



April 9, 2001

Mr. James G. Nolan
Legal Department
Texas Workforce Commission
101 East 15th Street
Austin, Texas 78778-0001

OR2001-1404

Dear Mr. Nolan:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 145804.

The Texas Workforce Commission (the "commission") received a request for information relating to investigations of sexual harassment, threats of violence, and use of illegal software. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

We begin by noting that almost all of the submitted information is made expressly public by section 552.022 of the Government Code. Section 552.022 provides in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Gov't Code § 552.022(a)(1). In this instance, the submitted information contains four completed investigation reports. This information may only be withheld if it is confidential under other law or if it is excepted under section 552.108 of the Government Code. You do not assert that the reports are excepted under section 552.108 of the Government Code. Furthermore, section 552.103 of the Government Code is a discretionary exception and is not "other law" for purposes of section 552.022.² Therefore, the commission may not withhold the submitted reports under section 552.103. Nevertheless, we will address whether the remainder of the submitted information, consisting of letters sent to the requestor, are excepted under section 552.103. Furthermore, we will address whether any of the submitted information is confidential under either section 552.101 of the Government Code or section 552.117 of the Government Code.

First, we address your section 552.103 argument with respect to the information that is not expressly public under section 552.022—the submitted letters. Section 552.103 provides as follows:

(a) Information is excepted from [required public disclosure] 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.

....

(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*

²Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. See, e.g., Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 592 at 8 (1991) (governmental body may waive section 552.104, information relating to competition or bidding), 549 at 6 (1990) (governmental body may waive informer's privilege), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions therefore do not constitute "other law" that makes information confidential.

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). Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. You state that the requested information relates to complaints filed with the Texas Commission on Human Rights and the Equal Employment Opportunity Commission by the requestor. However, it appears that the letters in question were provided to the requestor. Therefore, the letters are not protected under section 552.103. See ORD Nos. 349, 320.

Next, we address your argument that one of the requested reports is excepted from disclosure under section 552.101 and common law privacy. 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 Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The *Industrial Foundation* court stated 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 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.*

Here, we note that two of the requested investigations relate to claims of sexual harassment. In one investigation, the requestor is the subject of the complaint, while in the other investigation, the requestor is the alleged victim of sexual harassment. Because the second investigation implicates only the requestor's privacy rights, the commission must release this report to the requestor, subject to section 552.117 of the Government Code.³ See Gov't Code

³If the commission receives a subsequent request for this information from someone other than the requestor, it should submit another request for an opinion to this office in regard to that request.

§ 552.023. However, portions of the first sexual harassment investigation must be withheld under section 552.101 and common law privacy. The first sexual harassment investigation report contains an adequate summary of the investigation. The commission must release this summary, which we have marked, pursuant to *Ellen*, 840 S.W.2d at 525. However, the commission must withhold the remainder of the documents in the investigation file. *Id.* Furthermore, the commission must withhold the identities of the victim and witnesses of the alleged sexual harassment in the summary. *Id.*

Finally, we address your argument that portions of the requested information are excepted from disclosure under section 552.117. Section 552.117 excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See Open Records Decision No. 530 at 5 (1989)*. Therefore, the commission may only withhold information under section 552.117 on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. You indicate that some of the employees whose information is included in the requested materials elected to keep their information confidential under section 552.117. While the information you submitted indicates that some of the employees whose information is included in the requested materials elected to keep their home address and telephone number, social security number, and family member information confidential, there is no indication of when they made these elections. Furthermore, it appears that one employee whose personal information is included in the responsive documents has not elected to keep any of his information confidential. For those employees who timely elected to keep their personal information confidential, the commission must withhold the employees' home addresses and telephone numbers, social security numbers, and any information that reveals whether these employees have family members. The commission may not withhold this information under section 552.117 for those employees who did not make a timely election to keep the information confidential. We have marked the home address and telephone number, social security number, and family member information that may be excepted under section 552.117.⁴

In summary, the commission must withhold all documents included in the sexual harassment investigation involving the claim against the requestor except for the document which we have marked as a summary. Furthermore, you must withhold the names of the victim and witnesses to the alleged sexual harassment. With respect to the remainder of the information that is not protected under section 552.101 and common law privacy, you must withhold the home addresses, home telephone numbers, social security numbers, and family member

⁴We note that the requestor has a special right of access to his own home address and telephone number, social security number, and family member information under section 552.023 of the Government Code.

information of commission employees to the extent the employees elected to keep this information confidential before the commission received the instant request for information. The commission must release the remainder of the responsive information.

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).

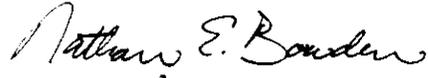
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

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,

A handwritten signature in cursive script that reads "Nathan E. Bowden".

Nathan E. Bowden
Assistant Attorney General
Open Records Division

NEB/er

Ref: ID# 145804

Encl: Submitted documents

cc: Mr. Jose Santana
1122 Tetbury Lane
Austin, Texas 78748
(w/o enclosures)