



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

March 3, 2003

Mr. James L. Hall
Assistant General Counsel
Texas Department of Criminal Justice
P.O. Box 4004
Huntsville, Texas 77342

OR2003-1328

Dear Mr. Hall:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 177315.

The Texas Department of Criminal Justice (the "department") received a request for a specific department EEO investigation as well as a copy of a specific disciplinary hearing. You claim that the requested information is excepted from disclosure under sections 552.101 and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," including information that is encompassed by the common law right to privacy. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the court applied the common law right to privacy addressed in *Industrial Foundation* to an investigation of allegations of sexual harassment. The investigation files at issue 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* 840 S.W.2d at 525. The court 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 court further 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 any information that would tend to identify the victims and witnesses of alleged sexual harassment. *See* Open Records Decision Nos. 393 (1983), 339 (1982).

In this instance, the submitted information includes a summary of the department's investigation and statements by the accused in response to the allegations. Upon careful review of the submitted information, we agree that the department's investigation summary is analogous to the conclusions of the board of inquiry, the release of which was upheld in *Ellen*. Accordingly, we conclude that the department must release its summary of the investigation and the accused's statements to the requestor. In doing so, however, the department must withhold any information that would tend to identify the victim and witnesses of the alleged sexual harassment. *See Ellen*, 840 S.W.2d at 525. The identity of the individual accused of sexual harassment is not protected from public disclosure, as common-law 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). You must withhold the information in the investigation summary and the statements of the accused that we have marked under section 552.101 in conjunction with common-law privacy. You must also withhold the remainder of the documents related to the investigation.

We note that one page of the submitted information contains the name of an offender. Section 552.134 of the Government Code relates to inmates of TDCJ and provides in relevant part:

- (a) Except as provided by Subsection (b) or by Section 552.029 [of the Government Code], information obtained or maintained by the Texas Department of Criminal Justice is excepted from [required public disclosure] if it is information about an inmate who is confined in a facility operated by or under a contract with the department.

Gov't Code § 552.134(a). Section 552.029 of the Government Code provides that, "[n]otwithstanding . . . Section 552.134," eight specified categories of "information about an inmate who is confined in a facility operated by or under a contract with [the department are] subject to required disclosure." Thus, the legislature explicitly made section 552.134 subject to section 552.029. We have marked the offender's name, which must be withheld under section 552.134.

We note that portions of the investigation summary and accused's comments are confidential under section 552.117(3) of the Government Code. Section 552.117(3) excepts from disclosure any department employee's home address, home telephone number, social security number, and family member information. You must withhold the information we have marked under section 552.117(3).

In summary, the department must release the investigation summary and the statements of the accused to the requestor. The remainder of the investigation and the identifying information of the victim and witnesses must be withheld under section 552.101 in conjunction with common-law privacy. Certain information is confidential under section 552.117(3). The identity of a department inmate must be withheld under section 552.134. We have marked the portions of the investigation summary and statements of the accused that must be withheld under these sections.

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.

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 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 Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or

complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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 that reads "Jennifer E. Berry". The signature is written in a cursive style with a large initial "J" and "B".

Jennifer E. Berry
Assistant Attorney General
Open Records Division

JEB/sdk

Ref: ID# 177315

Enc: Submitted documents

c: Ms. Lillie Cooper
810 Windham Place
Arlington, Texas 76017
(w/o enclosures)