



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 28, 2010

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

OR2010-01362

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# 368473.

The Health and Human Services Commission (the "commission") received a request for all records pertaining to a specified investigation concerning the requestor.¹ You claim the submitted investigation records are excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information. We have also received and considered comments submitted by the requestor. See Gov't Code § 552.304 (interested party may submit written comments regarding availability of requested information).

Initially, the requestor contends the commission did not comply with the procedural requirements of the Act in requesting our decision because the commission did not request a ruling by the statutory deadline. We understand the requestor to assert the commission failed to comply with section 552.301(b) of the Government Code, which requires a governmental body to ask for a decision from this office and state which exceptions apply to the requested information by the tenth *business* day after receiving the request. Gov't Code § 552.301(b) (emphasis added). The commission states it received the request for

¹You state the requestor, in subsequent communications with the commission, withdrew his request for certain e-mails he sought in his original request for information.

information on October 30, 2009, and informs us November 11, 2009, was observed as a commission holiday. Accordingly, the commission's ten-business-day deadline was November 16, 2009. The commission has provided an affidavit stating the commission's request for a ruling was deposited in interagency mail on November 16, 2009. *See id.* § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Upon review, we find the commission's request for a decision was timely. *See id.* § 552.301(b).

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. Section 552.101 encompasses the common-law right of privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). 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. *Ellen*, 840 S.W.2d at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating the public's interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held "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, under *Ellen*, if there is an adequate summary of an investigation of alleged sexual harassment, the investigation summary must be released along with the statement of the accused, 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* 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. We note supervisors are generally not witnesses for purposes of *Ellen*, except where their statements appear in a non-supervisory context. 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* Open Records Decision Nos. 438 (1986), 405 (1983), 230 (1979), 219 (1978).

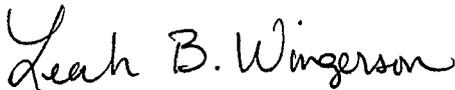
The submitted information consists of an investigation report, witness statements, a response statement by the accused, investigation records, and supporting documentation pertaining to an investigation of alleged sexual harassment. The submitted investigation report includes

an adequate summary of the investigation. Thus, the summary and accused's statement, which we have marked, are not confidential; however, the remaining submitted information must be withheld under section 552.101 in conjunction with common-law privacy and the holding in *Ellen*. As for the accused's statement, the commission must withhold the victim's identifying information, which we have marked, under section 552.101 in conjunction with common-law privacy and the holding in *Ellen*. As you have claimed no other exceptions to disclosure, the summary and the remaining information in the accused's statement must be released.

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.

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,



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/rl

Ref: ID# 368473

Enc. Submitted documents

c: Requestor
(w/o enclosures)