



March 22, 2000

Ms. Lan P. Nguyen
Assistant City Attorney
City of Houston
P.O. Box 1562
Houston, Texas 77251-1562

OR2000-1137

Dear Ms. Nguyen:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 133205.

The City of Houston (the “city”) received two requests for information relating to an instance of alleged sexual harassment. You inform this office that the requestors are the individual accused of the alleged harassment and his attorney. You state that a portion of the requested information will be released. You claim that other responsive information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted. We also have considered the comments that were submitted to this office by the requestor’s attorney.

Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App. – El Paso 1992, writ denied), the court of appeals applied the common law privacy principles discussed in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977), to an investigation of allegations of sexual harassment. The investigation files in *Ellen* contained third-party witness statements, an affidavit in which the individual accused of the misconduct responded to the allegations, and the conclusions of the board of inquiry that conducted the investigation. *See Ellen*, 840 S.W.2d at 525. The court of appeals upheld the release of the

affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the disclosure of such documents sufficiently served the public's interest in the matter. *Id.* The *Ellen* court also held, however, that "the public does 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.*

In accordance with *Ellen*, this office typically has required the release of a document analogous to the conclusions of the board of inquiry in *Ellen*, but has held that a governmental body must withhold both the identities of victims and witnesses of alleged sexual harassment and any information that would tend to identify such a victim or witness. *See* Open Records Decision Nos. 393 (1983), 339 (1982). The identity of the accused is not excepted from disclosure, however, as the common law right of privacy does not protect information about a public employee's alleged misconduct on the job or complaints made about the employee's job performance. *See* Open Records Decision Nos. 438 (1986), 230 (1979), 219 (1978).

In this instance, the submitted information does not include any summary of the investigation or written statement by the accused employee analogous to the documents held to be public in *Ellen*. Under these circumstances, we believe that section 552.101, in conjunction with *Ellen*, requires the city to protect the identities of the victim of the alleged sexual harassment and of the witnesses to the conduct in question by redacting from the submitted information both the victim's and the witnesses' names and any other information that would tend to identify the victim and witnesses. We have bracketed in red the information that the city must withhold. The rest of the submitted information is not excepted from disclosure under section 552.101.¹

You also claim that other responsive information is excepted from disclosure under section 552.107 of the Government Code. Section 552.107(1) excepts from required public disclosure "information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Evidence,

¹We note the argument by the requestor's attorney that his client has a special right of access to the requested information. Section 552.023 of the Government Code provides in relevant part that "[a] 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." Gov't Code § 552.023(a). The persons whose privacy interests are protected under section 552.101 in conjunction with *Morales v. Ellen*, and who therefore would have a special right of access to information that is otherwise confidential here, are the victim and witnesses of the alleged sexual harassment, rather than the individual accused of the conduct. *See Ellen*, 840 S.W.2d 524-25 (describing witness information protected by common law privacy); Open Records Decision No. 481 at 5 (1987) (stating that where an individual asks a governmental body to release information concerning only that individual, no common law privacy interest arises, and the individual is entitled to that information if the governmental body can claim no other basis for denying access to it).

the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct[.]” Gov’t Code § 552.107(1). Although the scope of section 552.107(1) would appear to be co-extensive with rule 1.05 of the Texas Disciplinary Rules of Professional Conduct, which prohibits an attorney from divulging “confidential information,” this office has concluded that such an interpretation of the disciplinary rule would be in potential conflict with the purposes of the Public Information Act. *See* Open Records Decision No. 574 at 4-5 (1990) (construing predecessor statute). Accordingly, this office has determined that section 552.107(1) protects only what rule 1.05 describes as “privileged” information, *i.e.*, information that represents confidential communications between attorney and client. *Id.* at 5. “Unprivileged” information, as defined by rule 1.05, is not excepted from disclosure under section 552.107(1). *Id.* Thus, section 552.107(1) excepts from disclosure only factual information or requests for legal advice communicated by the client to the attorney and legal advice or opinion rendered by the attorney to the client or to an associated attorney in the course of rendering legal services to the client. *Id.* at 7-8. Our review of the information in question indicates that some of the information that you seek to withhold under section 552.107 is identical to information that the city intends to release. Accordingly, the city has waived its interest in withholding that information under section 552.107. *See generally* Open Records Decision No. 630 at 4-6 (1994) (discussing waiver of claim of attorney-client privilege). We conclude, however, that the other information that you have marked represents a request for legal advice that the city may withhold under section 552.107. We also have marked that information.

In summary, any submitted information that either identifies or tends to reveal the identities of the victim and witnesses of the alleged sexual harassment is confidential under section 552.101 of the Government Code and must be withheld. Additionally, a small portion of the submitted information is excepted from disclosure under section 552.107. We have marked the information that is excepted from disclosure under sections 552.101 and 552.107. The rest of the submitted information must be released. This letter ruling is limited to the particular records 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 records or any other circumstances.²

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the

²We note that the requestor’s attorney argues that his client is entitled to the requested information under his constitutional rights of due process. This ruling does not address whether the requestor has a due process right in the requested information. Rather, we believe that that issue is one for a court of proper jurisdiction.

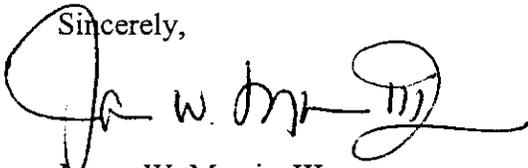
full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "James W. Morris, III". The signature is fluid and cursive, with a large initial "J" and a stylized "M" at the end.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/ch

Ref: ID# 133205

Encl. Submitted documents

cc: Mr. James H. Bell
2220 West Creek Lane, 22E
Houston, Texas 77027
(w/o enclosures)

Mr. William Sumpter Frazier
Attorney at Law
P.O. Box 968
Huffman, Texas 77336
(w/o enclosures)