Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 3, 1995

Mr. Kevin McCalla
Director, Legal Division
Texas Natural Resource
Conservation Commission
P.O. Box 13087
Austin, Texas 78711-3087

OR95-1181

Dear Mr. McCalla:

The Texas Natural Resource Conservation Commission (the "TNRCC") received a request for an internal investigation report into allegations of sexual harassment. You have asked whether the information at issue is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 36198.

You submitted the requested report to this office for review. You contend that the report is excepted from disclosure pursuant to sections 552.103 and 552.111, and on the basis of the informer's privilege and common-law privacy.

Section 552.103(a) provides an exception for information relating to litigation to which the governmental body is or may be a party. TNRCC has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex.App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. Since you have made no such showing, section 552.103(a) is inapplicable.

Section 552.111 excepts from disclosure interagency or intra-agency communications "consisting of advice, recommendations, opinions, and other material reflecting the deliberative or policymaking processes of the governmental body." Open Records Decision No. 615 (1993) at 5. The information at issue concerns routine personnel and administrative issues, not the TNRCC's policymaking functions. Thus, the information at issue is not excepted from disclosure under section 552.111.

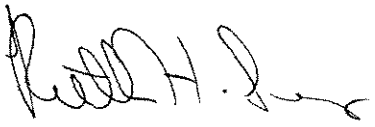
You also contend that the information at issue is excepted from disclosure pursuant to the informer's privilege aspect of section 552.101. *See* Open Records Decision No. 549 (1990) at 4-5. For information to come under the protection of the informer's privilege, the information must relate to a violation of a civil or criminal statute. *See* Open Records Decision Nos. 391 (1983), 191 (1978). Although the privilege can apply to administrative officials with a duty of enforcing particular laws, *see* Attorney General Opinion MW-575 (1982), the privilege does not apply ordinarily to employees "reporting" to their employers about the actions of other employees while at work. Open Records Decision No. 515 (1988). It is not apparent that there has been a violation of the law under the circumstances presented. We also note that the informer's privilege protects the content of communications only to the extent that it identifies the informants. Open Records Decision Nos. 202 (1978), 462 (1987). The individual in question appears to know the identity of the individuals who provided information. For these reasons, we conclude that the informer's privilege does not apply in this situation.

We agree that some of the information at issue is excepted under common-law privacy. Information is excepted from disclosure by a common-law right of privacy under section 552.101 if the information is (1) highly intimate or embarrassing to a reasonable person and (2) of no legitimate public concern. *Industrial Found. v. Texas Indus. Accident Bd.,* 540 S.W.2d 668 (Tex. 1976) *cert. denied*, 430 U.S. 930 (1977). 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 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." *Id.* at 525. Pursuant to *Ellen*, the identities of the victims of and witnesses to alleged sexual harassment are excepted from disclosure by the common-law privacy doctrine.

The court in *Ellen* did not reach the issue of whether the public employee who was accused of the harassment had any inherent right of privacy to his identity. However, the court held that the public possesses a legitimate interest in full disclosure of the facts surrounding employee discipline in this type of situation. *Id.* at 525. We believe that there is a legitimate public interest in the identity of public employees accused of sexual harassment in the workplace and the details of the complaint, regardless of the outcome of the investigation. *See* Open Records Decision Nos. 470 (1987) at 4 (public has legitimate interest in job performance of public employees); 423 (1984) at 2 (scope of public employee privacy is generally narrow).

We have marked the information that may be withheld from disclosure. We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Ruth H. Soucy
Assistant Attorney General
Open Records Division

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Ref.: ID# 36198

Enclosures: Marked documents