



May 17, 2000

Mr. Michael W. Fox
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Austin, Texas 78701-3236

OR2000-1971

Dear Mr. Fox:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 135295.

Williamson County (the "county"), which you represent, received two requests for essentially the same information which concerns two county employees. Specifically, one requestor (the "first requestor") seeks: 1) all personnel files of the Constable of Precinct 1; 2) any incident or offense reports issued over the last two years that involve this Constable as a subject or a witness; 3) any complaints filed against this Constable since 1995; and 4) all personnel files of a specific Deputy Constable of Precinct 1. The other requestor (the "second requestor") asks for: 1) the results of a sexual harassment investigation conducted by the county regarding allegations against the Constable; and 2) any actions the county has taken as a result of the investigation. You claim that the information that the county has located in regard to both requests is not technically responsive and is therefore not subject to required public disclosure under the Public Information Act (the "Act"). Alternatively, you argue that all or some of the submitted information is excepted from required public disclosure under sections 552.101, 552.102, 552.103, 552.107, 552.108, and 552.111 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

¹In addition, you claim that the requested information implicates the privacy rights of the two county employees that are the subjects of the request for information. You have notified these individuals of the requests under section 552.305 so as to allow them an opportunity to respond to the requests. However, as neither employee has responded, the only arguments at issue here are the ones that you have submitted on behalf of the county.

We begin with your argument that the submitted information is not responsive to the requests. It is well-established that a governmental body may not disregard a request for records made pursuant to the Act merely because a requestor does not specify the exact documents desired. A governmental body must make a good faith effort to relate a request to information held by it. Open Records Decision No. 561 at 8-9 (1990), 87 (1975). Section 552.222(b) of the Government Code, however, provides that if a governmental body is unable to determine the nature of the records being sought, it may ask the requestor to clarify the request so that the desired records may be identified. Open Records Decision No. 663 (1993). When a requestor makes a vague or broad request, the governmental body should make a good faith effort to advise the requestor of the type of documents available so that the requestor may narrow or clarify the request. *See id.* at 5.

You explain that the submitted documents, though relevant to both requests, are not responsive because they contain no investigation results, and because they were not found in any personnel files, incident reports, offense reports, or complaints. You further state that the reason the county has submitted these purportedly non-responsive documents is so that this office may confirm that the documents are not responsive to the requests. It is apparent, and you admit, that the submitted documents are relevant to the requests. Therefore, it is reasonable to conclude that the requestors intended for the scope of their requests to cover these documents. *See* Open Records Decision No. 327 at 2 (1982) (finding that anything relating to an employee's employment constitutes information relevant to the individual's employment relationship and is a part of his personnel file). Consequently, we consider the submitted documents to be the result of a good faith attempt by the county to relate documents in its possession to the requests. To the extent that the county was unsure as to the meaning or breadth of the requests, it could have contacted the requestors and sought clarification of the requests themselves or their scope. *See* Gov't Code § 552.222(b); Open Records Decision No. 663 (1999). However, because the county chose not to seek guidance from the requestors, and because the submitted documents are so clearly related to the requests, we find that each set of submitted documents constitutes responsive information subject to required public disclosure under the Act. Therefore, we will consider your arguments for withholding the submitted information.²

We turn to your attempts to raise sections 552.108 and 552.111. In regard to each request for information, you raised section 552.108 in your initial request for an attorney general decision. However, in each instance, you failed to subsequently submit to this office the county's arguments explaining how or why section 552.108 applies to the information at

²Although you have submitted a set of documents in regard to each request for information, the first set of documents you submitted (Exhibits E through PP) contains all of the documents found in the second submitted set (Exhibits U through JJ). Therefore, all of our markings referenced in this ruling appear only in the first set of submitted documents, and except as otherwise note below, apply to both requests for information.

issue. Consequently, the county has waived its claim of section 552.108. *See* Gov't Code §§ 552.301, 552.302. In regard to your claim of section 552.111, you did not raise this claim in your initial request for an attorney general decision. Although you raised section 552.111 in subsequent letters to this office, you failed to timely raise this section in regard to both requests.³ Consequently, the county has waived its claim of section 552.111. *See* Gov't Code §§ 552.301, 552.302. Therefore, the county may not withhold any of the submitted documents under section 552.108 or section 552.111.

Next, we address your claim that all of the submitted documents are excepted under section 552.103 of the Government Code. Section 552.103(a) excepts from disclosure information relating to litigation to which a governmental body is or may be a party. The governmental body has the burden of providing relevant facts and documents to show that section 552.103(a) is applicable in a particular situation. In order to meet this burden, the governmental body must show that since the time that the governmental body received the request: (1) litigation has been pending or reasonably anticipated, and (2) the information at issue is related to that litigation. Gov't Code § 552.103; *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (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 governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.⁴ Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Nor does the mere fact that an individual hires an attorney and alleges damages establish that litigation is reasonably anticipated.

³You raised section 552.111 in your letters of March 22, 2000 and April 10, 2000, respectively.

⁴In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

Open Records Decision No. 361 at 2 (1983). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

You explain that the employee alleging sexual harassment has hired an attorney, and that this attorney has contacted the county on behalf of the employee. Moreover, you state that the county perceives the current dialogue between this attorney and the county to indicate that litigation may lurk in the near future. We do not believe that these facts by themselves, or in conjunction with the submitted correspondence between the county and the attorney, demonstrate concrete evidence that litigation is likely to ensue. Therefore, we find that the county has not met its burden of showing that litigation has been either pending or reasonably anticipated since the county received the requests. Accordingly, the county may not withhold any of the submitted information under section 552.103.

Next, we turn to your arguments concerning sections 552.101 and 552.102 of the Government Code. Section 552.102(a) protects “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy” The scope of section 552.102(a) protection, however, is very narrow. See Open Records Decision No. 336 (1982). See also Attorney General Opinion JM-36 (1983). The test for section 552.102(a) protection is the same as that for information protected by common law privacy under section 552.101 of the Government Code. *Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 550 (Tex. App.--Austin 1983, writ ref'd n.r.e.). Therefore, we address your claims of section 552.101 and 552.102 simultaneously by focusing only on section 552.101.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Accordingly, section 552.101 encompasses information considered confidential under the common law right to privacy. Information is protected by the common law right to privacy 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. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). You claim that most or all of the submitted documents are confidential under common law privacy because they pertain to a county employee’s allegations of sexual harassment.

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 regarding 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.*

According to *Ellen*, the public has a legitimate interest in documents that adequately summarize sexual harassment allegations and the results of investigations into those allegations, but not in the identities or detailed statements of the victim and witnesses. *See id;* see also Open Records Decision Nos. 473 (1987), 470 (1987) (public has legitimate interest in job performance of public employees). You do not indicate that the county has released a summary of the sexual harassment allegations or the results of the county's investigation into the allegations. Consequently, we find that there currently remains a legitimate public interest in the submitted documents as they pertain to the sexual harassment allegations.⁵ However, section 552.101 in conjunction with *Ellen* requires the county to withhold the witnesses' and the alleged victim's identifying information which appears throughout the submitted documents. We have marked the types of information in the submitted documents that must be withheld under section 552.101.⁶

We note, however, that the second requestor is the attorney of the alleged sexual harassment victim. Under section 552.023 of the Government Code,

[a] person or a person's authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person's privacy interests.

Gov't Code § 552.023. Due to this special right of access, the information that the county must release to the second requestor includes all information that identifies the alleged victim. We emphasize, however, that the alleged victim's special right of access to information pertaining to herself does not entitle her to information that identifies witnesses of the sexual harassment.

⁵Although many of the submitted documents pertain to other types of allegations, these other allegations appear to be entwined with the sexual harassment allegations. Consequently, we consider all of the submitted documents to pertain either directly or indirectly to the sexual harassment allegations. Therefore, all of the submitted documents are subject to section 552.101 in conjunction with common law privacy and *Ellen*.

⁶We point out that Exhibit II contains what appears to be a completed audit report. Accordingly, to the extent that Exhibit II does not contain confidential information, it must be released pursuant to section 552.022(a)(1).

You also claim that Exhibit DD is excepted under section 552.107 of the Government Code. Section 552.107(1) excepts from disclosure 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(1) 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 at 5 (1990). When communications from attorney to client do not reveal the client's communications to the attorney, section 552.107(1) protects them only to the extent that such communications reveal the attorney's legal opinion or advice. Open Records Decision No. 574 at 3 (1990). In addition, basically factual communications from attorney to client, or between attorneys representing the client, are not protected. *Id.* We agree that Exhibit DD is an attorney-client communication that reveals client confidences. Accordingly, the county may withhold Exhibit DD under section 552.107(1).

Finally, we note that the submitted documents contain a Texas driver's license number. Section 552.130 of the Government Code prohibits the release of information that relates to a motor vehicle operator's or driver's license or permit issued by an agency of this state or a motor vehicle title or registration issued by an agency of this state. Therefore, we find that the county must withhold the Texas driver's license number under section 552.130. We have marked the driver's license number to be withheld.

In conclusion, the county must withhold the marked driver's license number under section 552.130. The county may withhold Exhibit DD under section 552.107. In regard to the rest of the submitted information, section 552.101 requires the county to withhold information that identifies the witnesses and the alleged victim in regard to the sexual harassment allegations. However, pursuant to section 552.023, the county may not withhold information that identifies the alleged victim from the second requestor. The county must release the remaining information from Exhibits E through PP to the first requestor, and the remaining information from Exhibits U through JJ to the second requestor.

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

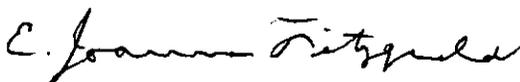
the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

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,



E. Joanna Fitzgerald
Assistant Attorney General
Open Records Division

EJF\nc

Ref: ID# 135295

Encl: Submitted documents

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