



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

August 20, 1996

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

OR96-1497

Dear Mr. McCalla:

You ask that this office reconsider its determination in Open Records Letter No. 94-796 (1994) that certain information held by the Texas Natural Resource Conservation Commission (the "commission") is subject to required public disclosure under the Texas Open Records Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 31502.

In Open Records Letter No. 94-796 (1994), this office concluded that the commission's failure to submit copies of the records at issue resulted in the legal presumption that the information is public. Your request for reconsideration does not contradict our initial conclusion that the commission did not submit copies of the documents at issue. You have provided no evidence that attests that the commission in fact submitted the requested materials to this office prior to your request for reconsideration. Accordingly, we decline to reconsider Open Records Letter No. 94-796 (1994) to the extent that it concluded that the commission had waived the protection of the act's permissive exceptions. Consequently, we will not consider your arguments that the requested information comes under the protection of the informer's privilege, the attorney-client privilege, or the intra-agency exception to public disclosure.

We now address your contention that the names of individuals who complained that the requestor made sexist remarks and the content of those allegations are excepted from public disclosure in accordance with *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied). In *Ellen*, the court 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. *Ellen*, 840 S.W.2d 519.

The court held that the names of witnesses and their detailed affidavits regarding allegations of sexual harassment were excepted from disclosure under the privacy doctrine as described in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). However, the court ordered the release of, among other things, the summary of the investigation with the identities of the victims and witnesses deleted from the documents, noting that the public interest in the matter was sufficiently served by disclosure of such documents and that in that particular instance "the public [did] not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements." *Id.* at 525.

In this instance, however, you have submitted to this office no evidence that the commission has released to the public details of the requestor's alleged conduct. Consequently, we have no basis for concluding that the commission has sufficiently informed the public of the details of each of the allegations against the requestor. We therefore conclude in this instance that only the identities of those witnesses who alleged sexual harassment¹ must be withheld from the public to protect their privacy interests in accordance with *Ellen*.² The commission must release to the requestor all of the remaining 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,



Loretta R. DeHay
Assistant Attorney General
Open Records Division

¹Please note that this office does not equate the allegations that the requestor engaged in "name calling" or certain allegations of disparate treatment of women in his office with the other allegations of a sexual nature so as to evoke the protection as outlined in *Ellen*. We have indicated the individuals whose identities should be withheld in accordance with *Ellen*.

²We note, however, that several of the individuals interviewed did not comment on any sexual harassment. Because those individuals' statements do not implicate the witnesses' privacy interests, the commission may not withhold those individuals' identities.

LRD/RWP/rho

Ref.: ID# 31502
Open Records Letter No. 94-796 (1994)

Enclosures: Marked documents

cc: Mr. William Lockey
Regional Manager
Texas Natural Resource Conservation Commission
P.O. Box 13087
Austin, Texas 78711-3087
(w/o enclosures)