



March 8, 1999

Mr. Ron Pigott
Attorney
Texas Water Development Board
P.O. Box 13231
Austin, Texas 78711-3231

OR99-0649

Dear Mr. Pigott:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID # 122569.

The Texas Water Development Board (the "board") received a request for the report and supporting data of the investigation of a complaint of sexual harassment filed against the requestor on October 23, 1998. You submitted to this office the responsive information. You contend that, with the exceptions of a letter of "Disciplinary Action" and the requestor's own statement, which you have provided to the requestor, the responsive information is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with both *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App. -- El Paso 1992, writ denied) and Rule 503 of the Texas Rules of Evidence. We have considered the exception you claim and have reviewed the documents at issue.

The *Ellen* court 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 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 in this matter was sufficiently served by the disclosure of these documents. *Id.* at 525. The court held, however, that the names of witnesses

and their detailed affidavits regarding allegations of sexual harassment was exactly the kind of information specifically excluded from disclosure under the privacy doctrine as described in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App. -- El Paso 1992, writ denied). 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.*¹

The *Ellen* decision controls the release of the documents you have submitted for our review. We believe there is a legitimate public interest in knowing the details of the allegations. Thus, the November 6, 1998, disciplinary letter is public information. (You state that you have already released this letter regarding the allegations of sexual harassment to the requestor.) However, the identities of the victim and witnesses to the alleged sexual harassment are excepted from disclosure by the common-law invasion of privacy doctrine as applied in *Ellen and Industrial Foundation*. With the exception of one instance of the complainant's name, which we have flagged and bracketed for redaction, we agree that the information marked on the disciplinary letter pursuant to *Ellen* must be withheld pursuant to common-law privacy.

The summaries of witness statements contained in the November 5, 1998, memorandum addressed by you to Craig D. Pederson and Kevin Ward must also be released after you have de-identified them by redacting the information bracketed by this office. Release of the disciplinary letter and de-identified summaries is sufficient to apprise the public of the details of the allegations and investigation. The complete statements of the victim and witnesses must be withheld from disclosure under *Ellen*.

You contend that the remaining, marked portions of the November 5 memorandum are protected as privileged communications to a client, intended to analyze the legal issues raised by the complaint. Although you claim that section 552.101 excepts the information from disclosure pursuant to the attorney-client privilege, the attorney-client privilege is more properly claimed under section 552.107 of the Government Code. Open Records Decision No. 574 at 2 (1990).

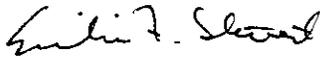
Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that

¹ We need not consider the privacy interest of the individual accused, if it exists. In this case, the person accused of misconduct is the requestor and has a special right of access to information that might otherwise be protected by laws intended to protect his privacy. See Gov't Code §552.023.

section 552.107 excepts from public disclosure only “privileged information,” that is, information that reflects either confidential communications from the client to the attorney or the attorney’s legal advice or opinions; it does not apply to all client information held by a governmental body’s attorney. *Id.* at 5. We find that the portions of the November 5, 1998, memorandum marked in blue ink by you contain legal advice and opinion and, therefore, may be withheld under section 552.107 of the Government Code.

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.

Sincerely,



Emilie F. Stewart
Assistant Attorney General
Open Records Division

EFS\nc

Ref: ID# 122569

Enclosures: Marked documents

cc: Mr. Joe Mendoza
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(w/o enclosures)