



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 29, 2010

Mr. Hyattye O. Simmons
General Counsel
Dallas Area Rapid Transit
P.O. Box 660163
Dallas, Texas 75266-0163

OR2010-16414

Dear Mr. Simmons:

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# 398356 (DART ORR# 7634).

The Dallas Area Rapid Transit ("DART") received a request for sexual harassment, hostile work environment, and unethical practices cases pertaining to two named individuals and information pertaining to an incident involving the requestor. You state DART does not possess records relating to one of the named individuals.¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107,

¹We note that the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

and 552.111 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information.³

We first address your claim under section 552.103 of the Government Code for a portion of the submitted information. 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.

...

(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 a portion of the submitted information is related to anticipated litigation. Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See*

²Although you also raise Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5, we note the proper exceptions to raise when asserting the attorney-client privilege and the attorney work product privilege for information not subject to section 552.022 of the Government Code are sections 552.107 and 552.111, respectively. *See* Open Records Decision Nos. 676 at 1-2 (2002), 677 (2002).

³We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

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 EEOC complaint indicates that litigation is reasonably anticipated. *See* Open Records Decision Nos. 386 at 2 (1983), 336 at 1(1982).

You inform us that the one of the individuals named in the request filed an EEOC complaint against DART for alleged harassment and discrimination. You explain the EEOC has concluded its investigation of the complaint and issued a right-to-sue letter to the individual on June 28, 2010. You further explain the 90-day period in which the complainant has a right to sue had not expired when DART received this request for information. Based on your representations and our review, we find DART reasonably anticipated litigation on the date of its receipt of this request for information. We also find the information at issue is related to the anticipated litigation. Therefore, we find section 552.103 is generally applicable to the information at issue.

We note, however, that once an opposing party in the anticipated 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, the opposing party in the EEOC complaint has already seen or had access to portions of the information at issue. Therefore, this information may not be withheld under section 552.103. However, because we have no indication that the remaining information at issue has been seen or obtained by the opposing party, these documents, which we have marked, may be withheld under section 552.103.⁴

We now turn to your arguments against disclosure of the information the opposing party has seen as well as the remaining submitted information. 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 demonstrated. *Id.* at 681-82. This office has found that the public has a legitimate interest in the qualifications and work conduct of employees of governmental bodies. *See* Open Records Decision Nos. 562 at 10 (1990), 542 at 5 (1990); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow).

⁴As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

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. 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 supervisors are not witnesses for purposes of *Ellen*, and thus supervisors' identities may generally not be withheld under section 552.101 and common-law privacy. In addition, 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).

A portion of the remaining information consists of an investigation of the requestor's sexual harassment allegations. An adequate summary of this investigation exists. Thus, the summary is not confidential and must be released with the identities of victims and witnesses redacted. We note because the requestor is the alleged victim in the investigation at issue, she has a right of access to her own identifying information, and this information may not be withheld from her. *See* Gov't Code § 552.023 (person has special right of access to information excepted from public disclosure under laws intended to protect person's privacy interest as subject of the information); *see also* Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when person asks governmental body for information concerning the person himself or herself). However, information within the summary that identifies witnesses of sexual harassment, which we have marked, is confidential under common-law privacy and the holding in *Ellen* and must be withheld pursuant to section 552.101 of the Government Code. *See Ellen*, 840 S.W.2d at 525.

The remaining information also contains another employee's sexual harassment allegations. DART asserts this victim's name and statement found in the EEOC charge and right to sue

letter are private pursuant to *Ellen*. We have marked the identifying information of another alleged sexual harassment victim that also must be withheld on this basis. However, we find you have failed to establish how any of the remaining information is highly intimate or embarrassing information of no legitimate public interest. Therefore, DART may not withhold any portion of the remaining information under section 552.101 of the Government Code on the basis of common-law privacy.

Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." Gov't Code § 552.111. This section encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined section 552.111 excepts from disclosure only those internal communications consisting of advice, recommendations, and opinions reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. A governmental body's policymaking functions do not encompass internal administrative or personnel matters, and disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. *Id.*; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). However, a governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995).

You contend that the remaining information at issue is excepted under section 552.111. You state that the information at issue consists of a memorandum prepared as a result of an employee being placed on administrative leave. You argue that, if released, the memorandum would inhibit free discussion within DART regarding personnel matters on administrative leave with pay. Upon review, we find that the submitted memorandum pertains to administrative and personnel matters. You have failed to establish the memorandum concerns DART matters that rise to the level of policymaking. Therefore, you have not demonstrated the applicability of section 552.111 to this information, and none of it may be withheld on this basis.

In summary, DART may withhold the information we have marked under section 552.103 of the Government Code. DART must withhold the information we have marked under

section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Ellen*. The remaining information must be released.⁵

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,



Paige Lay
Assistant Attorney General
Open Records Division

PL/eeg

Ref: ID# 398356

Enc. Submitted documents

cc: Requestor
(w/o enclosures)

⁵We note the information being released contains confidential information to which the requestor has a right of access. Thus, if DART receives another request for this particular information from a different requestor, then DART should again seek a decision from this office.