



November 18, 1999

Ms. Jeri Yenne  
Criminal District Attorney  
Brazoria County  
111 East Locust, Suite 408A  
Angleton, Texas 77515

OR99-3321

Dear Ms. Yenne:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID#129498.

The Criminal District Attorney of Brazoria County (the "Brazoria County DA") received a request for a copy of the deposition of David Christian, Justice of the Peace, Brazoria County, Precinct 2 in the Knight vs. Christian, E.E.O.C. matter. You claim that the requested information is excepted from disclosure under sections 552.101 and 552.103 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 governmental body is or may be a party. The Brazoria County DA 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. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *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 at 4 (1990). The Brazoria County DA must meet both prongs of this test for information to be excepted under section 552.103(a).

You state that this matter was assigned to an administrative law judge in September 1998 for adjudication pursuant to E.E.O.C. rules. An administrative trial was conducted from

April 14 through April 16, 1999, and no decision in the matter has been rendered at the time of the Brazoria County DA's request for a decision. Based on the foregoing explanation, we find that the Brazoria County DA has demonstrated the first prong of section 552.103(a). We also find that the information at issue is related to the litigation.

Generally, if the opposing party has not seen the submitted information, then, the information may be withheld under section 552.103(a). However, if the opposing party to the litigation has previously had access to the information at issue; absent special circumstances, once information has been obtained by all parties to the litigation, *e.g.*, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, if the opposing party has not seen or had access to the deposition, then it may be withheld under section 552.103(a).<sup>1</sup> However, if the opposing party has seen or had access to the deposition, you may not withhold it under section 552.103(a).

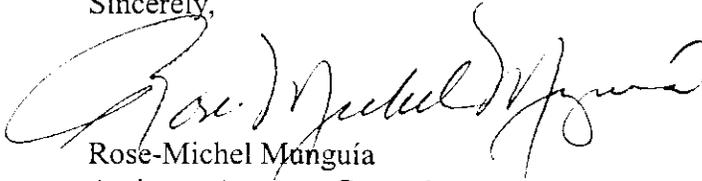
If section 552.103(a) is not applicable to the deposition, there are section 552.101 considerations which must be addressed prior to its release. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by 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 at 1 (1992). 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 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.* Based on *Ellen*, we believe that the Brazoria county DA must withhold information which would tend to identify the witnesses and victims of any alleged sexual harassment discussed within the documents. However, the remaining information must be released.

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<sup>1</sup> We also note that the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

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.

Sincerely,

A handwritten signature in black ink, appearing to read "Rose-Michel Munguía". The signature is fluid and cursive, with a large initial "R" and "M".

Rose-Michel Munguía  
Assistant Attorney General  
Open Records Division

RMM/jc

Ref.: 129498

Encl. Submitted documents

cc: Mr. H. M. Atchison  
P.O. Box 1181  
Fresno, Texas 77545  
(w/o enclosures)