



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 14, 2009

Ms. Laurie Pappas  
Assistant Public Counsel  
Office of Public Utility Counsel  
P.O. Box 12397  
Austin, Texas 78711-2397

OR2009-11386

Dear Ms. Pappas:

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# 351100.

The Office of Public Utility Counsel (the "OPC") received a request for the complete report pertaining to a specified grievance, including witness statements, summaries, conclusions, and recommendations. You state you have released the report to the requestor with the names of the complainant and witnesses redacted. You further claim that portions of the responsive information may be excepted from disclosure under sections 552.101 and 552.103 of the Government Code. You state that you have notified seven individuals of their right to submit arguments to this office as to why the requested information should not be released. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).<sup>1</sup> We have considered the exception you claim and reviewed the submitted information. Pursuant to section 552.304, we have also received and considered comments from the requestor.

Initially, we note that the OPC states that they are not in possession of the requested witness statements. The OPC informs this office that the witness statements were compiled by a third-party investigator who was hired by the OPC to conduct an investigation, and that the agreement between the OPC and the investigator was for the OPC to only receive the written

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<sup>1</sup>As of the date of this decision, this office has received no correspondence from any of the notified individuals.

report of the investigator's findings. Further, the OPC states that they contacted the investigator after receiving the present request in an attempt to obtain the requested statements and were told by the investigator that he would not release the statements at issue. Thus, the OPC informs this office that they do not have a right of access to the requested witness statements. However, we understand the requestor to assert that they believe the OPC does have access to these witness statements. Whether or not the OPC has access to the witness statements at issue is a question of fact. This office cannot resolve factual disputes in the opinion process. See Open Records Decision Nos. 592 at 2 (1991), 552 at 4 (1990), 435 at 4 (1986). Where fact issues are not resolvable as a matter of law, we must rely on the facts alleged to us by the governmental body requesting our decision, or upon those facts that are discernible from the documents submitted for our inspection. See ORD No. 552 at 4 (1990). Thus, based on the OPC's representations, we accept the OPC's assertion that they do not have access to the requested witness statements. Accordingly, because the OPC does not have access to the witness statements at issue, we need not address the OPC's arguments against disclosure of this information. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed) (Act only applies to information governmental body maintains or has a right of access to as of the date request is received).

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses the doctrine of common-law privacy, which protects information that (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683.

In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. 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. *Id.* 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.* 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.* Thus, if there is an adequate summary of an investigation of alleged sexual harassment, the investigation summary must be released under *Ellen*, but the identities of the victims and witnesses of the alleged sexual harassment must be redacted, and their detailed statements must be withheld from disclosure. See Open Records Decision Nos. 393 (1983), 339 (1982). However, common-law privacy does not protect information

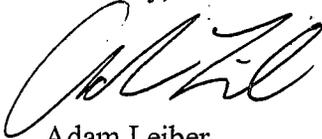
about a public employee's alleged misconduct on the job or complaints made about a public employee's job performance. *See* Open Records Decision Nos. 438 (1986), 405 (1983), 230 (1979), 219 (1978).

The submitted information consists of an adequate summary of an investigation into a sexual harassment allegation. In accordance with the holding in *Ellen*, we agree that the OPC must generally release the summary, redacting information that identifies the alleged victim and witnesses. We note, however, that the requestor is the attorney representing the alleged victim in this instance. Section 552.023 of the Government Code gives a person or the person's authorized representative a special right of access to information that is excepted from public disclosure under laws intended to protect that person's privacy interests. *See* Gov't Code § 552.023. Thus, here, the requestor has a special right of access to her client's information, and the OPC may not withhold that information from her under section 552.101 in conjunction with common-law privacy.<sup>2</sup> *See id.*; Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning herself). Accordingly, the OPC must release the summary, redacting only the information that identifies a witness. We have marked the identifying information that must be withheld under section 552.101 in conjunction with common-law privacy. The OPC must release the remaining information in the summary to the requestor.

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](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,



Adam Leiber  
Assistant Attorney General  
Open Records Division

ACL/rl

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<sup>2</sup>We note, however, that if the OPC receives another request for this particular information from a different requestor, the OPC should again seek a decision from us before releasing this information.

Ref: ID# 351100

Enc. Submitted documents

c: Requestor  
(w/o enclosures)