



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 26, 2012

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

OR2012-06008

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# 451844.

The Texas Health and Human Services Commission (the “commission”) received a request for the official notes and information related to a specified investigation. 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. Section 552.101 encompasses the common-law right of privacy, which protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *See id.* at 683. 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, 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 under *Ellen*, but the identities of the victim 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. Further, since 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).

You state the submitted information consists of records of an investigation of alleged sexual harassment. We find the marked memorandum is an adequate summary of the sexual harassment investigation. The submitted information also includes notes from an interview with the accused and an e-mail statement from the accused, which we find comprise the accused's statements. The summary and statements of the accused, which we have marked, are not confidential under section 552.101 in conjunction with common-law privacy. *See Ellen*, 840 S.W.2d at 525. We note, however, information within the summary and accused's statements that identifies the victim and witnesses is generally confidential under common-law privacy. *See id.* In this instance, the requestor is the alleged victim; thus, she has a right of access to her own identifying information, and this information may not be withheld from her under section 552.101 of the Government Code in conjunction with common-law privacy. *See* Gov't Code § 552.023 (person has special right of access to information excepted from public disclosure under laws intended to protect person's privacy interest as subject of the information); *see also* Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when person asks governmental body for information concerning the person herself). Accordingly, the commission must withhold the witnesses' identifying information in the summary and accused's statements, which we have marked, under section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Ellen*. Further, with the exception of the summary and the statements of the

accused, the commission must withhold the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Ellen*.¹

We note common-law privacy also protects other types of information. This office has found some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 343 (1982), 455 (1987). Upon review, we find the remaining information contains information that is highly intimate or embarrassing and not of legitimate public concern. Therefore, the commission must withhold this information, which we have marked, under section 552.101 of the Government Code in conjunction with common-law privacy.

We note portions of the remaining information may be excepted from disclosure under section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for information is made. *See* Open Records Decision No. 530 at 5 (1989). Information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date on which the request for information was made. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who did not timely request confidentiality under section 552.024. We have marked information in the remaining information that may be subject to section 552.117(a)(1). Therefore, to the extent the individual whose information is at issue timely requested confidentiality under section 552.024, the commission must withhold the marked information under section 552.117(a)(1) of the Government Code. To the extent the individual did not make timely election under section 552.024, the commission may not withhold the marked information under section 552.117(a)(1) of the Government Code.

In summary, the commission must release the summary and statements of the accused; however, in releasing these documents, the commission must withhold the identifying information of witnesses in the investigation under section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Ellen*, the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy, and the information we have marked under section 552.117(a)(1) of the Government Code, to the extent the individual whose information is at issue timely requested confidentiality under section 552.024 of the Government Code prior to the date on which the

¹We note that because the requestor has a right of access to some of the information being released, the commission must again seek a ruling from this office if the commission receives another request for this information from an individual other than this requestor.

request for information was made. The commission must withhold the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Ellen*.

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,

A handwritten signature in black ink, appearing to read 'C Galindo Jr.', is positioned above the typed name.

Charles Galindo Jr.
Assistant Attorney General
Open Records Division

CG/em

Ref: ID# 451844

Enc. Submitted documents

c: Requestor
(w/o enclosures)