



June 15, 2000

Mr. John Steiner
Division Chief
City of Austin
P.O. Box 1546
Austin, Texas 78767

OR2000-2337

Dear Mr. Steiner:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 136184.

The City of Austin (the "city") received a request for "details" related to any sexual harassment charges made against a named city council member; "details" on any conversations concerning such charges; and "all details" related to sexual harassment charges made against the named city council member by two named individuals. As you construe this request, "the responsive information consists of two sets of interviews." You have provided these interview materials to this office for review.¹ You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 excepts from required public disclosure information that is considered confidential by law, either constitutional, statutory, or by judicial decision. Information may be withheld under section 552.101 in conjunction with the common law right to privacy if (1) the information contains highly intimate or embarrassing facts about a person's private affairs such that release of the information would be highly objectionable to a reasonable person, and (2) the information is of no legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The court addressed the applicability of the common law

¹Note that the city must make a good faith effort to relate a request to information which it holds. Open Records Decision No. 561 (1990). This opinion letter does not authorize withholding responsive information which has not been provided to this office for review.

privacy doctrine to files of an investigation of allegations of sexual harassment in *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied). 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 was contained in the documents that had been ordered released. *Id.*

Based on *Ellen* and prior decisions of this office, *see e.g.* Open Records Decision Nos. 393 (1983), 339 (1982), a governmental body must withhold the identities of alleged victims and witnesses to alleged sexual harassment as well as any information which would tend to identify a witness or victim. Note that the common law right of privacy does not protect facts about a public employee's alleged misconduct on the job or complaints made about his job performance. *See* Open Records Decision Nos. 438 (1986), 230 (1979), 219 (1978). Therefore, the identity of the alleged offender is not protected by common law privacy.

In this case, you have not submitted copies of any formal complaints; or any information which indicates conclusions reached in these investigations; or what, if any, corrective measures were taken. You relate that you have released a redacted version of the interview materials generated in one of the investigations. You do not indicate that you have released any of the materials related to the second investigation. From our review of the submitted materials we conclude that adequate summaries of these investigations have not been released. We have marked the submitted materials to indicate that information which we consider to identify the purported victims, and the witnesses. The information that we have marked must be withheld under section 552.101 in conjunction with the common law right of privacy. The remainder of the submitted information is not protected by the common law right of privacy and may not be withheld under section 552.101 of the Government Code.

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 governmental body claiming this exception 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). Further, to be excepted under section 552.103, the information must relate to litigation that is pending or reasonably anticipated on the date that the information was requested. Gov't Code §552.103(c). In this case, there is no indication that litigation was pending at the time of the request for information.

In support of your contention that litigation related to the responsive information was anticipated at the time of the request, you have provided a copy of a demand letter from an attorney who represents an alleged victim of sexual harassment. The letter asserts claims "for mental anguish" and offers to release the city from liability for causes of action "which could be brought in an EEOC charge or lawsuit." This letter is dated April 30, 1999, and refers to actions which occurred "last year." We note that sexual harassment is actionable under title 42 of the United State Code as a form of unlawful employment practice based on sex. 42 U.S.C. § 2000e-5. A charge under that section must be filed within one hundred and eighty days after the alleged unlawful employment practice occurred, unless the allegedly aggrieved party institutes proceedings with a proper State or local agency, in which case the charge must be made no later than three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law. 42 U.S.C. § 2000e-5(e). In this case, there is no indication that a charge was made to any state, local or federal agency. As the limitations period for this cause of action lapsed before the subject request for information was made, the city cannot reasonably anticipate litigation related to information responsive to that request. We conclude that the submitted information is not excepted from disclosure by section 552.103 of the Government Code.

You assert that communications made to an investigating attorney in the course of an interview with the council member who was under investigation are protected as attorney client privileged communications under Government Code section 552.107. This section provides, in relevant part, that information is excepted from required public disclosure if

it is information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct.

Gov't Code § 552.107(1). Although the scope of section 552.107(1) would appear to be co-extensive with that of rule 1.05 of the Texas Disciplinary Rules of Professional Conduct, which prohibits an attorney from divulging "confidential information," this office has concluded that such an interpretation of rule 1.05 would be in potential conflict with the purposes of chapter 552 of the Government Code. *See* Open Records Decision No. 574 at 4-5 (1990) (construing predecessor statute). Accordingly, this office has determined that section 552.107(1) protects only what rule 1.05 describes as "privileged" information, *i.e.*, information that represents confidential communications between attorney and client. *Id.* at 5. "Unprivileged" information, as defined by rule 1.05, is not excepted from disclosure under section 552.107(1). *Id.* Thus, section 552.107(1) excepts from disclosure only factual information or requests for legal advice communicated by the client to the attorney and legal advice or opinion rendered by the attorney to the client or to an associated attorney in the course of rendering legal services to the client. *Id.* at 7-8. The privilege does not attach where an attorney is acting in a capacity other than attorney. Open Record Decision No. 462

(1987). You acknowledge that this attorney was retained by the city to act as an investigator, and not as an attorney, for all of the interviews of individuals other than the subject council member. However, you contend that during the interview with the council member the attorney acted in the capacity of the council member's attorney. We do not agree. The materials do not contain any representation by the attorney to the council member that the attorney represents the council member. The attorney noted that the council member was not a city employee and that in the event that the council member were sued for his alleged actions, the council member would need to retain other counsel. Further, the attorney informed the council member that he was free to "consult with his own legal counsel" before answering this attorney's questions. Although you assert that the interviewing attorney provided legal advice to this council member, we do not agree with this characterization of the informative statements made by this attorney. We conclude that, vis-a-vis these interview materials, the attorney was acting in the capacity of an investigator for the city and that he was not acting as this council member's attorney. Therefore, the subject communications are not privileged. The information may not be withheld under section 552.107 of the Government Code.

You also contend the all of the submitted materials are excepted from public disclosure by section 552.111 of the Government Code. This section excepts information "that would not be available by law to a party in litigation with the agency." To withhold information under this section a governmental body must show that the information was (1) created for trial or in anticipation of litigation, and (2) the work product consists of or tends to reveal an attorney's "mental processes, conclusions, and legal theories." Open Records Decision No. 647 (1996). This exception generally does not extend to facts obtained by the attorney. *Leede Oil & Gas, Inc. v. McCorkle*, 789 S.W.2d 686, 687 (Tex. App.—Houston [1st Dist.] 1990, no writ) ("neutral recital of facts" may not be withheld as attorney work product). In this case, we note that the investigating attorney indicates that she merely ordered the facts chronologically and paraphrased the witnesses statements for clarity. From our review of these materials we do not discern any indication of any attorney's mental processes, conclusions, or legal theories. We conclude that the submitted materials consist of neutral recitations of fact, and thus consist of information that cannot be excepted as work product under section 552.111 of the Government Code.

In summary, that portion of the submitted materials which we have marked as protected by the common law right of privacy must be withheld. All other submitted materials must be released.

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,



Michael Jay Burns
Assistant Attorney General
Open Records Division

MJB/nc

Ref: ID# 136184

Encl Submitted documents

cc: Ms. Linda Dailey
P.O. Box 141926
Austin, Texas 78714-1926
(w/o enclosures)