



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

January 23, 2004

Mr. Stephen L. Crain  
Atlas & Hall, L.L.P.  
P. O. Box 3725  
McAllen, Texas 78502-3725

OR2004-0518

Dear Mr. Crain:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 194857.

The McAllen Independent School District (the "district"), which you represent, received a request for information relating to complaints or grievances filed against the district by three named individuals. You state that some information has been released to the requestor and inform us that the district is withholding some responsive information pursuant to a previous ruling issued by this office. *See* Open Records Letter No. 2003-6325 (2003); *see also* Open Records Decision No. 673 at 6-7 (2001) (criteria of previous determination regarding specific information previously ruled on). You claim that other requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.117, and 552.135 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that this office recently issued a ruling that involved some of the same information that is at issue here. In Open Records Letter No. 2004-0311 (2004), we considered a request that the district received for a copy of the tape recording of a grievance hearing or the transcribed report of the hearing. Because the facts and circumstances surrounding that ruling do not appear to have changed, to the extent that the present request seeks information on which we have previously ruled, you must comply with our prior ruling. *See* Open Records Decision No. 673 at 6-7 (2001) (criteria of previous determination regarding specific information previously ruled on).

We next address the applicability of section 552.022 of the Government Code to the submitted information. This section provides that "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body" constitutes "public information . . . not excepted from required disclosure . . . unless . . . expressly confidential under other law" or excepted from disclosure under section 552.108 of the Government Code. Gov't Code § 552.022(a)(1). The submitted information includes a completed evaluation as well as

information pertaining to a completed sexual harassment investigation made of, for, or by the district.<sup>1</sup> Such information is subject to section 552.022 and may not be withheld unless it is excepted from disclosure under section 552.108 or is confidential under other law. You do not claim that this information is excepted from disclosure under section 552.108. You assert instead that it may be withheld pursuant to section 552.103 of the Government Code. This section is a discretionary exception to disclosure that protects the governmental body's interests and is therefore not other law that makes information expressly confidential for purposes of section 552.022(a). See *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103). Therefore, the information that is subject to section 552.022 may not be withheld under section 552.103 of the Government Code. We will, however, consider your claims regarding sections 552.101, 552.102, 552.117, and 552.135, which do constitute other law for purposes of section 552.022.

Section 552.102 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 to information claimed to be protected under 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. We will therefore consider your claims regarding section 552.101 and section 552.102 together.

In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if it (1) contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person and (2) is not of legitimate concern to the public. *Id.* at 685. The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683.

You inform us that some of the submitted information pertains to the same sexual harassment investigation that was at issue in Open Records Letter No. 2003-6325 (2003) but state that this information was not responsive to the request in that ruling. 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

---

<sup>1</sup>You inform us that some of the submitted information pertains to a sexual harassment investigation and was previously ruled on in Open Records Letter No. 2003-3253 (2003). However, because other information is at issue here and the circumstances surrounding that previous ruling have changed, that ruling may not be relied on as a previous determination in this instance. See Open Records Decision No. 673 at 6-7 (2001) (criteria of previous determination regarding specific information previously ruled on).

statements, an affidavit by the accused individual responding to the allegations, and the conclusions of the board of inquiry that conducted the investigation. *Id.* 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.* Based on *Ellen*, a governmental body must withhold information that would tend to identify a witness or victims.

In Open Records Letter No. 2003-6325 (2003), we concluded that there was an adequate summary of this sexual harassment investigation. In accordance with the holding in *Ellen*, we ordered the district to release the summary and the statement of the accused but required the district to redact information that tended to identify the complainants. Pursuant to section 552.101 of the Government Code and the common law privacy concerns expressed in *Ellen*, we ordered the district to withhold all other information pertaining to the investigation, including individual complainant and witness statements as well as other supporting documentary evidence. Because the additional documents relate to this same investigation, we again find that the district must release the redacted summary and statement of the accused, which you inform us you have done, and withhold these additional documents pursuant to section 552.101 and common law privacy.<sup>2</sup> As for the evaluation, we find that it is not protected under common law privacy, and it may not be withheld on that basis. *See* Open Records Decision Nos. 444 at 5-6 (1986) (public has interest in public employee's qualifications and performance and circumstances of his resignation or termination), 405 at 2-3 (1983) (public has interest in manner in which public employee performs his job); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow).

We note, however, that the evaluation includes the social security number of the employee at issue. Section 552.117(a)(1) of the Government Code excepts from public disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of governmental body who timely request that such 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, pursuant to section 552.117(a)(1), the district must withhold the social security number contained in the evaluation if the employee at issued elected, prior to the district's receipt of this request, to keep such information confidential.

Regardless of whether the employee timely complied with section 552.024, the social security number may be excepted from disclosure under section 552.101 in conjunction with federal law. Amendments to the Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), make confidential social security numbers and related records that are obtained or maintained by

---

<sup>2</sup>Because of our ruling on this issue, we need not address your other arguments about this information.

a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994). We have no basis for concluding that the social security numbers at issue are confidential under section 405(c)(2)(C)(viii)(I) and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, the district should ensure that such information is not obtained or maintained pursuant to any provision of law enacted on or after October 1, 1990. The remaining information in the marked evaluation must be released in accordance with section 552.022.

We turn now to the remaining submitted information, which is not subject to section 552.022. Because you claim regarding section 552.103 is the broadest, we address it first. This exception 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 and documents sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To meet this burden, the 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 [1<sup>st</sup> 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. *Id.*

The mere chance of litigation will not trigger section 552.103(a). Open Records Decision No. 452 at 4 (1986). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *Id.*

You have submitted information to this office showing that a district employee filed a complaint with the Equal Employment Opportunity Commission ("EEOC") alleging discrimination and that the EEOC has dismissed the complaint and issued the employee a notice of right to sue. You inform us that "the time for the [employee] to file a suit has not yet lapsed." Based on the information you have provided, we conclude that you have shown that litigation was reasonably anticipated when the district received this request. *See, e.g.*, Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982) (pending EEOC complaint indicates litigation is reasonably anticipated). In addition, our review of the remaining information shows that it is related to the anticipated litigation for purposes of section 552.103(a). Thus, you have demonstrated the applicability of section 552.103.

We note, however, that once information has been obtained by all parties to the litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note that the applicability of section 552.103(a) ends when the litigation is concluded. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982). As our ruling on this issue is dispositive, we need not address your remaining arguments.

In summary, to the extent that the present request seeks information that we considered in Open Records Letter No. 2004-0311 (2004), you must comply with our prior ruling. The information that pertains to the sexual harassment investigation that was at issue in Open Records Letter No. 2003-6325 (2003) must be withheld pursuant to section 552.101 and common law privacy. The personnel evaluation we have marked must be released; however, the social security number it contains may be excepted from disclosure under section 552.117 or confidential under federal law. The remaining submitted information may be withheld under section 552.103 to the extent it has not been seen by all opposing parties in the anticipated litigation.

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).

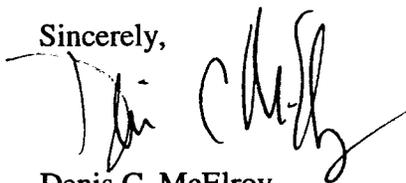
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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# 194857

Enc. Submitted documents

c: Ms. Martha P. Owen  
Wiseman, Durst, Owen & Colvin  
1004 West Avenue  
Austin, Texas 78701-2019  
(w/o enclosures)