



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

February 26, 1996

Mr. Richard D. Monroe
Deputy General Counsel
Texas Department of Transportation
Dewitt C. Greer State Highway Building
125 E. 11th Street
Austin, Texas 78701-2483

OR96-0245

Dear Mr. Monroe:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 38404.

The Texas Department of Transportation (the "department") received a request for a copy of all materials concerning a sexual harassment charge made against Mr. Eric Patin in November, 1992. You claim that the requested information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claimed and have reviewed the documents at issue.

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. The department 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. The department must meet both prongs of this test for information to be excepted under section 552.103(a).

You have submitted to this office a complaint filed with the Texas Commission on Human Rights in which the requestor complains that he was discriminated against by the department. This office has previously held that a pending complaint before the Equal Employment Opportunity Commission indicates a substantial likelihood of potential litigation. Open Records Decision Nos. 386 (1983), 336 (1982), 281 (1981). We believe that for the same reasons the same is true of a complaint pending before the Texas

Commission on Human Rights. Therefore, the department has met the first prong of the section 552.103(a) test.

You claim that "the subject information is being sought by [the requestor] to bolster his claim that [the department] allows or sanctions discriminatory treatment by its supervisory personnel." However, after a review of the requested information, we do not believe that it is related to any of the requestor's age discrimination charges against the department. Therefore, the department may not withhold the requested information under section 552.103(a).

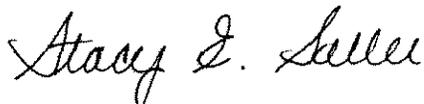
However, some of the information contained in the documents submitted to this office for review is excepted from disclosure by common-law privacy under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by common-law privacy and excepts from disclosure private facts about an individual. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Therefore, information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 (1992) at 1.

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 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.*

Based on *Ellen*, the department must withhold the identities of the witnesses to the alleged harassment and the identity of the alleged victim in the submitted documents. However, we find that the public interest in the identity of the alleged harasser outweighs any privacy interest he may have in that information. Therefore, the department may not withhold his identity. We have marked the information that the department must withhold under *Ellen* and *Industrial Foundation* as applied through section 552.101 of the Government Code. The department may not withhold the remainder of the submitted information.

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 should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Stacy E. Sallee
Assistant Attorney General
Open Records Division

SES/ch

Ref: ID# 38404

Enclosures: Submitted documents

cc: Mr. Carl Aplin, Sr.
(w/o enclosures)