



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 14, 2010

Mr. Carey E. Smith
General Counsel
Texas Health and Human Services Commission
P.O. Box 13247
Austin, Texas 78711

OR2010-00756

Dear Mr. Smith:

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# 367336.

The Texas Health and Human Services Commission (the "commission") received a request for information pertinent to the investigation and outcome of a specified employment discrimination complaint filed by the requestor. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception 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." Gov't Code § 552.101. This section encompasses common-law privacy, which excepts from disclosure private facts about an individual. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). Information is excepted from required public disclosure by a common-law right of privacy if the information (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Id.*

The information at issue relates to a sexual harassment investigation. 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. *Id.* 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.* 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 generally must be redacted, and their detailed statements withheld from disclosure. *See* 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 identify the victims and witnesses. Because 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, the identity of the individual accused of sexual harassment is not protected from public disclosure. *See* 840 S.W.2d at 525; Open Records Decision Nos. 438 (1986), 405 (1983), 230 (1979), 219 (1978). We also note supervisors are not witnesses for purposes of *Ellen*, and thus, supervisors' identities generally may not be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

In this instance, the submitted investigation file contains an adequate summary of the investigation. Therefore, with the exception of the marked summary, the commission must withhold the submitted information under section 552.101 in conjunction with common-law privacy under *Ellen*. The summary in this instance contains information identifying the complainant and witnesses to the investigation. We have marked the identifying information of non-supervisory witnesses that must be withheld under common-law privacy and *Ellen*. In this instance, however, the alleged victim of the sexual harassment is the requestor. Thus, because the requestor has a right of access to information that would ordinarily be withheld on the basis of her own privacy interests, the commission may not withhold the victim's identifying information. *See* Gov't Code § 552.023; *see also* Open Records Decision No. 481 (1987). Accordingly, with the exception of the marked identifying information of witnesses, the investigation summary must be released.¹

This letter ruling is limited to the particular information 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 information or any other circumstances.

¹Because the requestor in this instance has a right of access to some information that otherwise would be protected by exceptions and laws enacted to protect a person's right to privacy, if the commission receives another request for this particular information from a different requestor, the commission should again seek a decision from this office.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Bob Davis
Assistant Attorney General
Open Records Division

RSD/cc

Ref: ID# 367336

Enc. Submitted documents

cc: Requestor
(w/o enclosures)