section 552.101 in conjunction with common-law privacy.

Section 552.117(a)(3) of the Government Code excepts from public disclosure the present and former home addresses and telephone numbers, social security numbers, and family

member information of current or former department employees, regardless of whether the employee complies with section 552.1175 of the Government Code. Gov't Code § 552.117(a)(3). Accordingly, the department must withhold the personal information of department employees we have marked pursuant to section 552.117(a)(3).

In summary, the department may withhold the information you have marked under Texas Rule of Evidence 503. The department must withhold the information we have marked under (1) section 552.101 of the Government Code in conjunction with common-law privacy and (2) section 552.117 of the Government Code. The remaining information must be released.<sup>2</sup>

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](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,



Ana Carolina Vieira  
Assistant Attorney General  
Open Records Division

ACV/eeg

Ref: ID# 380854

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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<sup>2</sup>Because such information may be confidential with respect to the general public, if the department receives another request for this information from an individual other than this requestor, the department should again seek our decision.