



December 17, 1999

Mr. David Wofford
Staff Attorney
Texas Youth Commission
P.O. Box 4260
Austin, Texas 78765

OR99-3660

Dear Mr. Wofford:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 130369.

The Texas Youth Commission (the "commission") received a request for audiotapes of interviews conducted by the commission in relation to a complaint filed by a former commission employee. You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and have reviewed the submitted information.

You assert that section 552.103 of the Government Code excepts from disclosure the requested information. The Seventy-sixth Legislature amended section 552.103 of the Government Code to read as follows:

- (a) Information is excepted from the requirements of Section 552.021 if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party
- (b) For purposes of this section, the state or a political subdivision is considered to be a party to litigation of a criminal nature until the applicable statute of limitations has expired or until the defendant has exhausted all appellate and post conviction remedies in state and federal court.

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

The commission 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 commission must meet both prongs of this test for information to be excepted under 552.103(a).

We now examine whether the commission has shown that litigation is reasonably anticipated and that the requested information is related to the litigation. You previously submitted to this office for review a complaint filed with the Equal Employment Opportunity Commission ("EEOC") by a former commission employee (the "complainant"). The complaint alleges acts of discrimination and retaliation committed by a former supervisor.¹ You subsequently submitted a copy of a letter the commission received from the complainant's attorney. The attorney's letter indicates that the EEOC has issued the complainant a right to sue letter, and that his letter serves as notice to the commission of the complainant's intention of pursuing a lawsuit. The attorney's letter asserts that his firm "will proceed with filing suit and aggressively pursuing all legal remedies including compensatory damages, punitive damages, and attorneys' fees and costs." We believe these documents indicate that litigation is reasonably anticipated. Therefore, the commission has met the first prong of the section 552.103(a) test. We also conclude that the information submitted on the tapes is related to the reasonably anticipated litigation. Therefore, you may withhold the information pursuant to section 552.103 of the Government Code.

In our review of the submitted audiotapes, we note that the complainant is the subject being interviewed on two of the tapes. When the opposing party in the litigation has seen or had access to any of the information in the requested information, there is no justification for withholding that information from the requestor pursuant to section 552.103(a). Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, you must release the taped interview of the complainant to the requestor. The remaining tapes may be withheld from disclosure pursuant to section 552.103 of the Government Code. We note that the

¹This office has previously held that a pending complaint before the EEOC indicates a substantial likelihood of potential litigation. Open Records Decision Nos. 386 (1983), 336 (1982), 281 (1981).

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).

You have not specifically informed us as to whether the information at issue involves an ongoing investigation. It is important to note that section 552.022 of the Government Code now makes certain information expressly public, and therefore not subject to discretionary exceptions to disclosure. One such category of expressly public information under section 552.022 is “a completed report, audit evaluation, or investigation made of, for, or by a governmental body, except as provided by [s]ection 552.108[.]” Gov’t Code § 552.022(a)(1). The exception to disclosure you claim, section 552.103, is a discretionary exception which does not make information confidential by law. If the investigation is complete, the commission may not withhold the audiotapes pursuant to section 552.103. Therefore, we will address whether any of the requested information is confidential by law.

The commission’s investigation pertains to allegations of sexual harassment. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” The common-law right of privacy is incorporated into the Public Information Act by section 552.101. For information to be protected by common-law privacy it must meet the criteria set out in *Industrial Foundation of the South v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The *Industrial Foundation* court held that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. 540 S.W.2d at 685.

In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied), the court addressed the applicability of the right of common-law privacy to the files of a sexual harassment investigation. 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.*

According to *Ellen*, the requestor, as a member of the public, has a legitimate interest in the statement of the individual accused of misconduct. Therefore, the accused’s statement must be released. Also, we note that section 552.023 of the Government Code provides a person, or the authorized representative of a person, a special right of access to records held by a governmental body that contain information relating to the person that is protected from

public disclosure by laws intended to protect that person's privacy interests. Based on the information submitted, it appears that the requestor is the complainant's authorized representative. Therefore, in this instance, the commission must release the complainant's identifying information. The requestor is also entitled to the investigating body's summary of the alleged incident, or, if such documents do not exist, other documents that adequately summarize the allegations and findings. *See id.* Because no summary documents have been submitted, we conclude that the public has a legitimate interest in not only the accused's statement, but also in all of the other taped information regarding the investigation. However, because the witnesses are heard speaking on the tapes, we believe release of the tapes would identify the witnesses. Therefore, the commission may not release the tapes of the witnesses, with the exception, as noted above, of the interviews with the accused and with the complainant.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental

body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Carla Gay Dickson
Assistant Attorney General
Open Records Division

CGD/ch

Ref: ID# 130369

Encl. Submitted documents

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