



November 1, 2001

Mr. Robert W. Wilson
Gale, Wilson & Sánchez
115 East Travis, Suite 618
San Antonio, Texas 78205

OR2001-5032

Dear Mr. Wilson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 154215.

The Alamo Community College District (the “district”), which you represent, received written requests from two individuals that encompass all personnel records of two named district employees. You contend that the requested information is excepted from disclosure under section 552.103 of the Government Code. This office also received comments from the attorneys of the district employees regarding the release of the records at issue. *See* Gov’t Code § 552.304.

We note at the outset that this office previously addressed the extent to which the personnel records of one of the named individuals is subject to required public disclosure. *See* Open Records Letter No. 2001-3437 (2001). However, because the circumstances surrounding these records have changed since this office issued Open Records Letter No. 2001-3437, this office does not consider that ruling a “previous determination” for purposes of section 552.301(a) of the Government Code. *See* Open Records Decision No. 673 (2001). Accordingly, we will consider the applicability of section 552.103 to the records at issue.

Before we do so, however, we must address a procedural issue. Section 552.301 of the Government Code dictates the procedure that a governmental body must follow when it seeks a decision from the attorney general as to whether requested information falls within an exception to disclosure. Among other requirements, the governmental body must submit to this office within fifteen business days of receipt of an information request “a copy of the specific information requested, or . . . representative samples of the information if a

voluminous amount of information was requested.” Gov’t Code § 552.301(e)(1)(D). Otherwise, the requested information “is presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information.” Gov’t Code § 552.302.

You have not submitted to this office the records you characterize as “Attorney-Client information.” We therefore have no basis on which to conclude that there exists a compelling reason for withholding those records. Furthermore, unless this office has previously ruled on those precise documents, any prior ruling of this office recognizing the attorney-client privilege under either section 552.107(1) of the Government Code or Rule 503 of the Texas Rules of Evidence is inapplicable to such records held by the district. *See* Open Records Decision No. 673 (2001) (establishing two types of “previous determinations” and criteria for each). Consequently, we have no choice but to conclude that the “Attorney-Client information” that is responsive to the requests is presumed to be public under section 552.302 and therefore must be released to the requestors. If you believe the information is confidential and may not lawfully be released, you must challenge the ruling in court as outlined below.

We now address the applicability of section 552.103 to the records you submitted to our office. Section 552.103 of the Government Code is commonly referred to as the “litigation exception.” Under section 552.103(a) and (c), the governmental body raising this exception must demonstrate that (1) litigation involving the governmental body was pending or reasonably anticipated at the time of the records request, and (2) the information at issue is related to that litigation. *See also 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103.

In this instance, you have demonstrated that the district is currently the defendant in a lawsuit brought by one of the named district employees, and that the district reasonably anticipates becoming a defendant in other litigation that may be brought by the other named employee. Furthermore, we conclude that you have met your burden of demonstrating that the records you submitted to this office as responsive to the requests “relate” to both causes of action for purposes of section 552.103.

We therefore conclude that the district may withhold the information at issue pursuant to section 552.103 of the Government Code, except for that information discussed below. In reaching this conclusion, however, we assume that both of the opposing parties to the litigation have not previously had access to the records 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 interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). If both of the opposing parties in the litigation have

seen or had access to any of the information in these records, there would be no justification for now withholding that information from the requestors pursuant to section 552.103. We also note that the applicability of section 552.103 ends once the litigation has been concluded.¹ Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We further note that several of the records you submitted to our office as being responsive to the requests are specifically made public under section 552.022 of the Government Code. Section 552.022(a) provides in pertinent part as follows:

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;

(2) the name, sex, ethnicity, salary, title, and dates of employment of each employee and officer of a governmental body;

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body; [and]

....

(17) information that is also contained in a public court record[.]

We first note that one of the requestors has sought one employee's "full name, salary, titles held during employment, starting and ending dates of all and any positions held by this college or of any entity operating under the management of" the district. These categories of information are specifically made public under section 552.022(a)(2). Additionally, the records at issue contain employment contracts and performance evaluations made public under section 552.022(a)(1) and (a)(3). Finally, the records at issue contain pleadings and

¹We note, however, that some of the requested information may be confidential by law and must not be released even after litigation has concluded. If the district receives a subsequent request for the information, you should reassert your arguments against disclosure at that time. Gov't Code § 552.352 (distribution of confidential information is criminal offense).

motions that have been filed with the court in connection with the pending litigation against the district; this information is specifically made public under section 552.022(a)(17) of the Government Code. Consequently, the district may withhold these categories of information only if they are made confidential under other law.

Although you argue that the records are excepted under section 552.103 of the Government Code, this provision is a discretionary exception and therefore is not "other law" for purposes of section 552.022. *See, e.g.*, Open Records Decision Nos. 665 at 2 n.5 (2000) (governmental body may waive section 552.103). Accordingly, the district must release the categories of information specifically made public under section 552.022 of the Government Code.

We next note that section 552.022(a)(1) of the Government Code also makes public, among other things, records pertaining to "a completed . . . investigation made of, for, or by a governmental body, except as provided by Section 552.108." Portions of the submitted records pertain to two completed sexual harassment investigations. Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," including information protected by the common law right of privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The doctrine of common law privacy protects information that contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and the information must be of no legitimate concern to the public. *Id.* Because the release of information concerning sexual harassment complaints could impair the rights of third parties and because the improper release of confidential information constitutes a misdemeanor, *see* Gov't Code § 552.352, we must consider the applicability of section 552.101 to records of such investigations. *See* Gov't Code § 552.022(a).

The court addressed the applicability of the common law 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. *Id.* at 525. The court upheld 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 conclusion, 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*, a governmental body must withhold the identities of alleged victims and witnesses to alleged sexual harassment as well as any information that would tend to identify a witness or victim.

The submitted information contains some documents that we consider to be analogous to the summary released in *Ellen* as well as correspondence dealing with the sexual harassment complaint procedures and the accused person's interview. The district must release these documents in conformity with Open Records Letter No. 2001-3437, with the redaction of the identities of the victims and any witnesses to the alleged sexual harassment. In accordance with the holding in *Ellen*, the district must also withhold the witness statements and interview notes under section 552.101 in conjunction with common law privacy.

To summarize, the district must release all "Attorney-Client information," as well as all personnel information and court filed documents made public under section 552.022 of the Government Code. The district must also release the summary information pertaining to the two sexual harassment investigations except for identities of the victims and any witnesses to the alleged sexual harassment, but the remaining portions of the investigations must be withheld pursuant to common law privacy in conjunction with section 552.101 of the Government Code. The district may withhold the remaining requested information pursuant to section 552.103 of the Government Code.

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).

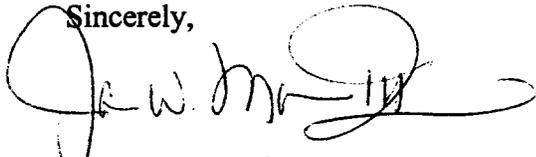
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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).

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 black ink, appearing to read 'J.W. Morris III', written over a circular stamp or mark.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/RWP/sdk

Ref: ID# 154215

Enc. Submitted documents

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