



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

October 29, 1996

Mr. Carl E. Lewis
Nueces County Attorney
901 Leopard, Room 206
Corpus Christi, Texas 78401-3680

OR96-1982

Dear Mr. Lewis:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 101930.

Nueces County (the "county") received a request for a report regarding a complaint of sexual harassment made by a county employee. You assert that the requested information is excepted from required public disclosure under sections 552.101 and 552.103 of the Government Code. You also raise section 552.305 on behalf of the county employee accused of the harassment.

You assert that the names of witnesses contained in the report must be withheld under section 552.101 in conjunction with the holding in *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso, 1992, writ denied). Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception excepts information made confidential by the common-law right to privacy. *Industrial Foundation of the South v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information must be withheld under section 552.101 in conjunction with the common-law right to privacy if the information contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person *and* the information is of no legitimate concern to the public. *Id.* In *Ellen*, 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 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.* We agree that the identities of several witnesses must be withheld to protect these individuals’ common-law privacy. We have marked the report to indicate what information must be withheld under section 552.101.¹

You also raise section 552.103, the “litigation exception.” When asserting section 552.103(a), a governmental body must establish that the requested information relates to pending or reasonably anticipated litigation. Thus, under section 552.103(a) a governmental body’s burden is two-pronged. The governmental body must establish (1) that litigation is either pending or reasonably anticipated and (2) that the requested information relates to that litigation. *See 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. You assert that litigation is reasonably anticipated because the alleged victim has “demanded reparation” and “has stated to the personnel director that [she] and her attorney will pursue the matter.”

To establish that litigation is reasonably anticipated, a governmental body must provide this office “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” Open Records Decision No. 452 (1986) at 4. You have not offered any concrete evidence to indicate that litigation is reasonably anticipated. Consequently, you may not rely on section 552.103 to withhold any of the requested information.

You finally assert section 552.305 on behalf of the employee accused of the harassment, citing the doctrine of “false light privacy.” False light privacy is not an actionable tort in Texas. *See Cain v. Hearst Corp.*, 878 S.W.2d 577, 579 (Tex. 1994). Thus, a governmental body may not withhold information merely because it might place a person in a false light. *See* Open Records Decision No. 579 (1990).

We conclude that, with the exception of the witnesses’ identities, the county must release the report to the requestor. We are resolving this matter with an 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 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Todd Reese
Assistant Attorney General
Open Records Division

¹Normally, any information which either identifies or tends to identify the victim also must be withheld under the common-law right of privacy and section 552.101 of the Government Code. However, as the alleged victim in this instance is also the requestor, we have not redacted any identifying information pertaining to her.

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Enclosures: Marked documents