



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

June 19, 1997

Ms. Lan P. Nguyen  
Assistant City Attorney  
City of Houston  
Legal Department  
P.O. Box 1562  
Houston, Texas 77251-1562

OR97-1418

Dear Ms. Nguyen:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 107078.

The City of Houston (the "city") received a request for the following information:

- a. Any handwritten notes, reports, summary of findings, investigation synopsis or like documents concerning the allegations made by AKAL about me and the subsequent investigation held by the DOA Personnel Department.
- b. Any correspondence or documents either from the DOA Personnel Department or to the City of Houston Legal Department relative to this matter.
- c. Any correspondence either from AKAL to the DOA or to AKAL from the DOA relative to the allegations made, the findings of the department's investigations or assignment actions taken, requested or contemplated as a result of said allegations/investigation.

You state that the city is releasing some of the requested information to the requestor. You claim, however, that the remaining requested information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state or a political subdivision is or may be a party. The city has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing 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. The city must meet both prongs of this test for information to be excepted under section 552.103(a).

You inform us that the requestor, a city employee, is involved in a grievance process that is "currently ongoing and pending at the Step II departmental level." You further assert that the city anticipates litigation if this grievance should "advance to a Step III level." We have reviewed your arguments and conclude that the internal grievance process you have presented to this office is not pending or reasonably anticipated litigation for the purposes of section 552.103(a). Therefore, you may not withhold the requested information pursuant to section 552.103 of the Government Code.

Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. Open Records Decision No. 574 (1990) at 5. When communications from attorney to client do not reveal the client's communications to the attorney, section 552.107 protects them only to the extent that such communications reveal the attorney's legal opinion or advice. *Id.* at 3. However, section 552.107(1) does not ordinarily protect from disclosure factual information compiled by an attorney acting on behalf of a governmental entity in the capacity of an investigator rather than a legal advisor. Open Records Decision No. 462 (1987). Most of the documents at issue appear to relate to an investigation of sexual harassment, and are thus not excepted from disclosure by section 552.107(1) to the extent that they consist of factual information compiled by an attorney acting as an investigator.

In addition, we note that some of the documents were either received from or disclosed to the representatives of Akal Security, and thus, the city may not withhold that information, as section 552.107(1) is waived by disclosure to persons outside the attorney-client relationship of the information sought to be withheld. Open Records

Decision No. 630 (1994). You have not established, nor is it apparent from the face of those documents that an attorney-client relationship exists between the city and Akal Security. We have reviewed the submitted material, and marked the type of information that may be withheld under section 552.107(1).

The Office of the Attorney General will raise section 552.101 on behalf of a governmental body when necessary to protect third-party interests. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987). Section 552.101 excepts from required public disclosure information that is considered confidential by law, either constitutional, statutory, or by judicial decision. In Open Records Decision No. 579 (1990), this office held that common-law privacy did not apply to witness names and statements regarding allegations of sexual misconduct. Recently, however, the court in *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied), addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment.

The *Ellen* decision controls the release of most of the documents you have submitted for our review. 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.* Therefore, based on *Ellen* and prior decisions of this office, *see e.g.*, Open Records Decision Nos. 393 (1983), 339 (1982), the city must withhold the identities of the witnesses to the alleged harassment and the identity of the alleged victim, and any information which would tend to identify the witnesses or victim, in each of the submitted documents.<sup>1</sup> We have marked the documents to indicate the types of information that must be withheld under section 552.101.

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 should not be relied on as a previous

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<sup>1</sup>We note that the common-law right of privacy does not protect facts about a public employee's misconduct on the job or complaints made about his performance, *see* Open Records Decision Nos. 438 (1986), 230 (1979), 219 (1978), and, therefore, the identity of the alleged offender may not be withheld from the requestor.

determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Vickie Prehoditch  
Assistant Attorney General  
Open Records Division

VDP/gle

Ref.: ID# 107078

Enclosures: Submitted marked documents

cc: Mr. John C. Silvia III  
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(w/o enclosures)