



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 24, 2012

Mr. Stan O. Springerley
Civil Assistant District Attorney
Smith County
100 North Broadway, Fourth Floor
Tyler, Texas 75702

OR2012-05813

Dear Mr. Springerley:

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# 451822.

The Smith County Precinct 5 Constable's Office (the "constable's office") received a request for a specified settlement agreement. You claim the requested information is excepted from disclosure under sections 552.101, 552.103, and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You inform us the settlement agreement at issue is subject to a confidentiality agreement. However, information is not confidential under the Act simply because the party submitting the information to a governmental body anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). Thus, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract."), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110). Consequently, unless the requested information falls within an exception to disclosure, it must be released, notwithstanding any expectations or agreement specifying otherwise.

Next, we must address the obligations of the constable's office under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. *See* Gov't Code § 552.301(b). You inform us the constable's office received the request for information on February 2, 2012. Thus, the ten-business-day deadline of the constable's office to request a ruling was February 16, 2011. We received your request for a ruling on February 21, 2012. In addition, the envelope containing your request for a ruling has two postmarks: the first dated February 9, 2012, and the second dated February 17, 2012. *See id.* § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail). Thus, upon review, we find you have not established the constable's office complied with the procedural requirements mandated by 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; *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. *See* Open Records Decision No. 150 (1977). Sections 552.103 and 552.107 of the Government Code are discretionary in nature: they serve only to protect a governmental body's interests. *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 No. 676 at 12 (2002) (attorney-client privilege under section 552.107 or Texas Rule of Evidence 503 constitutes compelling reason to withhold information under section 552.302 only if information's release would harm third party); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). Thus, the claims of the constable's office under sections 552.103 and 552.107 are not compelling reasons to overcome the presumption of openness. Therefore, the constable's office may not withhold any of the submitted information under either of these sections. However, section 552.101 of the Government Code can provide a compelling reason to overcome this presumption.

The requested information consists of a settlement agreement. Pursuant to section 552.022(a)(18) of the Government Code, a settlement agreement is expressly public unless it is expressly confidential under the Act or other law. You claim the information at issue is excepted under section 552.101 of the Government Code, which makes information confidential under chapter 552. Accordingly, we will address your argument under section 552.101.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses information protected by other statutes. Section 154.073 of the Civil Practice and Remedies Code provides in relevant part the following:

(a) Except as provided by Subsections (c), (d), (e), and (f), a communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding.

(b) Any record made at an alternative dispute resolution procedure is confidential, and the participants or the third party facilitating the procedure may not be required to testify in any proceedings relating to or arising out of the matter in dispute or be subject to process requiring disclosure of confidential information or data relating to or arising out of the matter in dispute.

...

(d) A final written agreement to which a governmental body, as defined by Section 552.003, Government Code, is a signatory that is reached as a result of a dispute resolution procedure conducted under this chapter is subject to or excepted from required disclosure in accordance with [the Act].

Civ. Prac. & Rem. Code § 154.073(a)-(b), (d). You also raise section 2009.054 of the Government Code, which provides in relevant part the following:

(a) Sections 154.053 and 154.073, Civil Practice and Remedies Code, apply to the communications, records, conduct, and demeanor of the impartial third party and the parties.

(b) Notwithstanding Section 154.073(e), Civil Practice and Remedies Code:

(1) a communication relevant to the dispute, and a record of the communication, made between an impartial third party and the parties to the dispute or between the parties to the dispute during the course of an alternative dispute resolution procedure are confidential and may not be disclosed unless all parties to the dispute consent to the disclosure; and

(2) the notes of an impartial third party are confidential except to the extent that the notes consist of a record of a communication with a party and all parties have consented to disclosure in accordance with Subdivision (1).

(c) Subsection (b)(1) does not apply to a final written agreement to which a governmental body is a signatory that is reached as a result of a dispute resolution procedure conducted under this chapter. Information in the final written agreement is subject to required disclosure, is excepted from required disclosure, or is confidential in accordance with [the Act] and other law.

Gov't Code § 2009.054(a)-(c). You assert the submitted settlement agreement is confidential under section 154.073(d) of the Civil Practice and Remedies Code and under section 2009.054(c) of the Government Code. However, neither section 154.073(d) nor section 2009.054(c) makes information confidential. *See* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Instead, they both require the governmental body to raise additional exceptions under the Act against disclosure. *See* Civ. Prac. & Rem. Code § 154.073(d); Gov't Code § 2009.054(c). Thus, the constable's office may not withhold the settlement agreement from release under section 552.101 of the Government Code in conjunction with section 154.073(d) or 2009.054(c).

Section 552.101 also encompasses 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.*, 540 S.W.2d at 685. 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 addition, 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.*

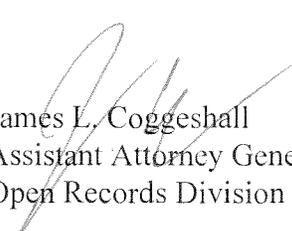
In accordance with *Ellen*, a governmental body must withhold information that would tend to identify a witness or victim of sexual harassment. We note, however, *Ellen* provides no

protection to individuals who are accused of sexual harassment. *See id.*; *see also* Open Records Decision Nos. 405 at 2-3 (1983) (public has interest in manner in which public employee performs his job), 329 at 2 (1982) (information relating to complaints against public employees and discipline resulting therefrom is not protected under former sections 552.101 and 552.102 of Government Code), 208 at 2 (1978) (information relating to complaint against public employee and disposition of complaint is not protected under either constitutional or common-law right of privacy). After reviewing the submitted documents, we have marked the information identifying a victim of sexual harassment that the constables office must withhold under section 552.101 of the Government Code in conjunction with common-law privacy and *Ellen*. However, we conclude the remaining information is not confidential under common-law privacy, and the constable's office may not withhold it under section 552.101 of the Government Code on that ground. Instead, the constable's office must release the remaining information to the requestor.

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,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/ag

Ref: ID# 451822

Enc. Submitted documents

c: Requestor
(w/o enclosures)