OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

December 2, 2002

Mr. James M. Frazier III
Assistant General Counsel
Texas Department of Criminal Justice
P.O. Box 4004
Huntsville, Texas 77342

OR2002-6853

Dear Mr. Frazier:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 172959.

The Texas Department of Criminal Justice (the "department") received a request for "a copy of all documents sent to EEO on cases" the requestor has filed regarding a named individual. You claim that the requested information is excepted from disclosure under sections 552.101 and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You assert that the submitted information pertains to a sexual harassment investigation and is excepted from disclosure under section 552.101 in conjunction with common-law privacy. The court in the case of *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App. - El Paso 1992, writ denied) applied the above-referenced common-law right of privacy test to the records resulting from a workplace sexual harassment investigation. 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. *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 such documents. *Id.* 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.* In its conclusion, the court stated:

> The records requested contain highly intimate, embarrassing revelations about persons required to cooperate with an investigation by their employer. These witnesses were never informed of the request that these records be made public; they have, thus, had no opportunity to assert privacy interests on their own behalf. To disclose their names and the details of their statements would send a most unfortunate message to all public employees in Texas: that they complain about sexual harassment in their workplace, or cooperate in the investigation of such a complaint, only at risk of embarrassing and offensive publicity. While this may occasionally be a necessary evil in the enforcement of prohibitions against sexual harassment, we do not believe it is warranted here and decline to order the disclosure of documents which would have such a chilling effect.

Id. at 526.

Upon careful review of the submitted information, we conclude the information you have submitted at the orange tab entitled "Analysis, Discussion & Conclusion" is analogous to the conclusions of the board of inquiry, the release of which was upheld in *Ellen*. Accordingly, we conclude that the department must release this information as a summary of the investigation and the statements of the accused, which you have submitted at the yellow tab entitled "Respondent's Questions," to the requestor. In doing so, however, we agree that the department must withhold from disclosure the identifying information of the alleged victims 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 department 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). Therefore, the requestor has a special right of access to her own identifying information under section 552.023. 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, the department must release to the requestor the summary and the statements of the accused with the identities of the witnesses and alleged victims, other than the requestor, redacted. The department must withhold the remainder of the submitted information under section 552.101 in conjunction with common-law privacy.

You next assert that some of the information in the statements to be released concerns a department employee, and is excepted from disclosure based on section 552.117(3) of the Government Code, which excepts from disclosure a department employee's home address,

home telephone number, or social security number, and any information that reveals whether an employee has family members, regardless of whether the employee complies with section 552.024. *See* Gov't Code § 552.117(3). We agree that some of the information in the statements is excepted from disclosure under this section. Accordingly, the department must withhold from disclosure the information we have marked pursuant to section 552.117(3).

In summary, we have marked the information in the accused's statements and the summary of the sexual harassment investigation that the department must withhold from disclosure. The remainder of the information in these two documents must be released to the requestor, except for information that is private under section 552.117(3), which we mark. The remaining submitted sexual harassment investigation information must be withheld from disclosure under section 552.101 in conjunction with the common-law right to privacy.

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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,

VGS

V.G. Schimmel
Assistant Attorney General
Open Records Division

VGS/sdk

Ref: ID# 172959

Enc: Submitted documents

bc: (w/o enclosures)