



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 21, 2011

Ms. Sharon Alexander
Associate General Counsel
Texas Department of Transportation
125 East Eleventh Street
Austin, Texas 78701

OR2011-01045

Dear Ms. Alexander:

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# 406644.

The Texas Department of Transportation (the "department") received a request for specified sexual harassment investigations, including action taken. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.¹

You state that some of the requested information is the subject of a previous ruling issued by this office, Open Records Letter No. 2010-10418 (2010), and that you have released one investigation report with redactions pursuant to that ruling. As we have no indication that the law, facts, and circumstances on which the prior ruling was based have changed, we agree the department must continue to rely on Open Records Letter No. 2010-10418 as a previous determination and withhold or release the information we previously ruled on in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental

¹We assume that the "representative sample" of information 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.

body, and ruling concludes that information is or is not excepted from disclosure). However, we will address your argument for the information not previously ruled upon.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. 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 (Tex. 1976).

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. *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.* In concluding, the *Ellen* court held "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, 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. We note supervisors are generally not witnesses for purposes of *Ellen*, and thus supervisors' identities generally may not be withheld under section 552.101 of the Government Code in conjunction with common-law privacy. In addition, since 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, the identity of the individual accused of sexual harassment is not protected from public disclosure. *See* Open Records Decision Nos. 438 (1986), 405 (1983), 230 (1979), 219 (1978).

The submitted information relates to two sexual harassment investigations. Upon review, we find the information labeled case number 50100001 does not contain an adequate summary of the investigation and does not identify any victims or witnesses. Thus, the department may not withhold any of the information labeled case number 50100001 under section 552.101 on the basis of common-law privacy and the holding in *Ellen*. Upon review, we determine the information labeled case number 10-M23 contains an adequate summary of the investigation. The summary and the statement of the accused are not confidential under section 552.101 in conjunction with common-law privacy; however, information

within the summary and statement of the accused identifying the victim and witnesses, which we have marked, must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy. *See id.* Because there is an adequate summary, the department must also withhold the remaining information we have marked under section 552.101 in conjunction with common-law privacy and the holding in *Ellen*. As you raise no further exceptions to disclosure, the remaining information in the summary and the statement of the accused must be released.

In summary, the department must continue to rely on Open Records Letter No. 2010-10418 as a previous determination and withhold or release the information we previously ruled on in accordance with that ruling. The department must withhold the information we have marked in case number 10-M23 under section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Ellen*. The remaining information must be released.

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, toll free, at (888) 672-6787.

Sincerely,



Jennifer Burnett
Assistant Attorney General
Open Records Division

JB/dls

Ref: ID# 406644

Enc. Submitted documents

c: Requestor
(w/o enclosures)