



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 30, 2009

Ms. Ruth H. Soucy
Deputy General Counsel for Open Records
Texas Comptroller of Public Accounts
P.O. Box 13528
Austin, Texas 78711-3528

OR2009-05723

Dear Ms. Soucy:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 341479 (Comptroller ID# 5594203634).

The Texas Comptroller of Public Accounts (the "comptroller") received a request for all correspondence to and from a named employee pertaining to the requestor during a specified time period. You state you have released some of the responsive information. You claim portions of the submitted information are excepted from disclosure under sections 552.101, 552.107, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, we note a portion of the submitted information is not correspondence to or from the named employee. Accordingly, this information, which we have marked, is not responsive to this request. This ruling does not address the public availability of nonresponsive information, and the comptroller is not required to release nonresponsive information in response to this request. Accordingly, we will address your arguments with regard to the responsive information.

Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses the doctrine of common-law privacy. Common-law privacy

¹We assume the representative sample 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.

protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). 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 alleged 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 also held 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.*

When there is an adequate summary of a sexual harassment investigation, the summary must be released along with the statement of the accused, but the identities of the victims and witnesses must be redacted and their detailed statements must be withheld from disclosure. However, when no adequate summary exists, detailed statements regarding the allegations must be released, but the identities of witnesses and victims must still be redacted from the statements. In either case, the identity of the individual accused of sexual harassment is not protected from public disclosure. Common-law privacy does not protect information about a public employee's alleged misconduct on the job or complaints made about a public employee's job performance. See Open Records Decision Nos. 438 (1986), 405 (1983), 230 (1979), 219 (1978).

In this instance, you state some the submitted information relates to a sexual harassment investigation that does not contain an adequate summary. Because there is no adequate summary of the investigation, the information at issue must generally be released. However, the information contains the identity of an alleged witnesses of the sexual harassment. Accordingly, we conclude that the comptroller must withhold portions of the information you have marked pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy and the holding in *Ellen*. However, you have failed to demonstrate how the remaining marked information reveals the identity of a victim or witness of alleged sexual harassment, and therefore, this information is not intimate and embarrassing and not of legitimate public interest. Thus, except as we have marked for release, the comptroller must withhold the information you have marked pursuant to section 552.101 in conjunction with common-law privacy under *Ellen*.

You assert the remaining information is protected by the attorney-client privilege. Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body

has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002).

First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5).

Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You assert the submitted e-mails consist of communications made for the purpose of facilitating the rendition of professional legal services. You state the communications were between identified counsel of the comptroller and identified comptroller employees, and that the communications were to be kept confidential among the intended parties. Finally, you state the comptroller has not waived its privilege with respect to the communications at issue. Based on your representations and our review, we agree that the information at issue constitutes privileged attorney-client communications. Accordingly, the comptroller may withhold this information under section 552.107(1) of the Government Code. However, we note one of the individual e-mails in the submitted e-mail chains consist of communications with a non-privileged party. Thus, to the extent this non-privileged e-mail, which we have marked, exist separate and apart from the submitted e-mail chain, it must be released to the requestor.

In summary, except as we have marked for release, the comptroller must withhold the information it has marked under section 552.101 in conjunction with common-law privacy and the holding in *Ellen*. The comptroller may withhold the submitted e-mails under section 552.107 unless the marked portion of this information exist separate and apart from the submitted e-mail chains. The remaining information must be released.²

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

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Olivia A. Maceo
Assistant Attorney General
Open Records Division

OM/eeg

Ref: ID# 341479

Enc. Submitted documents

c: Requestor
(w/o enclosures)

²We note the requestor has a special right of access to information in the submitted documents that otherwise would be excepted from release under the Act. Gov't Code § 552.023 (person or person's authorized representative has special right of access to records that contain information relating to the person that are protected from public disclosure by laws intended to protect that person's privacy interests). Thus, the comptroller must again seek a decision from this office if it receives a request for this information from a different requestor.