



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 23, 1998

Mr. J. Greg Hudson
Bickerstaff, Heath, Smiley, Pollan,
Kever & McDaniel
816 Congress Avenue, Suite 1700
Austin, Texas 78701-2443

OR98-1520

Dear Mr. Hudson:

You have asked 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# 115943.

Collin County (the "county"), which you represent, received a request for information concerning the county's former fire marshal. You submitted to this office for review the records at issue, designated as Attachment 3. You assert that the records at issue are protected from disclosure pursuant to sections 552.101, 552.103, 552.107, and 552.117 of the Government Code.

We note initially that some of the information has previously been considered by this office in Open Records Letter No. 96-1774 (1996). In that letter, we advised you to release certain documents. You indicate that those documents have been made public and have been provided to the current requestor. We also determined in that 1996 ruling that some records were protected from disclosure under sections 552.101, 552.103(a) and 552.107(1) of the Government Code. You must continue to withhold the records that we marked as confidential under section 552.101. You may also continue to withhold the records that we marked as subject to section 552.107(1).

In Open Records Letter No. 96-1774 (1996), you showed the applicability of section 552.103(a) to certain records because there was pending or reasonably anticipated litigation. You contend that section 552.103(a) is still applicable because litigation is reasonably anticipated. In 1996, an employee filed a claim of sexual discrimination with the Equal Employment Opportunity Commission ("EEOC"). In 1997, the employee received a Notice

of Right to Sue. You acknowledge that no suit has been brought and that the limitations period for a lawsuit has passed, although you express concern that the limitations period might, under certain circumstances, be equitably tolled. In Open Records Decision No. 452 (1986) at 4, this office stated:

Litigation cannot be regarded as "reasonably anticipated" unless there is more than a "mere chance" of it -- unless, in other words, we have concrete evidence showing that the claim that litigation may ensue is more than mere conjecture. Whether litigation is reasonably anticipated must be determined on a case-by-case basis. [Citations omitted.]

It appears that, in this situation, the prospect of litigation is too speculative for section 552.103(a) to be applicable. Thus, the records at issue may not be withheld from disclosure under section 552.103(a).

You have marked portions of the records in Exhibit 3 that you contend are protected from disclosure on the basis of common-law privacy. The test to determine whether information is private and excepted from disclosure under common-law privacy provisions, which are encompassed in sections 552.101 or section 552.102 of the Government Code, is whether the information is (1) highly intimate or embarrassing to a reasonable person, and (2) of no legitimate public concern. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 930 (1977); *Hubert v. Harte-Hanks Texas Newspapers Inc.*, 652 S.W.2d 546 (Tex. App.-Austin 1983, writ ref'd n.r.e.).

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 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.* at 525. Pursuant to the court's decision in *Ellen*, we have labeled the victim's and witnesses' statements as confidential. As to the other statements and details concerning the alleged harassment, the victim's and witnesses' common-law privacy interests must be protected by redacting identifying information about the victim and witnesses prior to releasing these other documents.

We note that the court in *Ellen* did not reach the issue of whether the public employee who was accused of the harassment had any inherent right of privacy to his identity. However, the court held that the public possesses a legitimate interest in full disclosure of the facts surrounding employee discipline in this type of situation. *Id.* at 525. We believe that there is a legitimate public interest in the identity of public employees accused of sexual harassment in the workplace and the details of the complaint, regardless of the outcome of the investigation. See Open Records Decision Nos. 470 (1987) at 4 (public has legitimate

interest in job performance of public employees); 423 (1984) at 2 (scope of public employee privacy is generally narrow).

You have also marked certain information as protected from disclosure under sections 552.024 and 552.117. Sections 552.024 and 552.117 provide that a current or former public employee can opt to keep private the employee's home address, home telephone number, social security number, or information that reveals whether the individual has family members. You submitted a form to this office which shows that the former fire marshal elected to keep private his home telephone number and home address. This information thus must be redacted prior to release of the records.

Also, you contend that information about family members of other employees is confidential. If these employees elected to withhold information about whether they have family members at the time of the request, then section 552.117 protects this information from disclosure. The information otherwise must be disclosed.

You assert that the fire marshal's social security number, driver's license number, and information about his education level and date of graduation are protected from disclosure. Section 552.117 protects social security numbers, as discussed previously. Also, if a social security number was obtained or maintained by a governmental body pursuant to any provision of law, enacted on or after October 1, 1990, that number is confidential pursuant to section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code. As to the driver's license number, section 552.130 of the Government Code provides that driver's license information is generally confidential and may be released only as provided under chapter 730 of the Transportation Code. Please note, however, that information concerning the employee's education level and date of graduation is not protected from disclosure on the basis of privacy. Open Records Decision Nos. 455 (1987) (information concerning age and date of birth not private), 373 (1983) (information regarding employment, age, and ethnic origin is not generally excepted under either common-law or constitutional right of privacy).

You also submitted to this office documents labeled as Exhibit 9 that you contend are excepted from disclosure under section 552.107(1). Section 552.107(1) protects from disclosure information that reveals client confidences to an attorney or that reveals the attorney's legal advice, opinion, and recommendation. See Open Records Decision No. 574 (1990). The documents at issue are a letter from the county's attorney and a draft document created by the attorney. We agree that the letter and draft reflect the attorney's legal advice, opinion, and recommendation. Thus, Exhibit 9 may be withheld from disclosure under section 552.107(1).

We have labeled the records at issue to show the type of information that must be withheld from disclosure. The remaining information must be released.

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

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

Yours very truly,



Ruth H. Soucy
Assistant Attorney General
Open Records Division

Ref.: ID# 115943

Enclosures: Marked documents

cc: Mr. Dave Lewis
Publisher
Celina Record
P.O. Box 308
Celina, Texas 75009-0308
(w/o enclosures)