



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 6, 2013

Mr. Carey Smith
General Counsel
Texas Health and Human Services Commission
P.O. Box 13247
Austin, Texas 78711

OR2013-09390

Dear Mr. Smith:

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# 490542.

The Texas Health and Human Services Commission (the "commission") received two requests for information pertaining to a specified investigation. 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 information.

Initially, we note the first requestor only requested the interviews conducted for the specified investigation. Therefore, any additional submitted information, including the summary of the investigation, is not responsive to the first requestor's request. The commission is not required to release non-responsive information in response to the first request.

Section 552.101 of the Government Code exempts 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 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 that 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). We note supervisors are generally not witnesses for purposes of *Ellen*, except where their statements appear in a non-supervisory context.

In this instance, the submitted information pertains to a sexual harassment investigation and, thus, is subject to the ruling in *Ellen*. Upon review, we find the submitted information includes an adequate summary of this investigation, as well as statements by the person accused of sexual harassment. The summary and statements of the accused are not confidential under section 552.101 in conjunction with common-law privacy. *See Ellen*, 840 S.W.2d at 525. Therefore, with the exception of the summary and the statements of the accused at issue, the commission must withhold the submitted information under section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Ellen*. We note, however, information within the summary and accused's statements that identifies the victim and witnesses is confidential under common-law privacy. *See Ellen*, 840 S.W.2d at 525. The first requestor is the alleged sexual harassment victim. Section 552.023 of the Government Code states a person or a person's authorized representative has a special right of access to information that relates to the person and that is protected from disclosure by laws intended to protect the person's privacy interest. *See* Gov't Code § 552.023(a); Open Records Decision No. 481 at 4 (1987) (governmental body may not deny access to whom information relates or person's authorized representative on grounds that information is considered confidential by privacy principles). Thus, the first requestor has a special right of access to her own information, and the commission may not withhold this information in the accused's statements from the first requestor. Accordingly, only the witness identifying information in the accused's statements, which we have marked,

must be withheld from the first requestor under section 552.101 in conjunction with common-law privacy and the holding in *Ellen*. However, the witness identifying information and the identifying information of the victim we have marked within the summary and accused's statements must be withheld from the second requestor under section 552.101 in conjunction with common-law privacy and the holding in *Ellen*.

We note portions of the remaining information in the summary and the accused's statement may be subject to section 552.117 of the Government Code.¹ Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government Code. *Id.* § 552.117(a)(1). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. We note that, because section 552.117 protects privacy, each requestor has a right of access to his or her own private information under section 552.023 of the Government Code. *See* Gov't Code § 552.023. Thus, if the individuals whose information we have marked timely requested confidentiality under section 552.024, the commission must withhold the information we have marked under section 552.117(a)(1). Conversely, if the individuals did not make a timely election under section 552.024, the commission may not withhold the marked information under section 552.117(a)(1).

In summary, with the exception of the summary and the accused's statements, the commission must withhold the submitted information under section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Ellen*. The witness identifying information in the accused's statements, which we have marked, must be withheld from the first requestor under section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Ellen*. The witness identifying information and the identifying information of the victim we have marked within the summary and accused's statements must be withheld from the second requestor under section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Ellen*. If the individuals whose information we have marked timely requested confidentiality under section 552.024 of the Government Code, the commission must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The commission must release the remaining information in the summary to the second

¹The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

requestor. The commission must release the remaining information in the accused's statements to both requestors.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Sean Nottingham
Assistant Attorney General
Open Records Division

SN/tch

Ref: ID# 490542

Enc. Submitted documents

c: Two Requestors
(w/o enclosures)