



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 28, 2010

Ms. Cary Grace
Assistant City Attorney
City of Austin
P.O. Box 1088
Austin, Texas 78767-8828

OR2010-14762

Dear Mr. Grace:

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# 394789.

The City of Austin (the "city") received a request for forty-two categories of information relating to specified investigations.¹ You state that some of the requested information does not exist.² You state the city will release some of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code.³ We have considered the exceptions you claim and reviewed the submitted information.

Initially, you inform us a portion of the requested information was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2010-09248 (2010). In that ruling, we found the city may withhold a portion of the information at issue under section 552.107 of the Government Code and the remaining

¹You inform this office that the city is seeking clarification regarding a portion of the request. Accordingly, should the requestor respond to the request for clarification, the city must seek a ruling from this office before withholding any information responsive to the clarified request.

²We note that the Act does not require a governmental body to disclose information that did not exist when the request for information was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

³In its July 28th letter, the city withdrew its claim under section 552.111 of the Government Code.

information under section 552.111 of the Government Code. You assert that the law, facts, and circumstances on which the prior ruling was based have not changed. Therefore, with regard to information responsive to the current request that is identical to the information previously requested and ruled upon by this office, we conclude that the city may continue to rely on that ruling as a previous determination and withhold that information in accordance with Open Records Letter No. 2010-09248. *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). We will consider your arguments with respect to the remaining requested information that has not been ruled on previously by this office.

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 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). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82.

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 of allegations of sexual harassment in an employment context. 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. We note that since 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).

You contend, and we agree, most of the submitted information pertains to a sexual harassment investigation and is subject to the ruling in *Ellen*. Upon review, we find the investigation includes an adequate summary, as well as a statement by the person accused of sexual harassment. The summary and statement of the accused are not confidential under section 552.101 in conjunction with common-law privacy; however, information within the summary and accused's statement that identifies the victims and witnesses must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy. *See Ellen*, 840 S.W.2d at 525. Thus, this identifying information, which we have marked, is confidential under common-law privacy and must be withheld pursuant to section 552.101 of the Government Code. *See id.* Further, the city must withhold the additional records of this sexual harassment investigation, which we have marked, under section 552.101 in conjunction with common-law privacy and the court's holding in *Ellen*.

You claim that the remaining information, which consists of an Equal Employment Opportunity ("EEO") Summary created by the city, is excepted from disclosure under section 552.103 of the Government Code. 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 that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated 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 [1st 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* Open Records Decision No. 551 at 4 (1990).

You contend that the EEO Summary is related to anticipated litigation. 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.* This office has stated that a pending Equal Employment Opportunity Commission ("EEOC") complaint indicates that litigation is reasonably anticipated. *See* Open Records Decision Nos. 386 at 2 (1983), 336 at 1(1982).

You inform us, and have provided documentation showing, that prior to the date the city received the request, an employee filed a complaint against the city with the Texas Workforce Commission and the EEOC alleging gender, age, and racial discrimination. You state that the EEO Summary was created by the city in response to that complaint. Based on your representations and the submitted documentation, we find that the city reasonably anticipated litigation on the date of its receipt of this request for information. We also find that the EEO Summary is related to the anticipated litigation. We, therefore, conclude that the city may withhold this information under section 552.103.

We note that the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to that litigation to obtain it through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). Therefore, if the opposing party has seen or had access to information relating to anticipated litigation through discovery or otherwise, there is no interest in withholding such 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).

We note some of the information in the accused's statement may be subject to section 552.117 of the Government Code.⁴ Section 552.117(a)(1) excepts from 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 this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee who did not timely request under section 552.024 the information be kept confidential.

⁴The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

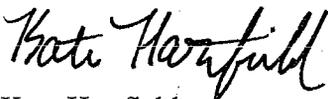
Therefore, to the extent the employees at issue timely requested confidentiality under section 552.024, the city must withhold the information we have marked under section 552.117(a)(1).

In summary, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy and the court's holding in *Ellen*. The city may withhold the information you have marked under section 552.103 of the Government Code. To the extent the employees at issue timely requested confidentiality under section 552.024, the city must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The remaining information must be released.

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,



Kate Hartfield
Assistant Attorney General
Open Records Division

KH/em

Ref: ID# 394789

Enc. Submitted documents

c: Requestor
(w/o enclosures)