



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 5, 2010

Ms. Laurie Barker
Litigation Director and General Counsel
Office of Public Utility Counsel
P.O. Box 12397
Austin, Texas 78711-2397

OR2010-03261

Dear Ms. Barker:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 371943.

The Office of Public Utility Counsel (the "OPC") received a request for 1) the personnel files of three named employees; 2) all documents pertaining to the OPC's policies on fraternization of OPC employees; and (3) all documents pertaining to complaints against a named employee by former or current OPC employees.¹ We understand the OPC to have released some of the requested information to the requestor. You claim portions of the submitted information are excepted from disclosure under sections 552.101, 552.103, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, you state portions of the submitted information were the subject of a previous request for information, in response to which this office issued Open Records Letter No.

¹We note the OPC asked for and received clarification regarding this request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); *see also* Open Records Decision No. 663 (1999) (discussing tolling of deadlines during period in which governmental body is awaiting clarification).

2009-11386 (2009). In that ruling, we concluded the OPC must release the investigation summary, redacting only the information that identifies a witness under section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied). We note the requestor in the previous request was the attorney representing the alleged victim; therefore, she had a special right of access to her client's information. However, we note the present request involves a different requestor with no special right of access to any of the information. Thus, we find that the circumstances have changed, and the OPC may not continue to rely on Open Records Letter No. 2009-11386 as a previous determination in this instance. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). Accordingly, we will address your arguments against the disclosure of the submitted information.

Next, we note the requestor excludes from his request social security numbers, personal e-mail addresses, home addresses, home telephone numbers, driver's license numbers, information that reveals whether or not an individual has family members, and certain personal financial information. Thus, such information is not responsive to the present request for information. The OPC need not release non-responsive information in response to this request, and this ruling will not address that information. Accordingly, we do not address your argument under section 552.137 of the Government Code.

Next, we note portions of the information at issue are subject to section 552.022(a)(1) of the Government Code, which provides:

the following categories of information are public information and not excepted from required disclosure under [the Act] 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). The submitted investigation summary and investigative file, which we have marked, are part of a completed investigation. This information must be released under section 552.022(a)(1), unless the information is excepted from disclosure under section 552.108 or expressly confidential under other law. Section 552.103 of the Government Code is a discretionary exception to public disclosure that protects a governmental body's interests and may be waived. *See id.* § 552.007; *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 section 552.103); Open Records Decision No. 665 at 2 n.5

(2000) (discretionary exceptions generally). As such, section 552.103 is not "other law" that makes information confidential for the purposes of section 552.022. Therefore, the OPC may not withhold the information at issue, which we have marked, under section 552.103. You claim, however, the information is excepted under section 552.101 of the Government Code. Because section 552.101 of the Government Code is "other law" for purposes of section 552.022(a)(1), we will consider the applicability of this exception to the information at issue.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses the doctrine of common-law privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). In *Morales v. Ellen*, the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. 840 S.W.2d at 519. 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.*

Thus, if there is an adequate summary of an investigation of alleged sexual harassment, the investigation summary must be released under *Ellen*, along with the statement of the accused, 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 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 identify the victims and witnesses. Because 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, the identity of the individual accused of sexual harassment is not protected from public disclosure. *See Open Records Decision Nos. 438 (1986), 405 (1983), 230 (1979), 219 (1978)*.

The submitted information contains an adequate summary of a sexual harassment investigation. The summary is not confidential under section 552.101 in conjunction with common-law privacy. However, information within the summary that identifies the alleged victims and witnesses is confidential under common-law privacy and must generally be withheld pursuant to section 552.101 of the Government Code. *See Ellen*, 840 S.W.2d

at 525. We note a portion of the information you have marked in the summary identifies a supervisor. For purposes of *Ellen*, supervisors are not witnesses, and thus, supervisors' identities generally may not be withheld under section 552.101 and common-law privacy. Therefore, pursuant to section 552.101 in conjunction with common-law privacy and the ruling in *Ellen*, the adequate summary must be released, but the identifying information of the alleged victim and witnesses, which we have marked, must be withheld along with the remainder of the information in the investigative file.² You inform us that the documents in Attachment D are not part of the OPC's investigative file regarding the sexual harassment. Further, the remaining documents you seek to withhold in Attachment B pertain to a retaliation claim rather than a claim of sexual harassment. Consequently, the OPC may not withhold the remaining documents in Attachment B or the documents in Attachment D under common-law privacy on the basis of *Ellen*. We will, however, address your remaining argument against disclosure of this information.

Section 552.103 of the Government Code provides in part as follows:

(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 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 on the date the governmental body received the request, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. 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). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See id.*

²As our ruling is dispositive for this information, we need not address your remaining argument against its disclosure.

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). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See id.* 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. *See* Open Records Decision No. 555 (1990); *see also* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). This office has found that a pending complaint filed with the Equal Employment Opportunity Commission (the "EEOC") indicates that litigation is reasonably anticipated. *See, e.g.,* Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982). We also note that the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983).

You inform us, in this instance, the complainant hired an attorney to represent her regarding the complaint at issue. You also state the complainant filed a grievance with the OPC and verbally indicated that she had also filed a complaint with the EEOC. Further, you state the complainant's attorney threatened the OPC with litigation when she made a prior request for information. After reviewing your arguments and the information at issue, we agree that based on the totality of the circumstances, the OPC reasonably anticipated litigation on the date it received the instant request. Further, based on our review of the information at issue, we conclude the remaining documents you have marked are related to the anticipated litigation for purposes of section 552.103(a). Accordingly, we agree section 552.103 is generally applicable to this information.

We note the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information that is related to litigation through discovery procedures. *See* ORD 551 at 4-5. If the opposing party has seen or had access to information that is related to the anticipated litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, the information the opposing party in the anticipated litigation has seen or had access to is not excepted from disclosure under section 552.103(a) and must be disclosed. In this instance, the opposing party to the anticipated litigation has already seen or had access to some of the information in Attachment D. Therefore, this information, which we have marked, may not be withheld under section 552.103. However, the remaining information at issue, which we have marked, may be withheld under section 552.103 of the Government Code. Further, the applicability of section 552.103(a) ends once the litigation has concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

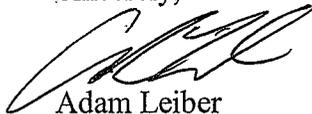
In summary, the summary of the sexual harassment investigative file must be released, but the identifying information of the alleged victim and witnesses, which we have marked,

must be withheld along with the remainder of the information in the sexual harassment investigative file pursuant to section 552.101 of the Government Code in conjunction with common-law privacy and the ruling in *Ellen*. With the exception of the information that the opposing party in the anticipated litigation has seen or had access to, the OPC may withhold the remaining information it has marked under section 552.103 of the Government Code.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Adam Leiber
Assistant Attorney General
Open Records Division

ACL/rl

Ref: ID# 371943

Enc. Submitted documents

c: Requestor
(w/o enclosure)