



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 10, 2003

Mr. John D. Bell
Wood, Boykin & Wolter, P.C.
615 North Upper Broadway, Suite 1100
Corpus Christi, Texas 78477-0397

OR2003-8091

Dear Mr. Bell:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 190798.

The Regional Transportation Authority in Corpus Christi (the "RTA"), which you represent, received a request for "any and all information regarding" a particular sexual harassment claim. You state that some information has previously been released and claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We begin by addressing your claim that the submitted information is confidential under federal law. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information made confidential by other statutes. Section 2000e-5 of Title 42 of the United States Code provides in pertinent part:

Whenever a charge is filed alleging that an employer . . . has engaged in an unlawful employment practice, the [Equal Employment Opportunity] Commission [(the "EEOC")] shall serve a notice of the charge . . . and shall make an investigation thereof. . . . Charges shall not be made public *by the [EEOC]*. . . . If the [EEOC] determines after such investigation that there is reasonable cause to believe that the charge is true, the [EEOC] shall

endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the [EEOC], its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than \$1,000 or imprisoned for not more than one year, or both. . . .

42 U.S.C. § 2000e-5(b) (emphasis added.) If the EEOC had processed the discrimination charges at issue, that agency would be prohibited from releasing information about the discrimination charges that were made. You do not inform us however, nor do the documents reflect, that the EEOC processed this complaint or is in any way involved.

Instead, you indicate that the complaint at issue is being investigated by the RTA's EEO Officer. You assert that "[u]nder Title VII, investigations by local authorities are given similar weight and responsibilities as for EEOC investigations." You have not established, however, that the RTA's EEO Officer meets the statutory definition of a local commission or local authority. See Labor Code § 21.152 (authorizing "[a] political subdivision or two or more political subdivisions" to create local commission to act as fair employment practices agency). Furthermore, although you refer us to section 2000e-5(c) of Title 42 of the United States Code, we note that this provision only concerns the effect that the existence of a state or local law or state or local investigating authority has on the deadlines under the federal system; it does not state that information gathered by such a state or local authority is confidential. See 42 U.S.C. § 2000e-5(c); see also 29 C.F.R. § 1601.13(a)(3)(i) (explaining that "the policy of section 706(c) of Title VII [42 U.S.C. § 2000e-5(c)], [is to] afford[] State and local fair employment practice agencies that come within the provisions of [this] section an opportunity to remedy alleged discrimination concurrently regulated by Title VII or the ADA and State or local law"). Therefore, having considered your arguments, the statutes at issue, and the submitted information, we conclude that you have failed to establish that the submitted information is confidential under section 2000e-5(b) of Title 42 of the United States Code, and it may not be withheld on this basis.

We turn now to your arguments regarding section 552.103 of the Government Code. This section provides in part:

(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.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To meet this burden, a governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information *and* (2) that the information at issue is related to that litigation. *See 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 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See University of Tex. Law Sch.*, 958 S.W.2d at 481.

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986) (construing predecessor statute). 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.” *Id.* Among other examples, this office has concluded that litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission (“EEOC”), *see* Open Records Decision No. 336 (1982); (2) 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 (3) threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

You state that “[n]o litigation currently has been filed.” Thus, you admit that no litigation regarding this incident was pending on the date the RTA received this request for information. *See* Gov't Code § 552.103(c). You go on to claim that “litigation could be reasonably anticipated in any claim involving sexual harassment. To our knowledge at this time, no other complaints have been filed concerning this particular alleged incident. Nevertheless, the risk of further action in this regard is within the realm of reason.” Based on these representations, we find that you have failed to provide “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *See* ORD 452 at 4.

We also understand you to argue that release of the information at issue could interfere with the RTA's litigation interests in general. You claim that “[a]lthough the information in this particular case is very limited in scope, the precedent it would establish in other matters could be very far-reaching.” However, section 552.103 does not protect information the release of which would set an unfavorable precedent or harm general, speculative future

litigation interests. This exception is designed to protect “information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party . . . only if the litigation is pending or reasonably anticipated on the date” that the request is received. Because you have failed to explain how release of this information would interfere with any particular litigation that was pending or reasonably anticipated on the date that the RTA received this request, we conclude that you have failed to establish that section 552.103 protects the submitted information, and it may not be withheld on that basis.

You also contend that the submitted information must be withheld under section 552.102 of the Government Code. This section excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Gov’t Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref’d n.r.e.), the court ruled that the test to be applied for information claimed to be protected under the statutory predecessor to section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976) for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101. The test formulated in *Industrial Foundation* dictates that information is protected by common law privacy if it is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person and (2) 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 into allegations of sexual harassment. The investigation files in *Ellen* contained individual witness statements, an affidavit by the accused individual responding to the allegations, and the 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.*

When there is an adequate summary of the investigation, the summary must be released, but the identities of the victims and witnesses must be redacted and their detailed statements must be withheld from disclosure. However, we find that when no adequate summary exists, detailed statements regarding the allegations must be released, but the identities of witnesses and victims must still be redacted from the statements. Because there is not an adequate summary in this instance, the submitted document must be released. However, before releasing this document, in accordance with the holding in *Ellen*, the RTA must redact the information that we have indicated tends to identify a witness. Ordinarily, information that identifies the victim of the alleged sexual harassment would also be withheld on the basis of

section 552.101 and the common law privacy interests discussed in *Ellen*; however, you indicate that the requestor in this instance is seeking the information on behalf of the alleged victim. As the agent of the complainant, the requestor has a special right of access to the information that identifies the complainant. *See* Gov't Code § 552.023(b) (governmental body may not deny access to person to whom information relates or person's agent on grounds that information is considered confidential by privacy principles). We have marked information that identifies a witness to the alleged sexual harassment and that must be withheld pursuant to section 552.101 and the common law right of privacy. We have reviewed the remaining information and conclude that none of it is protected by privacy, and it may not be withheld on that basis. *See* Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute his private affairs), 455 (1987) (public employee's job performances or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (1984) (scope of public employee privacy is narrow).

In summary, the RTA must withhold the witness-identifying information that we have marked. The remainder of the document 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).

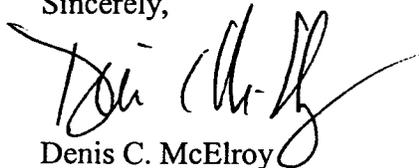
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following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



Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/lmt

Ref: ID# 190798

Enc. Submitted documents

c: Ms. Guadalupe J. Salazar
C.C.R.T.A.
2304 Saratoga Blvd. #4
Corpus Christi, Texas 78417
(w/o enclosures)