



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

August 22, 1995

Mr. Richard D. Monroe
Deputy General Counsel
Texas Department of Transportation
Dewitt C. Greer State Highway Bldg.
125 East 11th Street
Austin, Texas 78701-2483

OR95-831

Dear Mr. Monroe:

The Texas Department of Transportation (the "department") received two requests for information concerning an internal investigation of allegations of sexual harassment. You have asked whether the information at issue is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. These requests were assigned ID#s 34384 and 34491. Since the requestors seek the same type of information, this letter addresses both requests.

One of the requestors asked for the entire investigation file concerning the sexual harassment complaint. The other requestor asked for various transcripts and investigation records from the file. You submitted to this office a letter and a memorandum as representative samples of the documents at issue. Please note that a "representative sample" of the documents at issue must be truly representative of the records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988) (where requested documents are numerous and repetitive, governmental body should submit representative sample; but if each record contains substantially different information, all must be submitted). This open records letter *does not* reach any other requested records to the extent that those records contain substantially different types of information than the documents you submitted to this office. Also, we note that the memorandum does not appear to be a responsive document.

You contend that the requested information is excepted from disclosure under section 552.221(b), which provides:

If the requested information is unavailable at the time of the request to examine because it is in active use or in storage, the officer for public records shall certify this fact in writing to the applicant and set a date and hour within a reasonable time when the record will be available for inspection or duplication.

Section 552.221(b) concerns a procedure for access to information that is in active use or storage and does not act as an exception from disclosure.¹ You assert that the documents at issue are being used in an internal investigation. You submitted a document, dated June 5, 1995, indicating that the department's civil rights investigator planned to make copies of documents for his investigation. Even if the documents at issue were in "active use" while they were actually being copied, we assume they are now available. These records are not excepted from disclosure under section 552.221(b).

You also contend that the information at issue is excepted from disclosure pursuant to section 552.101. Information is excepted from disclosure by a common-law right of privacy under section 552.101 if the information is (1) highly intimate or embarrassing to a reasonable person and (2) of no legitimate public concern. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976) cert. denied, 430 U.S. 930 (1977). In *Morales v. Ellen*, 840 S.W.2d 519, 525 (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.* 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.*

The memorandum you submitted would serve to identify the victim of alleged sexual harassment. Since the identity of the victim to the alleged sexual harassment is protected by the common-law privacy doctrine as applied in *Ellen* and *Industrial Foundation*, the name of the individual must be redacted, as we have indicated, before the memorandum is released to the public. However, you may not withhold information under section 552.101 on the basis of protecting a requestor's own common-law privacy interests. Open Records Decision No. 481 (1987) at 4. Thus, the memorandum need not be redacted prior to releasing it to the victim, who is one of the requestors.

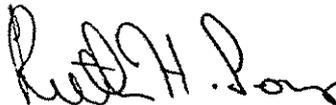
¹The Seventy-fourth Legislature has significantly amended the Open Records Act effective September 1, 1995. See Act of May 29, 1995, H.B. 1718, sec. 15, § 552.221 74th Leg., R.S. (to be codified at Gov't Code Ch. 552) (copies available from House Document Distribution).

As to the letter you submitted, it is a medical record as defined by section 5.08(b), of the Medical Practice Act (the "MPA"), article 4495b, V.T.C.S. As discussed in Open Records Decision No. 598 (1991), the MPA provides both for the confidentiality of records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician and for access to these medical records. V.T.C.S. art. 4495b, § 5.08(b). Therefore, access to the letter you submitted is governed by the MPA provisions rather than the Open Records Act. Open Records Decision No. 598 (1991) at 4.

We assume that the investigation file contains other types of documents, but since those documents were not submitted to this office to review, we are unable to determine whether any of the other information at issue is also confidential. We note, however, that the identities of the victims and witnesses to sexual harassment are excepted from disclosure by the common-law privacy doctrine.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Ruth H. Soucy
Assistant Attorney General
Open Government Section

RHS/rho

Ref.: ID# 34384, 34491

Enclosures: Marked documents

cc: Mr. Ernest Fierro
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(w/o enclosures)