



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

March 24, 1994

Ms. Sandra Joseph  
Open Records Counsel/Disclosure Officer  
Office of the Comptroller of Public Accounts  
LBJ State Office Building  
111 East 17th Street  
Austin, Texas 78774

OR94-106

Dear Ms. Joseph:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code (former article 6252-17a, V.T.C.S.).<sup>1</sup> The Comptroller of Public Accounts (the "comptroller") has received two requests for information relating to an employee grievance proceeding. The first request was assigned ID# 14450. The second request was assigned ID# 15916.

One of the requestors seeks "all information under the custody and control of the Comptroller's Office that relates to Mr. Rothert's dismissal, including but not limited to the 'investigation file' and Eric Rothert's personnel file," including, "a copy of the transcript of the grievance hearing," or "a copy of the tapes." The other requestor seeks information about himself, including "a copy of my personnel file and all information regarding me or my actions, gathered as a result of the 'investigation' into the harassment charges" made by a certain comptroller employee. We understand that the requested tapes and personnel files have been made available to the requestors. You have submitted to us for review, however, the materials contained in the "investigation file," including a draft investigation summary and several written statements and affidavits. You claim that this information is excepted from required public disclosure by sections 552.101 and 552.111 of the Government Code. We address your arguments in turn.

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<sup>1</sup>We note that the Seventy-third Legislature repealed V.T.C.S. article 6252-17a. Acts 1993, 73d Leg., ch. 268, § 46. The Open Records Act is now codified in the Government Code at chapter 552. *Id.* § 1. The codification of the Open Records Act in the Government Code is a nonsubstantive revision. *Id.* § 47.

Section 553.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." You claim that the information submitted to us for review is protected by the doctrine of common-law privacy. Information may be withheld from required public disclosure under common-law privacy if it meets the criteria articulated for section 552.101 by the Texas Supreme Court in *Industrial Found. of the S. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546, 550 (Tex. App.--Austin 1983, writ ref'd n.r.e.); *see also* Open Records Decision No. 441 (1986). Under *Industrial Foundation*, information may be withheld on common-law privacy grounds only if it is highly intimate or embarrassing *and* it is of no legitimate concern to the public. Although information relating to a disciplinary action against a public employee may be highly intimate or embarrassing, the public generally has a legitimate interest in knowing the reasons why such an action was taken. *See* Open Records Decision No. 444 (1986).

In Open Records Decision No. 579 (1990), this office held that common-law privacy did not apply to witness names and statements regarding allegations of sexual misconduct. Recently, however, the court in *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied), addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigatory files at issue in *Ellen* contained individual witness and victim statements, an affidavit given by the individual accused of the misconduct in response to the allegations, and the conclusions of the board of inquiry that conducted the investigation. *Id.* The court held that the nature of the information, *i.e.* the names of witnesses and their detailed affidavits regarding allegations of sexual harassment, was exactly the kind of information specifically excluded from disclosure under the privacy doctrine as described in *Industrial Foundation*. *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."<sup>2</sup> *Id.*

You have submitted to us for review a draft investigation summary and several written statements and affidavits in which comptroller employees detail complaints of sexual harassment. We conclude that the written statements and affidavits of the complainants and witnesses are excepted in their entirety from required public disclosure by the common-law privacy doctrine as applied in *Ellen*. Moreover, any information contained in the draft investigation summary that tends to identify the complainants and witnesses is also protected by common-law privacy. This type of information has been

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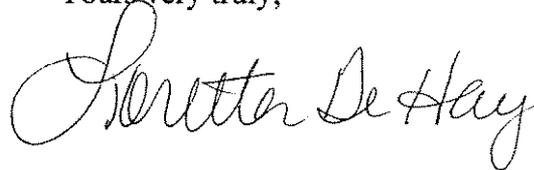
<sup>2</sup>Although the *Ellen* court recognized that the person accused of misconduct may in some instances have a privacy interest in information contained within investigatory files, we think in this case the public's interest in disclosure of the information outweighs the accused's privacy interest. *See Ellen*, 840 S.W.2d at 525.

marked and must be withheld under section 552.101 of the Open Records Act. However, the remaining information, *i.e.*, the redacted draft summary investigation, is not protected under section 552.101 of the Open Records Act in conjunction with the court's holding in *Ellen* because it contains sufficient information to serve the public interest.<sup>3</sup>

You also claim that some of the requested information constitutes "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency" under section 552.111 of the act and, therefore, is excepted from public disclosure. In *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 413 (Tex. App.--Austin 1992, no writ), the Third Court of Appeals recently held that section 552.111 "exempts those documents, and only those documents, normally privileged in the civil discovery context." In Open Records Decision No. 615 (1993), this office reexamined the section 552.111 exception in light of the *Gilbreath* decision and ruled that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. An agency's policymaking functions, however, do not encompass routine personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. *Id.* at 5-6. As the requested information relates to a personnel matter, we conclude that section 552.111 does not except it from required public disclosure. Accordingly, except as noted above, you must release the submitted information in its entirety.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact this office.

Yours very truly,



Loretta R. DeHay  
Assistant Attorney General  
Open Government Section

LRD/GCK/rho

Enclosures: Marked documents

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<sup>3</sup>You also claim that the information submitted to us for review is protected under section 552.101 of the Open Records Act in conjunction with the informer's privilege. The content of an informer's statement is protected only to the extent that it would reveal the informer's identity. See Open Records Decision Nos. 549 (1990) at 5; 515 (1988). As we protect the identities of the complainants under the court's holding in *Ellen*, we need not consider whether such information is protected by the informer's privilege.

Ref.: ID# 14450  
ID# 14536  
ID# 15916

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