



**ATTORNEY GENERAL OF TEXAS**  
**GREG ABBOTT**

July 31, 2012

Ms. Molly Cost  
Assistant General Counsel  
Texas Department of Public Safety  
P.O. Box 4087  
Austin, Texas 78773-0001

OR2012-11964

Dear Ms. Cost:

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# 460630 (PIR # 12-1520).

The Texas Department of Public Safety (the "department") received a request for the requestor's personnel file and any documents referencing the requestor, e-mails between named individuals during a specified time period, and a specified witness statement. You state the department will release some of the responsive information. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.107, 552.111, and 552.116 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the information in Folder B is subject to a previous determination issued to the department. Open Records Letter No. 2010-12863 (2010) is a previous determination authorizing the department to withhold personnel records of commissioned officers of the department under section 552.101 of the Government Code in conjunction with

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<sup>1</sup> Although you raise section 552.101 in conjunction with the attorney-client privilege under Texas Rule of Evidence 503 and with the attorney work product privilege under Texas Rule of Civil Procedure 192.5, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Furthermore, we note the proper exceptions to raise when asserting the attorney-client privilege and the attorney work product privilege for information not subject to section 552.022 of the Government Code are sections 552.107 and 552.111, respectively. *See* Open Records Decision Nos. 677 (2002), 676 at 1-2 (2002).

section 411.00755 of the Government Code, unless the exceptions to confidentiality listed in subsections 411.00755(b)(1)-(12) or the release provisions listed in subsection 411.00755(c) are applicable. *See* Gov't Code § 411.00755(b)(1)-(12), (c). In this instance, you state the information in Folder B consists of personnel records. You also state this information does not contain any of the types of information listed in subsections 411.00755(b)(1)-(12), and there is no indication the release provisions in subsection 411.00755(c) are applicable in this instance. Therefore, pursuant to Open Records Letter No. 2010-12863, the department must withhold the information in Folder B under section 552.101 of the Government Code in conjunction with section 411.00755 of the Government Code. *See* Open Records Decision No. 673 (2001) (governmental body may rely on previous determination when elements of law, facts, and circumstances have not changed, decision concludes specific, clearly delineated category of information is excepted, and governmental body is explicitly informed it need not seek a decision from this office to withhold information in response to future requests).

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 Americans with Disabilities Act of 1990 (the "ADA"), which provides for the confidentiality of certain medical records of employees and applicants. Specifically, the ADA provides that information about the medical conditions and medical histories of applicants or employees must be (1) collected and maintained on separate forms, (2) kept in separate medical files, and (3) treated as a confidential medical record. 29 C.F.R. § 1630.14(c). In addition, an employer's medical examination or inquiry into the ability of an employee to perform job-related functions is to be treated as a confidential medical record. *Id.*; *see also* Open Records Decision No. 641 (1996). The Equal Employment Opportunity Commission determined medical information for the purposes of the ADA includes "specific information about an individual's disability and related functional limitations, as well as, general statements that an individual has a disability or that an ADA reasonable accommodation has been provided for a particular individual." *See* Letter from Ellen J. Vargyas, Legal Counsel, EEOC, to Barry Kearney, Associate General Counsel, National Labor Relations Board, 3 (Oct. 1, 1997). Federal regulations define "disability" for the purposes of the ADA as (1) a physical or mental impairment that substantially limits one or more of the major life activities of the individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment. 29 C.F.R. § 1630.2(g). The regulations further provide that physical or mental impairment means: (1) any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or (2) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. *See id.* § 1630.2(h). Upon review, we find the ADA is applicable to a portion of the information in Folder A, which we have marked. The department must withhold the information we have marked under section 552.101 in conjunction with the ADA.

Section 552.101 of the Government Code also 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 type 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.

You claim the remaining information in Folder A is protected by common-law privacy under *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied). 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.

The information at issue contains an adequate summary of an investigation into alleged sexual harassment and a statement of an accused individual. Thus, this summary, as well as the statement, are not confidential under common-law privacy. However, the portions of information within the summary and the statement that identify the victims of and witnesses to the alleged sexual harassment, which we have marked, are 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. The department must release the remaining portions of the summary and the statement to the requestor. The department must withhold the

remaining information in this investigation, which we have indicated, under section 552.101 in conjunction with common-law privacy and the holding in *Ellen*. However, we find you have failed to demonstrate the remaining information in Folder A pertains to a sexual harassment investigation. Accordingly, the department may not withhold any of the remaining information in Folder A under section 552.101 of the Government Code in conjunction with common-law privacy and the ruling in *Ellen*.

We note some of the remaining information in Folder A is highly intimate or embarrassing and not of legitimate public concern. Therefore, the department must generally withhold this information pursuant to section 552.101 of the Government Code in conjunction with common-law privacy. However, we note the requestor is the individual to whom some of this information pertains. *See* Gov't Code § 552.023(b) ("person or a person's authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person's privacy interests"). Thus, the requestor has a right of access to his own information pursuant to section 552.023(b), and this information may not be withheld from him under section 552.101 in conjunction with common-law privacy. The department, however, must withhold the information we have marked in Folder A, which pertains to individuals other than the requestor, under section 552.101 in conjunction with common-law privacy.

You claim the information in Folder C is excepted from disclosure under section 552.102 of the Government Code. 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 Supreme Court has held section 552.102(a) excepts 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.*, 354 S.W.3d 336 (Tex. 2010). Upon review, we find the information you seek to withhold is not excepted under section 552.102(a). Thus, the department may not withhold any of the information in Folder C under section 552.102(a).

Section 552.107(1) of the Government Code protects information that comes 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. *See* 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. *See* 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. *See 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 capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a

communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* TEX. R. EVID. 503(b)(1)(A)-(E). 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. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). 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 seek to withhold the information in Folder D under section 552.107(1). You state this information consists of confidential communications between attorneys for and employees of the department that were made for the purpose of rendering professional legal advice. You also state the department has maintained the confidentiality of the communications. Based on your representations and our review, we conclude the department generally may withhold the information in Folder D under section 552.107(1) of the Government Code. However, we note some of the submitted e-mail strings include communications with a non-privileged party. If the communications with this non-privileged party, which we have marked, exist separate and apart from the e-mail strings in which they appear, then the department may not withhold them under section 552.107.

You claim the information in Folder E is excepted from disclosure under section 552.111 of the Government Code. Section 552.111 excepts from disclosure “[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]” Gov’t Code § 552.111. Section 552.111 encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as

(1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial between a party and the party’s representatives or among a party’s representatives,

including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5. A governmental body seeking to withhold information under this exception bears the burden of demonstrating the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. TEX. R. CIV. P. 192.5; ORD 677 at 6-8. In order for this office to conclude the information was made or developed in anticipation of litigation, we must be satisfied

(a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

*Nat'l Tank Co. v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204; ORD 677 at 7.

You claim the information at issue discloses attorney work product. Upon review, we find the department has failed to demonstrate the applicability of the work product privilege to the information at issue. Accordingly, the department may not withhold any of the information in Folder E under the work product privilege of section 552.111 of the Government Code.

Section 552.116 of the Government Code provides as follows:

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, a school district, a hospital district, or a joint board operating under Section 22.074, Transportation Code, including any audit relating to the criminal history background check of a public school employee, is excepted from [required public disclosure]. If information in an audit working paper is also maintained in another record, that other record is not excepted from [public disclosure] by this section.

(b) In this section:

(1) "Audit" means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, the bylaws adopted by or other action of the governing board of a hospital district, resolution or other action of a board of trustees of a school district, including an audit by the district relating to the

criminal history background check of a public school employee, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.

(2) "Audit working paper" includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116(a), (b)(1)-(2). You state some of the information in Folder F consists of communications between the department and the State Auditor's Office ("SAO") in connection with an audit being conducted by the SAO. We note the SAO is an independent auditor for Texas state government. The SAO has authority under section 321.013 of the Government Code to conduct investigations and audits of all state departments as specified in the audit plan or as directed by the Legislative Audit Committee. *See id.* § 321.013(a), (f). We note, however, section 552.116 is intended to protect the auditor's interests. As previously noted, the audit is being conducted by the SAO. In this instance, the department cannot assert section 552.116 in order to protect the information at issue. You do not inform us the SAO seeks to withhold the information at issue under section 552.116. Accordingly, section 552.116 is inapplicable and does not protect the information at issue from disclosure.

You state the remaining information in Folder F pertains to audits conducted pursuant to section 411.243 of the Government Code by the department's Office of Audit and Review (the "OAR"). Section 411.243 provides that the OAR shall inspect all department divisions to ensure that operations are conducted in compliance with established procedures and make recommendations for improvements in operational performance. *Id.* § 411.243(a)(1); *see also id.* § 411.241(1) (office shall inspect and audit departmental programs and operations for compliance with established procedures and develop recommendations for improvement).

You state the information at issue consists of information prepared and maintained by the OAR in conducting an audit or used to draft audit reports. Based on your representations and our review, we find this information in Folder F, which we have marked, consists of audit working papers that the department may withhold under section 552.116.

We note some of the submitted information may be subject to section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who timely request that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a). Section 552.117 encompasses personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See Open Records Decision No. 506 at 5-6 (1988)* (statutory

predecessor to Gov't Code § 552.117 not applicable to numbers for cellular mobile telephones installed in county officials' and employees' private vehicles and intended for official business). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). The department may withhold information under section 552.117 only on behalf of current or former 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. We have marked cellular telephone numbers in Folders A and C subject to section 552.117(a)(1). If the employees whose information is at issue timely elected to keep their personal information confidential, and if a governmental body does not pay for the cellular service, the department must withhold the cellular telephone numbers we have marked. The department may not withhold this information under section 552.117(a)(1) if the employees did not make timely elections to keep the information confidential or if a governmental body pays for the cellular service at issue.

Section 552.136 of the Government Code provides “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” *Id.* § 552.136(b). An access device number is one that may be used to (1) obtain money, goods, services, or another thing of value, or (2) initiate a transfer of funds other than a transfer originated solely by paper instrument, and includes an account number. Gov't Code § 552.136(a) (defining “access device”). Accordingly, the department must withhold the cellular telephone account numbers we have marked in Folder F under section 552.136.

In summary, in accordance with the previous determination issued in Open Records Letter No. 2010-12863, the department must withhold the information in Folder B under section 552.101 of the Government Code in conjunction with section 411.00755 of the Government Code. The department must withhold the information we have marked in Folder A under section 552.101 of the Government Code in conjunction with the ADA. The department must withhold the identifying information of the victims and the witnesses we have marked in the sexual harassment investigation summary and the statement of an accused individual in Folder A under section 552.101 of the Government Code in conjunction with common-law privacy and the ruling in *Ellen*. Further, with the exception of the remaining information in the summary and the statement, the department must withhold the remaining information in this investigation, which we have indicated, under section 552.101 of the Government Code in conjunction with common-law privacy and the ruling in *Ellen*. The department also must withhold the information we have marked in Folder A under section 552.101 of the Government Code in conjunction with common-law privacy. The department generally may withhold the information in Folder D under section 552.107 of the Government Code, except for any non-privileged e-mails we have marked that exist separate and apart from the e-mail strings to which they are attached. The department may withhold the information we have marked in Folder F under section 552.116 of the Government Code. The department must withhold the information we have marked in Folders A and C under section 552.117(a)(1) of the Government Code if the employees whose information is at issue timely elected under section 552.024 of the Government Code

to keep their personal information confidential and if a governmental body does not pay for the cellular service. The department must withhold the cellular telephone account numbers we have marked in Folder F under section 552.136. The department must release the remaining information.<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,



Tamara H. Holland  
Assistant Attorney General  
Open Records Division

THH/ag

Ref: ID# 460630

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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<sup>2</sup>As previously noted, the requestor has a special right of access under section 552.023 of the Government Code to some of the information being released. See Gov't Code § 552.023(a). Therefore, if the department receives another request for this information from a person who does not have a special right of access to this information, the department should resubmit this same information and request another decision from this office. See *id.* §§ 552.301(a), .302; Open Records Decision No. 673 (2001).