



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 1, 1995

Mr. Vernon M. Arrell
Commissioner
Texas Rehabilitation Commission
4900 North Lamar Blvd.
Austin, Texas 78751-4059

OR95-1168

Dear Mr. Arrell:

You ask whether certain information is subject to required public disclosure pursuant to chapter 552 of the Government Code. Your request was assigned ID# 36169.

The Texas Rehabilitation Commission (the "commission") received an open records request from a current employee seeking copies of written complaints her co-workers submitted to the commission on particular dates about her conduct on the job. You contend that copies of the complaints are excepted from required public disclosure pursuant to sections 552.101, 552.102, 552.103, and 552.108 of the Government Code. You have submitted documents for our review. Some of the documents you submitted have been released previously to the requestor. Consequently, you may not now withhold those documents from the requestor.

You contend that the documents submitted for our review are protected by common-law privacy and are therefore excepted from required disclosure pursuant to sections 552.101 and 552.102. Your concern is that by disclosing the substance of the complaints and the identities of the employees filing the complaints that the complainants may be subjected to intimidation or that they may no longer cooperate with the commission in resolving the allegations. You state that the employees that authored the complaints sought by the requestor did so with the expectation that their identity would be withheld. While you do not state that you promised the individuals that their statements would be kept confidential we note that by providing that all information a governmental body collects, assembles, or maintains is public unless expressly excepted from disclosure, chapter 552 of the Government Code prevents a governmental body from making an enforceable promise to keep information confidential unless the governmental body is authorized by law to do so. *See* Attorney General Opinion H-258 (1974); Open Records Decision No. 594 (1991) at 3.

Section 552.101 excepts from disclosure "information deemed confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. The informer's privilege, as incorporated by section 552.101, protects the identity of persons who report violations of the law to officials having the duty of enforcing those particular laws. *See Roviario v. United States*, 353 U.S. 53, 59 (1957). The informer's privilege does not, however, apply to information that does not describe illegal conduct. Open Records Decision No. 515 (1988) at 5. For example, the informer's privilege aspect of section 552.101 does not protect memoranda and written statements complaining of a fellow employee's work performance when those statements do not reveal the violation of specific laws to the officials charged with enforcing those laws. *See* Open Records Decision Nos. 579 (1990) at 8, 515 at 3. In reviewing the documents submitted, it appears that the complainants considered themselves to be commenting on the performance of an individual and situations at the facility rather than reporting criminal or illegal behavior. *See* Open Records Decision No. 579 (1990) at 8. Consequently, you may not withhold any of the information submitted for our review pursuant to the informer's privilege as incorporated into section 552.101 of the Government Code.

Section 552.101 encompasses common-law privacy and excepts from disclosure private facts about an individual. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Therefore, information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 (1992) at 1. The test to be applied to information claimed to be excepted by section 552.102 is the same as that formulated in *Industrial Foundation* for information claimed to be protected by section 552.101. *Hubert v. Harte-Hanks Tex. Newspapers Inc.*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.).

We have examined the information submitted to us for review. We have marked the information that is protected by common-law privacy and that you may withhold pursuant to section 552.101. You must release the remaining information.

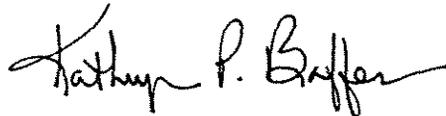
You contend that section 552.103 excepts the submitted information from required disclosure. To show that section 552.103(a) is applicable, the commission must demonstrate that (1) litigation is pending or reasonably anticipated and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. For purposes of section 552.103(a), this office considers a contested case under the Administrative Procedure Act, chapter 2001 of the Government Code, to be litigation. Open Records Decision No. 588 (1991) at 7. Section 552.103 requires concrete evidence that the claim that litigation may ensue is more than mere conjecture. Open Records Decision No. 518 (1989). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986) at 4.

In reviewing the documents submitted we conclude that you have not shown that litigation is more than conjecture. We find no concrete evidence of reasonably anticipated litigation. Consequently, you may not withhold any of the documents submitted pursuant to section 552.103.

You contend that section 552.108 excepts the submitted information from required public disclosure. Section 552.108 may except some information related to criminal cases under active investigation as well as some internal records of a law enforcement agency. The information submitted for our review is not the type of information to which section 552.108 applies. You may not withhold any information submitted pursuant to section 552.108.

We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office

Yours very truly,



Kathryn P. Baffes
Assistant Attorney General
Open Records Division

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Ref: ID# 36169

Enclosures: Marked documents