



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

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Mr. James Mu  
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Office of the General Counsel  
P.O. Box 4004  
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OR2011-17452

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# 437147.

The Texas Department of Criminal Justice (the "department") received a request for a copy of a specified investigation, any statements made by two named individuals, and any notes from interviews of these individuals. You state the department's non-confidential responsive information has been or will be released to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.108 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted information.

Initially, we must determine whether the department complied with section 552.301 of the Government Code in requesting this decision. Section 552.301 prescribes procedures a governmental body must follow in asking this office to determine whether information is excepted from public disclosure under the Act. Section 552.301(e)(1)(A) requires the governmental body to submit to this office "written comments stating the reasons why the

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<sup>1</sup>You inform us the department withdraws its initial claims under sections 552.102, 552.104, 552.110, 552.111, 552.116, 552.122, 552.130, 552.1325, 552.134, 552.136, and 552.137 of the Government Code.

stated exceptions apply that would allow the information to be withheld[.]” Gov’t Code § 552.301(e)(1)(A). Section 552.301(e-1) provides as follows:

A governmental body that submits written comments to the attorney general under Subsection (e)(1)(A) shall send a copy of those comments to the person who requested the information from the governmental body not later than the 15<sup>th</sup> business day after the date of receiving the written request. If the written comments disclose or contain the substance of the information requested, the copy of the comments provided to the person must be a redacted copy.

*Id.* § 552.301(e-1). We note the department redacted its entire argument under section 552.103 of the Government Code from the copy of written comments the department provided to the requestor pursuant to section 552.301(e-1). We further note the department’s section 552.103 argument neither discloses nor contains the substance of the submitted information. Therefore, we conclude the department failed to comply with section 552.301(e-1) in requesting a decision under section 552.103.

Generally, a governmental body’s failure to comply with section 552.301 results in the waiver of its claims under the exceptions at issue, unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *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). In general, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). We note section 552.103 is discretionary in nature. It serves only to protect a governmental body’s interests, and may be waived; as such, it does not constitute a compelling reason to withhold information for purposes of section 552.302. *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. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, in failing to comply with section 552.301(e-1), the department has waived section 552.103 because it is not a compelling reason to withhold the submitted information. *See* Gov’t Code § 552.302. Accordingly, none of the submitted information may be withheld under section 552.103. However, we will address your remaining arguments against disclosure of the submitted information.

Section 552.101 of the Government Code exempts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 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 (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 that 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 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). We note supervisors are generally not witnesses for purposes of *Ellen*, except where their statements appear in a non-supervisory context.

In this case, only a small portion of the submitted information pertains to a sexual harassment investigation. Upon review of this information, we find it does not contain an adequate summary of this investigation. Because there is no adequate summary, the sexual harassment investigation must be released. Although the identifying information of victims and witnesses in a sexual harassment investigation are generally confidential, the information at issue does not include any witnesses of the alleged sexual harassment. Furthermore, the requestor, who is the victim of the alleged sexual harassment, has a special right of access to her own identifying information. See Gov't Code § 552.023(a) (stating that person or person's authorized representative has special right of access to information that relates to person and that is protected from disclosure by laws intended to protect person's privacy interest); Open Records Decision No. 481 at 4 (1987) (governmental body may not deny access to whom information relates or person's authorized representative on grounds that information is considered confidential by privacy principles). Accordingly, the information pertaining to the sexual harassment investigation must be released. We note that the remaining information pertains to an investigation of alleged gender discrimination, not sexual harassment. Therefore, the department may not withhold any of the submitted

information under section 552.101 in conjunction with common-law privacy and the holding in *Ellen*.

The department raises section 552.108(b)(1) of the Government Code for portions of the submitted information. Section 552.108(b)(1) excepts from disclosure the internal records and notations of law enforcement agencies and prosecutors when their release would interfere with law enforcement and crime prevention. Gov't Code § 552.108(b)(1); *see also* Open Records Decision No. 531 at 2 (1989) (quoting *Ex parte Pruitt*, 551 S.W.2d 706, 710 (Tex. 1977)). Section 552.108(b)(1) is intended to protect "information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State." *See City of Ft. Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no writ). To demonstrate the applicability of this exception, a governmental body must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. Open Records Decision No. 562 at 10 (1990). This office has concluded that section 552.108(b) excepts from public disclosure information relating to the security or operation of a law enforcement agency. *See, e.g.*, Open Records Decision Nos. 531 (release of detailed use of force guidelines would unduly interfere with law enforcement), 252 (1980) (section 552.108 is designed to protect investigative techniques and procedures used in law enforcement), 143 (1976) (disclosure of specific operations or specialized equipment directly related to investigation or detection of crime may be excepted). Section 552.108(b)(1) is not applicable, however, to generally known policies and procedures. *See, e.g.*, ORDs 531 at 2-3 (Penal Code provisions, common-law rules, and constitutional limitations on use of force not protected), 252 at 3 (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known).

You inform us the information at issue concerns sensitive security procedures of department correctional facilities. You also inform us this information divulges security procedures in these facilities regarding inmate cell ingress and egress, and how department correctional officers perform inmate counts. You state the information could be useful to inmates in their future attempts to circumvent the security of these facilities. Having reviewed your arguments and the information at issue, we agree release of most of the information at issue would interfere with law enforcement or crime prevention. Accordingly, the department may withhold the information we have marked under section 552.108(b)(1). However, we find you have failed to demonstrate how release of the remaining information at issue would interfere with law enforcement or crime prevention. Thus, this information may not be withheld under section 552.108(b)(1).

You claim section 552.107 of the Government Code for a portion of the remaining information. Section 552.107 protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to

withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.* 503(b)(1), meaning it was “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).

Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no pet.). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You represent the information you have marked under section 552.107 consists of a communication between a department attorney and department employees that was made in the furtherance of the rendition of professional legal services to the department. You also represent this communication was intended to be and has remained confidential. Based on your representations and our review, we conclude you have established the information at issue is protected by the attorney-client privilege. Therefore, the department may withhold the information you have marked under section 552.107(1).

We note the remaining information contains employees’ birth dates that are excepted from disclosure under section 552.102(a) of the Government Code.<sup>2</sup> Section 552.102(a) excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Gov’t Code § 552.102(a). The Texas

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<sup>2</sup>The 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).

Supreme Court recently held section 552.102(a) exempts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010). In this instance, the birth dates at issue include the requestor's birth date. Because section 552.102 protects personal privacy, the requestor has a special right of access to her own birth date. *See* Gov't Code § 552.023(a); ORD 481 at 4. However, the remaining birth dates at issue are those of other department employees. Therefore, the department must withhold this information, which we have marked, under section 552.102(a).

We also note portions of the remaining information are subject to section 552.117(a)(3) of the Government Code. Section 552.117(a)(3) exempts from disclosure the home address, home telephone number, emergency contact information, social security number, and family member information of a current or former employee of the department or any division of the department, regardless of whether the current or former employee complies with section 552.1175 of the Government Code. *See* Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 2 (to be codified as an amendment to Gov't Code § 552.117(a)). We note an individual's personal post office box number is not a "home address" for purposes of section 552.117, and therefore may not be withheld under section 552.117. *See* Open Records Decision No. 622 at 6 (1994) (legislative history makes clear that purpose of section 552.117 is to protect public employees from being harassed at *home*) (citing House Committee on State Affairs, Bill Analysis, H.B. 1979, 69th Leg. (1985) (emphasis added)). We further note that some of the information at issue consists of the requestor's personal information. Thus, because section 552.117 protects personal privacy, as noted above, the requestor has a right of access to her own information. Gov't Code § 552.023(a); ORD No. 481 at 4. However, the remaining information at issue is the personal information of other department employees. Therefore, the department must withhold this information, which we have marked, under section 552.117(a)(3).

In summary, the department may withhold the information we marked under section 552.108(b)(1) of the Government Code. The department may withhold the information you marked under section 552.107(1) of the Government Code. The department must withhold the information we marked under sections 552.102(a) and 552.117(a)(3) of the Government Code. The remaining information must be released.<sup>3</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.

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<sup>3</sup>We note 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. If the department receives another request for this information from a different requestor, then the department should again seek a decision from this office.

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,



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Assistant Attorney General  
Open Records Division

KLC/agn

Ref: ID# 437147

Enc. Submitted documents

c: Requestor  
(w/o enclosures)