



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 19, 2011

Ms. Catherine L. Clifton  
Senior Assistant City Attorney  
City of Odessa  
205 North Grant  
Odessa, Texas 79761

OR2011-10258

Dear Ms. Clifton:

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# 424534.

The City of Odessa (the "city") received a request for all complaints of sexual harassment, discrimination, or wrongful termination by city employees or former city employees during a specified time period. You claim the submitted 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.

Initially, we address your contention the submitted documents are not responsive to the present request for information because they are not "complaints" as specified by the requestor. You state the author of the submitted documents "characterizes one as a grievance and one as an appeal." Upon review, we find the submitted documents allege discrimination and wrongful termination and therefore are responsive to the request. Accordingly, we will consider your arguments against disclosure of the 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. This section encompasses the doctrine of common-law privacy, which protects information that (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 elements of the test must be established. *Id.* at 681-82. The types of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included 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. *Id.* at 683. However, information pertaining to the work conduct and job performance of public employees is subject to a legitimate public interest and, therefore, generally not protected from disclosure under common-law privacy. *See* Open Records Decision Nos. 562 at 10 (1990) (personnel information does not involve most intimate aspects of human affairs, but in fact touches on matters of legitimate public concern), 470 at 4 (job performance does not generally constitute public employee's private affairs), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of government employees), 423 at 2 (1984) (scope of public employee privacy is narrow), 405 at 2-3 (1983) (public has interest in manner in which public employee performs job), 329 at 2 (1982) (information relating to complaints against public employees and discipline resulting therefrom is not protected under former section 552.101), 208 at 2 (1978) (information relating to complaint against public employee and disposition of the complaint is not protected under common-law right of privacy). Upon review, we find none of the submitted information is highly intimate or embarrassing, or it is of legitimate public interest.<sup>1</sup> Therefore, the city may not withhold any portion of the submitted information under section 552.101 of the Government Code in conjunction with common-law privacy.

You also raise 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.

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<sup>1</sup>Although you state the submitted information alleges another city employee committed sexual harassment, we note the fact a person is accused of sexual harassment is not protected by common-law privacy. *See Morales v. Ellen*, 840 S.W.2d 519, 526-27 (Tex. App.—El Paso 1992, writ denied) (legitimate public interest in substance of complaint against individual accused of sexual harassment).

Gov't Code § 552.103(a), (c). The governmental body claiming this exception bears the burden of providing relevant facts and documents to demonstrate the applicability of the exception. 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 for information, 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 governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

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 demonstrate litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* This office has stated that a pending complaint with the Equal Employment Opportunity Commission (the "EEOC") indicates litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982).

You state, and provide documentation showing, prior to the city's receipt of the instant request, an employee filed a charge of discrimination with the EEOC against the city. Based on your representation and our review, we find the city reasonably anticipated litigation on the date it received the instant request. Further, we find the submitted information is related to the anticipated litigation.

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 relating to litigation through discovery procedures. *See* ORD 551 at 4-5. Thus, if the opposing party has seen or had access to information relating to 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). You inform us the individual who filed the EEOC complaint is the author of the submitted information. Because these documents have been seen by the opposing party to the anticipated litigation, the city may not withhold them under section 552.103. However, we note a portion of one document may be subject to section 552.117 of the Government Code.<sup>2</sup> Thus, we will address the applicability of this exception.

Section 552.117 excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request this

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<sup>2</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

information be kept confidential under section 552.024. Act of May 24, 2011, 82<sup>nd</sup> Leg., R.S., S.B. 1638, § 2 (to be codified as an amendment to Gov't Code § 552.117(a)). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). You do not inform us whether the individual whose personal information is at issue timely elected confidentiality under section 552.024. Accordingly, we must rule conditionally. To the extent the individual whose personal information is 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. Conversely, to the extent the individual whose personal information is at issue did not timely request confidentiality under section 552.024, the city may not withhold the marked information under section 552.117(a)(1). As you raise no further exceptions to disclosure, the city must release the remaining information.

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](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,



Mack T. Harrison  
Assistant Attorney General  
Open Records Division

MTH/em

Ref: ID# 424534

Enc. Submitted documents

c: Requestor  
(w/o enclosures)