



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

May 13, 2003

Mr. David M. Feldman
Feldman & Rogers, L.L.P.
5718 Westheimer, Suite 1200
Houston, Texas 77057

OR2003-3204

Dear Mr. Feldman:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 183659.

The Conroe Independent School District (the "district"), which you represent, received a request for 1) the former superintendent's W-2 forms and 2) information pertaining to the district's current investigations of wrongdoing, including sexual harassment, by any district personnel. The district has released item 1. The district asserts that item 2 is excepted from public disclosure under sections 552.101, 552.103, 552.111, and 552.135 of the Government Code. We have considered the district's arguments and reviewed the submitted information.

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 district 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 (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 district must meet both prongs of this test for information to be excepted under section 552.103(a). Furthermore, section 552.103 applies only if the litigation is pending or reasonably anticipated on the date that the district receives the request for information. Gov't Code § 552.103(c).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "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.¹ 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).

The district contends that litigation was reasonably anticipated when the complainants came forward with their sexual harassment allegations on March 24, 2003. This fact is insufficient to show that the district reasonably anticipated litigation on this date. In order to conclude that litigation is reasonably anticipated, this office requires a showing that an individual has taken objective steps toward filing suit, such as hiring an attorney who threatens to sue, and that only a public threat to bring suit against a governmental body is not sufficient. *See* Open Records Decision Nos. 346 (1982), 331 (1982). On March 24, 2003, the individuals had not even threatened to sue the district or taken any concrete steps toward filing suit. They merely filed a complaint with the district. Merely filing a complaint is insufficient to establish reasonably anticipated litigation because many possible outcomes may result from resolution of the complaint. The possibility that a lawsuit may eventually result from the complaint is too speculative for the purposes of section 552.103. *Cf.* Open Records Decision No. 361 (1983) (litigation is not reasonably anticipated when an individual who was rejected for employment hires an attorney to investigate the circumstances of the rejection or when an individual hires an attorney who makes a request for information). Furthermore, filing a complaint is not a formal first step toward potential litigation akin to filing a complaint with the Equal Employment Opportunity Commission or the Texas Commission on Human Rights. Open Records Decision Nos. 386 at 2 (1983) (pending EEOC complaint indicates litigation is reasonably anticipated), 336 at 1 (1982). The district also refers to Exhibit B, which shows that the complainants retained counsel on April 15, 2003. Again, the submitted information does not show any threats to sue from the opposing counsel. Open Records Decision No. 551 (1990) (litigation is reasonably anticipated where attorney demands damages and threatens to sue). Moreover, the district received the request for information on April 11, 2003. Thus, Exhibit B, showing hiring of attorney on April 15, is not proof that the district anticipated litigation at the time it received the request for information. Gov't

¹In 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).

Code § 552.103(c) (section 552.103 applies only if litigation is pending or reasonably anticipated on date that district receives request for information). Accordingly, the district may not withhold the submitted information under section 552.103.

The district also argues that the submitted information is confidential under common-law privacy. Section 552.101 excepts “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Section 552.101 also encompasses the doctrine of common-law privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication 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, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

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 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.*

Because the submitted information contains no adequate summary of the sexual harassment complaint investigation and you do not relate that such a summary has been released, most of the submitted information may not be withheld under section 552.101. However, based on *Ellen*, the district must withhold the marked victims’ identifying information under section 552.101 in conjunction with common-law privacy.²

Next, we consider the district’s attorney work product claim for the information in Exhibit D that is not protected under common-law privacy. Section 552.111 of the Government Code is the proper exception to assert when claiming attorney work product. Section 552.111 excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” A governmental body may withhold attorney work product from disclosure if it demonstrates that the material was 1) created for trial or in anticipation of civil litigation, and 2) consists of or tends to reveal

²Because section 552.101 is dispositive, we do not address the district’s claim under section 552.135 of the Government Code, which excepts from public disclosure the identity of an employee or former employee of a school district who has furnished a report of another person’s possible violation of criminal, civil, or regulatory law to the school district or the proper regulatory enforcement authority.

an attorney's mental processes, conclusions and legal theories. Open Records Decision No. 647 (1996). The first prong of the work product test, which requires a governmental body to show that the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate that 1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and 2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. Open Records Decision No. 647 at 4 (1996). The second prong of the work product test requires the governmental body to show that the documents at issue tend to reveal the attorney's mental processes, conclusions, and legal theories. After reviewing the district's arguments and the submitted information, we conclude that the district has not demonstrated either prong of the work product test. Thus, the district may not withhold the remaining information in Exhibit D under section 552.111.

The submitted information contains information made confidential under sections 552.117 and 552.137 of the Government Code. 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 district 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. For those employees who timely elected to keep their personal information confidential, the district must withhold the employees' home addresses and telephone numbers, social security numbers, and any information that reveals whether these employees have family members. The district 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 information subject to section 552.117.

Section 552.137 of the Government Code provides:

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code § 552.137. The district must withhold the marked e-mail addresses under section 552.137.

In summary, the district must withhold the alleged sexual harassment victims' identifying information that we have marked under section 552.101. The marked e-mail addresses are confidential under section 552.137. The district must withhold the personal information under section 552.117 for those employees who made a timely election to keep their information confidential. The district must release the remaining submitted 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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/sdk

Ref: ID# 183659

Enc. Marked documents

c: Ms. Nancy Flake
HCN
100 Avenue A
Conroe, Texas 77301
(w/o enclosures)