



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 10, 2012

Ms. Patricia M. Crawson  
Warrant Officer  
Adjutant General's Department  
Texas Military Forces  
P.O. Box 5218  
Austin, Texas 78763-5218

OR2012-12631

Dear Ms. Crawson:

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# 461599.

The Texas Military Forces (the "military") received a request for information regarding a specified commander's inquiry. You state you have released some of the requested information. You claim portions of the submitted information are excepted from disclosure under sections 552.101 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

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. Section 552.101 encompasses the common-law right of privacy, which protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. See *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. The type 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.

*See 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. *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 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 along with the statement of the accused under *Ellen*, but the identities of the victim 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). If no adequate summary of the investigation exists, then all of the information relating to the investigation ordinarily must be released, with the exception of information that would identify the victims and witnesses. We note supervisors are generally not witnesses for purposes of *Ellen*, except where their statements appear in a non-supervisory context. Further, 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).

You state the submitted information consists of records of an investigation of alleged sexual harassment. In this instance, the submitted information contains an adequate summary of the investigation, and a written statement and an audio recording of a statement of the accused. The summary and the accused's statements, which we have marked, are not confidential under section 552.101 in conjunction with common-law privacy, and must be released.<sup>1</sup> *See Ellen*, 840 S.W.2d at 525. We note, however, information within the summary and accused's statements that identifies the victim and witnesses is confidential under common-law privacy. *See id.* You state the military lacks the technical capability to redact the identifying information from the recorded audio statement. However, because the military had the

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<sup>1</sup>We note the information being released contains confidential information to which the requestor has a right of access under section 552.023 of the Government Code. *See* Gov't Code § 552.023 (person has special right of access to information that is excepted from public disclosure under laws intended to protect person's privacy interest); *see also* Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when person requests information concerning himself). As such information would be confidential with respect to the general public, if the military receives another request for this information from a different requestor it must again seek a ruling from this office.

capability to copy the audio recording at issue in order to submit it for our review, we believe the military has the capability to produce a copy of only the non-confidential portions of the audio recording. Accordingly, in releasing the marked information, the military must withhold the identifying information of victims and witnesses we have marked in the summary and the written statement, as well as the identifying information contained in the recorded audio statement, under section 552.101 of the Government Code in conjunction with common-law privacy and the decision in *Ellen*. Additionally, the military must withhold the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy and the decision in *Ellen*.<sup>2</sup>

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, toll free at (888) 672-6787.

Sincerely,



Kristi L. Wilkins  
Assistant Attorney General  
Open Records Division

KLW/ag

Ref: ID# 461599

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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<sup>2</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure.