



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

May 16, 1994

Ms. Sandra C. Joseph
Disclosure Officer, Inspector General's Office
Office of the Comptroller of Public Accounts
L.B.J. State Building
111 East 17th Street
Austin, Texas 78774

OR94-215

Dear Ms. Joseph:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, Government Code chapter 552.¹ We assigned your request ID# 15916 and ID# 25315.

The Comptroller of Public Accounts (the "comptroller") has received a request for information relating to a certain employee grievance proceeding. Specifically, the requestor seeks "a copy of all statements made by any and all employees of the state of Texas regarding the conduct" of a certain employee of the comptroller's office. You have submitted to us for review a set of statements. You claim that this information is excepted from required public disclosure by sections 552.101 and 552.111 of the Government Code.

Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." You claim that the information submitted to us for review is protected by the doctrine of common-law privacy. Information may be withheld from required public disclosure under common-law privacy if it meets the criteria articulated for section 552.101 by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). *Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546, 550 (Tex. App.--Austin 1983, writ ref'd n.r.e.); *see also*

¹We note that the Seventy-third Legislature repealed V.T.C.S. article 6252-17a. Acts 1993, 73d Leg., ch. 268, § 46. The Open Records Act is now codified in the Government Code at chapter 552. *Id.* § 1. The codification of the Open Records Act in the Government Code is a nonsubstantive revision. *Id.* § 47.

Open Records Decision No. 441 (1986). Under *Industrial Foundation*, information may be withheld on common-law privacy grounds only if it is highly intimate or embarrassing and it is of no legitimate concern to the public. Although information relating to a disciplinary action against a public employee may be highly intimate or embarrassing, the public generally has a legitimate interest in knowing the reasons why such an action was taken. See Open Records Decision No. 444 (1986). In Open Records Decision No. 579 (1990), this office held that common-law privacy did not apply to witness names and statements regarding allegations of sexual misconduct.

Recently, however, the court in *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.-- El Paso 1992, writ denied), addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigatory files at issue in *Ellen* contained individual witness and victim statements, an affidavit given by the individual accused of the misconduct in response to the allegations, and the conclusions of the board of inquiry that conducted the investigation. *Id.* The court held that the nature of the information, *i.e.*, the names of witnesses and their detailed affidavits regarding allegations of sexual harassment, was exactly the kind specifically excluded from disclosure under privacy doctrine as described in *Industrial Foundation*. *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 that the public's interest was sufficiently served by the disclosure of these 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.*²

You have submitted to us for review several statements in which employees of the comptroller's office detail complaints of sexual harassment. We conclude that the identity of the complainants and witnesses detailing the allegations of misconduct and any information that tends to identify the complainants and witnesses, *i.e.*, social security numbers, addresses, dates of birth, and positions of employment, are excepted from disclosure by the common-law privacy doctrine as applied in *Ellen*. However, section 552.101 of the Government Code in conjunction with common-law privacy or the court's holding in *Ellen* does not protect the remainder of the submitted information.³ We have marked the type of information that you may withhold under section 552.101.

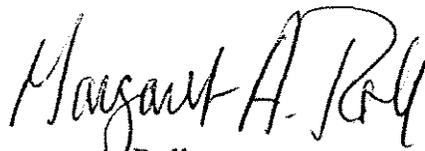
²Although the *Ellen* court recognized that the person accused of misconduct may in some instances have a privacy interest in information contained within investigatory files, we think in this case the public's interest in disclosure of the information outweighs the accused's privacy interest. See *Ellen*, 840 S.W.2d at 525.

³You also claim that the information submitted to us for review is protected under section 552.101 of the Government Code in conjunction with the informer's privilege. The content of an informer's statement is protected only to the extent that it would reveal the informer's identity. See Open Records Decision Nos. 549 (1990) at 5; 515 (1988). As we protect the identities of the complainants under the court's holding in *Ellen*, we need not consider whether such information is protected by the informer's privilege.

You also claim that the requested information is excepted from required public disclosure by section 552.111 of the act, which excepts information that constitutes an "interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the section 552.111 exception and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the deliberative or policymaking processes of the governmental body at issue. An agency's policymaking functions, however, do not encompass routine personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. *Id.* at 5-6. Because the submitted information relates to a personnel matter, we conclude that section 552.111 of the Government Code does not except it from required public disclosure. Accordingly, except as noted above, you must release the submitted information in its entirety.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact this office.

Yours very truly,



Margaret A. Roll
Assistant Attorney General
Open Government Section

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Ref.: ID# 21868
ID# 24980
ID# 25315
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Enclosures: Sumbitted documents

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