



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 9, 1997

Ms. Kimberley L. Kiplin
Acting Executive Director
Texas Lottery Commission
P.O. Box 16630
Austin, Texas 78761-6630

OR97-1317

Dear Ms. Kiplin:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 106523.

The Texas Lottery Commission (the "commission") received a request for information relating to the number of complaints of sexual harassment that have been filed with the agency by lottery employees in the past 36 months, as well as the identity of the complainants, the names of the accused, the dates the complaints were filed and the disposition of the complaints. You assert that the information is excepted from disclosure pursuant to sections 552.101 and 552.111 of the Government Code. We have considered your arguments and have reviewed the information submitted.¹

You argue that the names of the complainants and the accused individuals contained in Exhibits B through J are excepted from disclosure under section 552.101 and the decision in *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied). In *Ellen*, the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. See also *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), cert. denied, 430 U.S. 931 (1977) (common-law privacy protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable

¹In reaching our conclusion here, we assume that the "representative samples" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

person, and is of no legitimate concern to the public). 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.

We note, that although not at issue under the instant facts, the court held in *Ellen* that the names of witnesses and their detailed affidavits regarding allegations of sexual harassment were exactly the kind of information specifically excluded from disclosure under the privacy doctrine as described in *Industrial Foundation. Ellen, supra*, at 525. However, the court ordered the release of the affidavit of the person under investigation, in part because it ruled that he had waived any privacy interest he may have had in the information by publishing a detailed letter explaining his actions and state of mind at the time of his forced resignation. *Id.* The *Ellen* court also ordered the disclosure of the summary of the investigation with the identities of the victims and witnesses deleted from the documents, noting that the public interest in the matter was sufficiently served by disclosure of such documents and that in that particular instance "the public [did] not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements." *Id.*

You advise this office that although the disposition of the complaints have been documented in different ways, some responsive documents were located regarding the dispositions of the complaints and to the extent the dispositions were of a summary nature, you made that information available to the requestor as denoted in Exhibits E-1, F-1, and G. As some files contain no documentation reflecting the resolution of the complaint, we have no basis for concluding that the commission has sufficiently informed the public of the details of each of the six sexual harassment complaints filed against the particular commission employees.

This office feels compelled to follow the *Ellen* decision with regard to victims' and witnesses' identities; the commission therefore must withhold these individuals' names and any other identifying information concerning the alleged victim and witnesses pursuant to common-law privacy. However, the court in *Ellen* did not reach the issue of whether the public employee who was accused of the harassment had any inherent right of privacy to his identity or the content of his statement and we decline to extend such protection here, as we believe there is a legitimate public interest in the identity of public employees accused of sexual harassment in the workplace. *See, e.g.,* Open Records Decision Nos. 484 (1987), 400 (1983).² Consequently, the commission may not withhold the remaining information at issue under section 552.101 because of the clear public interest in this information. *Cf.* Open Records Decision No. 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees).

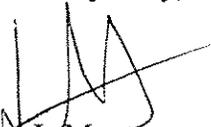
²We also note that sexual harassment by a public employee may constitute official oppression punishable as a Class A misdemeanor. *See Bryson v. State*, 807 S.W.2d 742 (Tex. Crim. App. 1991).

You also argue that Exhibit J is excepted from disclosure pursuant to section 552.111 as it contains advice, opinion and recommendations by the then Deputy Executive Director for use as a summary of the disposition. Section 552.111 excepts "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 predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. An agency's policymaking functions, however, do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 (1993) at 5-6.

Because the information contained in Exhibit J pertains to an internal personnel matter, and not to the commission's policymaking functions, we conclude this information may not be withheld under section 552.111.

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 should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Janet L. Monteros
Assistant Attorney General
Open Records Division

JIM/glg

Ref.: ID# 106523

Enclosures: Submitted documents

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