



December 5, 2001

Mr. Craig H. Smith
Deputy General Counsel
Texas Workers' Compensation Commission
4000 South IH-35
Austin, Texas 78704

OR2001-5657

Dear Mr. Smith:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 155618.

The Texas Workers' Compensation Commission (the "commission") received a request for all information in the requestor's personnel file and documents relating to an investigation into sexual harassment and into the misconduct of several named employees. You advise that you are releasing information responsive to the request with the exception of information related to the sexual harassment investigation that you claim is exempt from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

First, we note that a completed investigation made by a governmental body is subject to required public disclosure under section 552.022 of the Government Code. Section 552.022 provides in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure . . . *unless they are expressly confidential under other law:*

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1) (emphasis added). You inform us that the investigation at issue in this request has been finalized. Therefore, the commission must release the requested information in its entirety unless that information is expressly confidential under other law

or excepted from disclosure under section 552.108 of the Government Code. Section 552.101 of the Government Code constitutes other law for purposes of section 552.022. You claim that witness statements taken during the investigation of the sexual harassment lawsuit, submitted as Attachment B, and identities of victims and witnesses, as well as statements that may be embarrassing, contained in Attachment C, are excepted from disclosure under section 552.101 of the Government Code in conjunction with the common law right of privacy. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," including information that is encompassed by the common law right to privacy. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 at 1 (1992).

In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App. – El Paso 1992, writ denied), the court applied the common law right to privacy to an investigation of allegations of sexual harassment. The investigation files at issue in *Ellen* contained third-party witness statements, an affidavit in which the individual accused of the misconduct responded to the allegations, and the conclusions of the board of inquiry that conducted the investigation. *See* 840 S.W.2d at 525. The court upheld the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the disclosure of such documents sufficiently served the public's interest in the matter. *Id.* The court further held, however, that "the public does 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.* In accordance with *Ellen*, with respect to investigations of sexual harassment, this office typically has required the release of a document analogous to the conclusions of the board of inquiry in *Ellen*, but has held that a governmental body must withhold both the identities of victims and witnesses of alleged sexual harassment and any information that would tend to identify such a victim or witness. *See also* Open Records Decision Nos. 393 (1983), 339 (1982).

In this instance, the submitted information includes statements by the victim of the alleged sexual harassment, statements of witnesses, statements of the accused, and a summary of the commission's investigation. Upon careful review of the commission's investigation summary, we conclude that Attachment C is analogous to the conclusions of the board of inquiry, the release of which was upheld in *Ellen*. Accordingly, we conclude that the commission must release Attachment C as a summary of the investigation and the statements of the accused to the requestor. In doing so, however, we agree that the commission must withhold the identifying information of the alleged victim and witnesses, other than that of the requestor. *See Ellen*, 840 S.W.2d at 525. Pursuant to section 552.023 of the Government Code, the requestor has a special right of access, beyond that of the general public, to

information held by the commission that pertains to the requestor and that is protected from disclosure to the public by laws intended to protect the requestor's privacy interests. *See* Gov't Code § 552.023(a). Further, the identity of the individual accused of sexual harassment is not protected from public disclosure, as common law privacy does not protect information about a public employee's alleged misconduct on the job or complaints made about the employee's job performance. *See* Open Records Decision Nos. 438 (1986), 230 (1979), 219 (1978). Thus, with the exception of the summary and the accused's statements, the statements and identities of the witnesses and alleged victim are protected from disclosure under section 552.101 and must be withheld.

There is additional information in Attachment C that may be confidential. Section 552.117 excepts from disclosure the home addresses and telephone numbers, 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. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the commission may only withhold the personal information, which we have marked, under section 552.117 on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. The commission may not withhold this information under section 552.117 for those employees who did not make a timely election to keep the information confidential. However, the requestor has a special right of access to her own personal information held by the commission. *See* Gov't Code § 552.023. None of the additional information that you have marked in green in the investigation summary is private. Therefore, it may not be withheld under section 552.101 in conjunction with common law privacy. We have marked the information that you must withhold. You must release the remaining information.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script that reads "Kristen Bates". The signature is written in black ink and is positioned above the typed name.

Kristen Bates
Assistant Attorney General
Open Records Division

KAB/sdk

Ref: ID# 155618

Enc. Marked documents