



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 30, 2010

Mr. David Daugherty
Assistant County Attorney
Harris County
1019 Congress, 15th Floor
Houston, Texas 77002

OR2010-04473

Dear Mr. Daugherty:

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# 374220 (C. A. File No. 10GEN0045).

The Harris County Constable Precinct 1 (the "constable") received a request for information related to the termination of a named employee and information related to a named polygrapher. You claim that the requested information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Some of the submitted documents, which we have marked, are not responsive to the instant request for information because they were created after the date the request was received. This ruling does not address the public availability of any information that is not responsive to the request and the constable is not required to release that information in response to this request.

Next, we note some of the submitted information is subject to section 552.022 of the Government Code, which provides in pertinent part:

- (a) Without limiting the amount or kind of information that is public information under this chapter, 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). The submitted information contains a completed investigation and completed reports made of, for, or by the constable. Pursuant to section 552.022(a)(1) of the Government Code, these records are expressly public unless they are either excepted under 552.108 of the Government Code or expressly confidential under other law. The constable does not claim section 552.108. Section 552.103 of the Government Code is a discretionary exception that protects a governmental body's interest 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 section 552.103); Open Records Decision No. 552 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, 552.103 is not other law that makes information confidential for the purposes of section 552.022(a)(1). Consequently, the completed investigation and completed reports may not be withheld under section 552.103 of the Government Code. However, because section 552.101 is a confidentiality provision for purposes of section 552.022(a)(1), we will consider the applicability of this exception to the completed investigation and completed reports. Additionally, we will consider both of the claimed exceptions for the information not subject to section 552.022.

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. Section 552.101 encompasses information that other statutes make confidential. Section 1703.306 of the Occupations Code provides in part:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

- (1) the examinee or any other person specifically designated in writing by the examinee[.]

Occ. Code § 1703.306. We have marked the information acquired from a polygraph examination that is confidential under section 552.101 in conjunction with section 1703.306. We note that the constable has the discretion to release the marked information pertaining to the requestor's client pursuant to section 1703.306(a)(1). *See* Open Records Decision

No. 481 at 9 (1987) (statutory predecessor to Occ. Code § 1703.306 permitted, but did not require, examination results to be disclosed to polygraph examinees). Otherwise, the constable must withhold the information we have marked under section 552.101 in conjunction with section 1703.306 of the Occupations Code.

Next, we note that the remaining information subject to section 552.022 pertains to a sexual harassment investigation. Section 552.101 also 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 remaining information is related to an investigation of alleged sexual harassment. Moreover, the information at issue contains an adequate summary of the 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 victim 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. 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 and statements of the accused persons 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 subject to section 552.022.¹

Finally, we address your claims for the information not subject to section 552.022. You assert that this information is excepted from disclosure under section 552.103 of the Government Code, which 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). The city 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). The constable must meet both prongs of this test for information to be excepted under 552.103(a).

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

¹As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

(1990); *see also* Open Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”).²

You inform us, and provide documentation showing, that in this instance, the requestor is an attorney who represents the named former employee. You further state that the requestor is asserting claims against the constable in the present request, and that the requestor’s client has previously threatened litigation. After reviewing your arguments and the submitted information, we agree that based on the totality of the circumstances, the constable reasonably anticipated litigation on the date it received the instant request. Further, based on our review of the information at issue, we conclude the submitted documents not subject to section 552.022 are related to the anticipated litigation for purposes of section 552.103(a). Accordingly, we agree section 552.103 is generally applicable to the remaining information.

We note, however, that once an opposing party in pending litigation has seen or had access to information that is related to litigation, 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, some of the information at issue consists of communications with the opposing party. Therefore, as the opposing party has already seen or had access to this information, it may not be withheld under section 552.103 of the Government Code. However, the opposing party is a former deputy constable and only had access to some of the information at issue in the usual scope of his employment. Such information is not considered to have been obtained by the opposing party to anticipated litigation and thus may be withheld under section 552.103. Therefore, with the exception of information the opposing party has seen or had access to, the constable may withhold the information we have marked under section 552.103.

In summary, the marked polygraph information is confidential under section 552.101 in conjunction with section 1703.306 of the Occupations Code, but the constable has the discretion to release the polygraph information pertaining to the requestor’s client pursuant to section 1703.306(a)(1) of the Occupations Code. Pursuant to section 552.101 of the Government Code in conjunction with common-law privacy and the ruling in *Ellen*, the adequate summary of the sexual harassment investigation and statements of the accused 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 subject to

²In 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).

section 552.022 Government Code. With the exception of information the opposing party has seen or had access to, the constable may withhold the remaining information pursuant to 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,



Tamara Wilcox
Assistant Attorney General
Open Records Division

TW/dls

Ref: ID# 374220

Enc. Submitted documents

c: Requestor
(w/o enclosures)