



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 7, 2004

Mr. Carey Smith  
Deputy Commissioner for Legal Services  
Texas Department of Human Services  
P.O. Box 149030  
Austin, Texas 78714-9030

OR2004-2831

Dear Mr. Smith:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 198225.

The Texas Department of Human Services (the "department") received a request for (1) the entire file of the second Office of Inspector General ("OIG") investigation of the civil rights office in region 8; (2) all civil rights complaints filed with the region 8 civil rights office during calendar years 2002 and 2003 and information relating to the complaints; and (3) correspondence from either of two named individuals concerning OIG investigations of the region 8 civil rights office and a recommendation to dismiss the requestor. You inform us that the department has released some of the requested information. You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.103, 552.108, and 552.117 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted.<sup>1</sup>

We first note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides that

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<sup>1</sup>This letter ruling assumes that the submitted representative samples of information are truly representative of the responsive information as a whole. This ruling neither reaches nor authorizes the department to withhold any information that is substantially different from the submitted information. See Gov't Code § 552.301(e)(1)(D); Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

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[.]

Gov't Code § 552.022(a)(1). You inform us that the submitted documents include information that is part of a completed investigation made of, for, or by the department. The department must release that information unless it is excepted from disclosure under section 552.108 of the Government Code or expressly confidential under other law. Section 552.103 of the Government Code is a discretionary exception to disclosure that protects the governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); Open Records Decision No. 542 at 4 (1990) (statutory predecessor to Gov't Code § 552.103 could be waived). As such, this exception is not other law that makes information confidential for the purposes of section 552.022. Therefore, the department may not withhold information that relates to the completed investigation under section 552.103.

The department also seeks to withhold all of the submitted information under section 552.108. We first note that the department did not assert this claim within the ten-business-day period prescribed by section 552.301(b) of the Government Code. *See Gov't Code § 552.301(b)* (governmental body must request attorney general decision and state exceptions that apply not later than tenth business day after date of receipt of written request for information). Section 552.108 also is a discretionary exception that a governmental body may waive. *See id.* § 552.007; Open Records Decision No. 177 (1977) (statutory predecessor to Gov't Code § 552.108 was subject to waiver). Section 552.108 is ordinarily waived when it is not claimed within the time prescribed by section 552.301(b), and the information at issue is presumed to be public and subject to required public disclosure unless there is a compelling reason to withhold the information. *See Gov't Code § 552.302*; Open Records Decision No. 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions). The need of another governmental body to withhold information under section 552.108 can provide a compelling reason for non-disclosure sufficient to overcome the presumption that information is public under section 552.302. *See Open Records Decision No. 586* (1991).

In this instance, the department has stated that the matter to which the submitted information relates was referred to a criminal prosecutor for review. The department has since informed this office, however, that the prosecutor has declined to take any action and has not requested that the department withhold any of the submitted information. We therefore conclude that the department may not withhold any of the submitted information under section 552.108.

The department also believes that the information encompassed by section 552.022 may be confidential under section 552.101 of the Government Code in conjunction with section 531.1021 of the Government Code. Section 552.101 excepts from required public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses information that another statute makes confidential. Section 531.1021 of the Government Code provides in relevant part as follows:

(g) All information and materials subpoenaed or compiled by the office [of inspector general] in connection with an investigation are confidential and not subject to disclosure under Chapter 552, and not subject to disclosure, discovery, subpoena, or other means of legal compulsion for their release to anyone other than the office [of inspector general] or its employees or agents involved in the investigation conducted by the office, except that this information may be disclosed to the office of the attorney general and law enforcement agencies.

Gov’t Code § 531.1021(g). Section 531.1021 is applicable to the Office of Inspector General of the Texas Health and Human Services Commission (the “commission”) and was enacted by the Seventy-eighth Legislature as part of House Bill 2292.<sup>2</sup> The department informs us that the submitted information that is subject to section 552.022 was compiled during an investigation conducted by its OIG. The department also informs us that under other provisions of House Bill 2292, the functions of the OIG have been consolidated into the commission, so that the OIG staff now answers to the commission’s Inspector General. Based on the transfer of the OIG to the commission, the department argues that the investigative information that is subject to section 552.022 may be confidential under section 531.1021.

We begin our analysis of this issue by noting that the primary goal in statutory interpretation is to ascertain and effectuate legislative intent. *See In re Canales*, 52 S.W.3d 698, 702 (Tex. 2001). In discerning the legislature’s intent, we begin with a statute’s plain language, because we assume that the legislature tries to say what it means and, thus, that the words it chooses are the surest guide to legislative intent. *See Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 865-66 (Tex. 1999). “In applying the plain and common meaning of a statute, [one] may not by implication enlarge the meaning of any word in the statute beyond its ordinary meaning, especially when [one] can discern the legislative intent from a reasonable interpretation of the statute as it is written.” *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 324 (Tex. App.-Austin 2002, no pet.) (citing *Sorokolit v. Rhodes*, 889 S.W.2d 239, 241 (Tex.1994)). In *Fleming Foods of Texas, Inc. v. Rylander*, 6 S.W.3d 278 (Tex. 1999), the Texas Supreme Court addressed an apparently inadvertent omission of significant language from a nonsubstantive codification of the Tax Code. The court

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<sup>2</sup>Added by Act of April 24, 2003, 78<sup>th</sup> Leg., R.S., ch. 198, § 2.20, eff. Sept. 1, 2003, 2003 Tex. Sess. Law Serv. 4, 652 (Vernon) (to be codified at Gov’t Code § 531.1021).

determined that the plain language of the codification must be effectuated, despite the legislature's stated intent that no substantive change in the law was intended by the codification. *See Fleming Foods*, 6 S.W.3d at 286-87; *see also* Gov't Code § 311.011 ("Words and phrases shall be read in context and construed according to the rules of grammar and common usage."); *RepublicBank Dallas, N.A. v. Interkal, Inc.*, 691 S.W.2d 605, 607-08 (Tex. 1985) (directing that statute be construed according to its plain language); *Smith v. Nelson*, 53 S.W.3d 792, 796 (Tex. App.—Austin 2001, pet. denied) (court must interpret legislative intent as expressed in plain language of statute). Accordingly, the plain language of section 531.1021 must be effectuated.

In light of these principles of statutory construction, we next consider whether section 531.1021 is applicable to the submitted information that is encompassed by section 552.022. Effective September 1, 2003, the legislature created the commission's Office of Inspector General to consolidate compliance and enforcement activities currently taking place across state health and human service agencies. Section 531.1021(g) clearly states that all materials subpoenaed or compiled by the commission's Office of Inspector General in connection with an investigation are confidential. The department informs us that its OIG concluded the investigation to which the section 552.022 information pertains and produced a final report on November 17, 2003. The department also states that the functions of its OIG staff were consolidated into the commission as of January 1, 2004 and that the budget and funds of the department's OIG were scheduled for transfer to the commission effective February 1, 2004. Thus, the information at issue here relates to a investigation that was completed more than a month before the department's OIG became part of the commission. Under these circumstances, any information and materials that were subpoenaed or compiled by the department's OIG in connection with its investigation would not have been "subpoenaed or compiled" by the commission's Office of Inspector General. We therefore conclude that section 531.1021 of the Government Code is not applicable to the submitted information that is subject to section 552.022, and thus the department may not withhold any of that information under section 552.101 of the Government Code in conjunction with section 531.1021.

You also raise section 552.101 in conjunction with the common-law right to privacy. Information must be withheld from the public under section 552.101 in conjunction with common-law privacy when the information is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, *and* (2) of no legitimate public interest. *See Indus. Found. v. Tex. 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 applied the common-law right to privacy addressed in *Industrial Foundation* to an investigation of alleged sexual harassment. The investigation files at issue in *Ellen* contained third-party witness statements, an affidavit in which the individual accused of the misconduct responded to the allegations, and the conclusions of the board of inquiry that conducted the investigation. *See* 840 S.W.2d 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 disclosure of such documents sufficiently

served the public's interest in the matter. *Id.* The court further held, however, that "the public does 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.*

Thus, if there is an adequate summary of an investigation of alleged sexual harassment, the investigation summary must be released under *Ellen*, but the identities of the victims and witnesses of the alleged sexual harassment must be redacted, and their detailed statements must be withheld from disclosure. *See also* Open Records Decision Nos. 393 (1983), 339 (1982). If no adequate summary of the investigation exists, then all of the information relating to the investigation ordinarily must be released, with the exception of information that would tend to identify the victims and witnesses. In either case, the identity of the individual accused of sexual harassment is not protected from public disclosure. Common-law privacy does not protect information about a public employee's alleged misconduct on the job or complaints made about a public employee's job performance. *See* Open Records Decision Nos. 438 (1986), 405 (1983), 230 (1979), 219 (1978).

The department states that the information that is subject to section 552.022 relates to a concluded investigation of alleged sexual harassment and other charges. We conclude that *Morales v. Ellen* is applicable to the investigative information. We also find that this information includes an adequate summary of the investigation, as well as statements made to the OIG by the person who was the subject of the investigation. The department must release the investigation summary and the statements, except for those portions of the summary and statements that identify the victims of and witnesses to the alleged sexual harassment. We have marked that information. The department must withhold the marked information, along with the rest of the submitted documents that relate to the investigation, under section 552.101 in conjunction with common-law privacy under *Morales v. Ellen*.

We next note that the investigation summary also contains other private information that the department must withhold under section 552.101. Common-law privacy also protects the specific types of information that the Texas Supreme Court held to be intimate or embarrassing in *Industrial Foundation*. *See* 540 S.W.2d at 683 (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). This office has since concluded that other types of information also are private under section 552.101. *See* Open Records Decision Nos. 659 at 4-5 (1999) (summarizing information attorney general has determined to be private), 470 at 4 (1987) (illness from severe emotional job-related stress), 455 at 9 (1987) (prescription drugs, illnesses, operations, and physical handicaps), 343 at 1-2 (1982) (references in emergency medical records to a drug overdose, acute alcohol intoxication, obstetrical/gynecological illness, convulsions/seizures, or emotional/mental distress). We have marked the other information in the investigation summary that the department must withhold under section 552.101 in conjunction with common-law privacy.

The department also asserts that information relating to the investigation is confidential under section 552.101 in conjunction with sections 12.003 and 21.012 of the Human Resources Code. Section 12.003 provides in part:

(a) Except for purposes directly connected with the administration of the department's assistance programs, it is an offense for a person to solicit, disclose, receive, or make use of, or to authorize, knowingly permit, participate in, or acquiesce in the use of the names of, *or any information concerning*, persons applying for or receiving assistance if the information is directly or indirectly derived from the records, papers, files, or communications of the department or acquired by employees of the department in the performance of their official duties.

Hum. Res. Code § 12.003(a) (emphasis added). In Open Records Decision No. 584 (1991), this office concluded that "[t]he inclusion of the words 'or any information' juxtaposed with the prohibition on disclosure of the names of the department's clients clearly expresses a legislative intent to encompass the broadest range of individual client information, and not merely the clients' names and addresses." See Open Records Decision No. 584 at 3. Consequently, it is the specific information pertaining to individual clients, and not merely the clients' identities, that is made confidential under section 12.003. See also 42 U.S.C. § 1396a(a)(7) (state plan for medical assistance must provide safeguards that restrict use or disclosure of information concerning applicants and recipients to purposes directly connected with administration of plan); 42 C.F.R. § 431.300 *et seq.*; Hum. Res. Code § 21.012(a) (requiring provision of safeguards that restrict use or disclosure of information concerning applicants for or recipients of assistance programs to purposes directly connected with administration of programs); Open Records Decision No. 166 (1977).

The department indicates that the investigative documents contain client information that is confidential under sections 12.003 and 21.012. The department also states that the disclosure of client information in this instance would not be a release of such information for purposes directly connected with the administration of the department's assistance programs, so that the department is thus prohibited by law from releasing the information in question. Based on the department's representations, we have marked client information in the investigation summary that the department must withhold under section 552.101 in conjunction with sections 12.003 and 21.012 of the Human Resources Code.

The investigation summary also contains information that may be excepted from disclosure under section 552.117. Section 552.117(a)(1) excepts from public disclosure the home address and telephone number, social security number, and family member information of a current or former employee of a governmental body who requests that this information be kept confidential under section 552.024. The determination of whether a particular item of information is protected by section 552.117(a)(1) must be made at the time of the governmental body's receipt of the request for the information. See Open Records Decision No. 530 at 5 (1989). Therefore, information may only be withheld under section

552.117(a)(1) on behalf of a current or former employee of the department who requested confidentiality under section 552.024 prior to the date of the department's receipt of the request for the information in question. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee who did not make a timely election under section 552.024 to keep the current or former employee's section 552.117 information confidential. We have marked the information in the investigation summary that the department may be required to withhold under section 552.117(a)(1).<sup>3</sup>

Next, we address the department's claim under section 552.103 with regard to the submitted information that is not subject to section 552.022. Section 552.103 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.

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(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). The 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 Univ. of Tex. Law Sch. v. Tex. 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.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See also* Open Records Decision No. 551 at 4 (1990).

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<sup>3</sup>We note that the investigative documents also contain other information that the department might be required to withhold from the public under section 552.117(a)(1). In this instance, however, the requestor has a special right of access to that information, and therefore it may not be withheld from him under section 552.117. *See* Gov't Code § 552.023(a); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself). Should the department receive another request for this same information from a person who would not have a right of access to it, the department should resubmit this same information and request another decision. *See* Gov't Code §§ 552.301, .302; Open Records Decision No. 673 (2001).

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). 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 instances, this office has concluded that litigation is reasonably anticipated where the prospective opposing party has filed a complaint with the Equal Employment Opportunity Commission (“EEOC”). *See* Open Records Decision No. 336 (1982). In this instance, the department states that the requestor filed a notice of charge of discrimination with the Texas Commission on Human Rights (the “TCHR”) on July 22, 2003 and with the EEOC on August 7, 2003.<sup>4</sup> The department further informs us that the requestor’s TCHR and EEOC charges were pending on the date of the department’s receipt of this request for information. The department also states that the information that is not encompassed by section 552.022 relates to charges filed with the EEOC and the TCHR by current or former employees and clients of the department. The department contends that this information relates to the basis of the requestor’s charge of discrimination. Based on these representations, we find that the department reasonably anticipated litigation on the date of its receipt of this request for information. We also find that the information that is not encompassed by section 552.022 relates to the anticipated litigation. We therefore conclude that the department may withhold that information at this time under section 552.103.

In reaching this conclusion, we assume that the requestor has not seen or had access to any of the submitted information that is not encompassed by section 552.022. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information that relates to the litigation to obtain such information through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). If the opposing party has seen or had access to information relating to anticipated litigation, through discovery or otherwise, then there is no interest in withholding that information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). We also note that the applicability of section 552.103 ends once the related litigation concludes or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary: (1) the department must withhold the investigative information that is confidential under section 552.101 in conjunction with common-law privacy under *Morales v. Ellen*, including (a) the victim and witness information in the investigation summary and the statements made by the subject of the investigation and (b) the rest of the information that relates to the investigation; (2) the department also must withhold the information in the investigation summary that is private under section 552.101 in conjunction with *Industrial Foundation*; (3) the department must withhold the client information in the investigation summary under section 552.101 in conjunction with sections 12.003 and 21.012 of the Human Resources Code; (4) the department may be required to withhold other information

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<sup>4</sup>The TCHR operates as a federal deferral agency under section 706(c) of title VII, 42 U.S.C. § 2000e-5. The EEOC defers jurisdiction to the TCHR over complaints alleging employment discrimination.

in the investigation summary under section 552.117(a)(1); and (5) the department may withhold the information that is not subject to section 552.022 under section 552.103. The department must release the rest of the submitted information that is responsive to this request. As we are able to make these determinations, we need not address your other arguments against disclosure.

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).

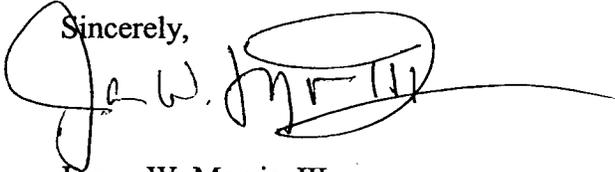
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following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

A handwritten signature in black ink, appearing to read "J.W. Morris III", with a long horizontal flourish extending to the right.

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

JWM/sdk

Ref: ID# 198225

Enc: Submitted documents

c: Mr. J. Richard Avena  
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(w/o enclosures)