



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 20, 2004

Ms. Karol H. Davidson
Staff Attorney
Texas Youth Commission
P.O. Box 4260
Austin, Texas 78765

OR2004-10766

Dear Ms. Davidson:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 215335.

The Texas Youth Commission (the "commission") received a request for information relating to an investigation of an employee grievance. You claim that some of the requested information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and have reviewed the information you submitted.

Section 552.101 excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses the common-law right to privacy. Information must be withheld from the public under section 552.101 in conjunction with common-law privacy when the information is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) of no legitimate public interest. See *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). 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 alleged 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.*

Thus, if there is an adequate summary of an investigation of alleged sexual harassment, the investigation summary must be released under *Ellen*, but the identities of the victims and witnesses of the alleged sexual harassment must be redacted, and their detailed statements must be withheld from disclosure. *See also* Open Records Decision Nos. 393 (1983), 339 (1982). If no adequate summary of the investigation exists, then all of the information relating to the investigation ordinarily must be released, with the exception of information that would tend to identify the victims and witnesses. In either case, the identity of the individual accused of sexual harassment is not protected from public disclosure. Common-law privacy does not protect information about a public employee's alleged misconduct on the job or complaints made about a public employee's job performance. *See* Open Records Decision Nos. 438 (1986), 405 (1983), 230 (1979), 219 (1978).

You inform us that the submitted information relates to an investigation of alleged sexual harassment. We agree that *Morales v. Ellen* is applicable in this instance. We also find that the submitted information includes an adequate written summary of the investigation, a statement obtained from the individual accused of sexual harassment, and information obtained from the victim and witnesses. The commission must release the investigation summary and the statement of the individual accused of sexual harassment, with the exception of those portions of the summary and statement that identify the victim and witnesses of the alleged sexual harassment. In addition to the victim and witness information that you have highlighted, we have marked other information that identifies the victim and witnesses. The commission must withhold the victim and witness information in the investigation summary and the accused individual's statement, along with the other marked information that relates to the investigation, under section 552.101 in conjunction with common-law privacy under *Morales v. Ellen*.

You also inform us that the submitted documents contain information that identifies youths committed to the custody of the commission. You also seek to withhold that information under section 552.101. We agree that the highlighted information in the investigation summary and accused individual's statement that identifies youths in the commission's custody must be withheld under section 552.101 in conjunction with common-law privacy. We have marked other information in those documents that identifies youths in the commission's custody; the commission must also withhold that information under section 552.101. *See* Open Records Decision No. 394 (1983); *cf.* Fam. Code § 58.007.

In summary: (1) the commission must withhold the victim and witness information in the investigation summary and accused individual's statement, as well as the rest of the submitted information, under section 552.101 in conjunction with common-law privacy under *Morales v. Ellen*; and (2) the information in the summary and statement that identifies youths in the commission's custody must also be withheld under section 552.101 in conjunction with common-law privacy. The rest of the information in the summary and statement must be released. As we are able to make these determinations, we need not address your other claim under section 552.101.¹

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).

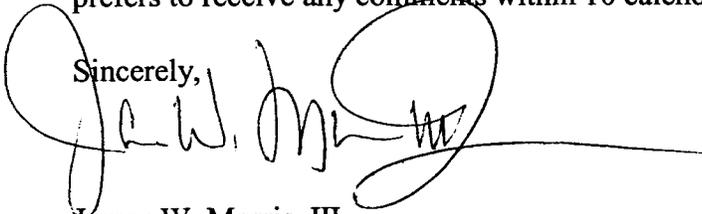
¹We note that the commission might ordinarily be required to withhold a small amount of other information contained in the investigation summary under section 552.117. *See* Gov't Code §§ 552.117(a)(1), .024. In this instance, however, the requestor has a special right of access to that information. *See id.* § 552.023; Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself). Should the commission receive another request for this same information from a person who would not have a special right of access, the commission should resubmit this same information and request another ruling. *See* Gov't Code §§ 552.301(a), .302; Open Records Decision No. 673 (2001).

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, appearing to read 'J.W. Morris, III', with a long horizontal line extending to the right.

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

JWM/sdk

Ref: ID# 215335

Enc: Submitted documents

c: Mr. Charles Wilborn
1518 Springhouse
San Antonio, Texas 78251
(w/o enclosures)