



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 4, 2012

Ms. Tiffany N. Evans
Assistant City Attorney
City of Houston
P.O. Box 368
Houston, Texas 77001-0368

OR2012-04868

Dear Ms. Evans:

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# 449467 (GC No. 19247).

The City of Houston (the “city”) received a request for (1) the departmental files of two named city employees; (2) copies of the hard drives for two named city employees; (3) the disciplinary histories of five named city employees; and (4) e-mails from four named city employees during a specified time period. You contend some of the requested information is not subject to the Act. You claim the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered your arguments and reviewed the representative sample of information you submitted.¹

We first note some of the e-mails in Exhibit 5 were created after the city received the present request for information. The Act does not require a governmental body to release information that did not exist when it received a request or create responsive information.²

¹This letter ruling assumes the submitted representative sample of information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the city to withhold any information that is substantially different from the submitted information. *See* Gov’t Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

²*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).

We also note another e-mail in Exhibit 5 is not from any of the four named employees. Thus, the e-mails we have marked that were created after the city received the present request and the additional e-mail we have marked that is not from any of the four named employees are not responsive to the present request for information. This decision does not address the public availability of the marked e-mails, which need not be released in response to the request.

Next, we address your claim with regard to the request for copies of two named employees' hard drives. The Act is applicable to "public information," which, as defined by section 552.002 of the Government Code, consists of information collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business by a governmental body or for a governmental body if the governmental body owns the information or has a right of access to it. *See* Gov't Code § 552.002(a). This office has concluded that tangible physical items are not "information," as that term is contemplated under the Act. *See* Open Records Decision No. 581 (1990). Although you contend the employees' hard drives are not public information for purposes of section 552.002, it is not clear to this office whether the requestor seeks access to copies of the hard drives, as tangible physical items, or information maintained on the named employees' hard drives. Accordingly, we must rule in the alternative. Thus, if the requestor actually seeks access to copies of the hard drives themselves, as tangible physical items, then we conclude the hard drives are not public information for purposes of the Act and need not be released. If, on the other hand, the requestor seeks access to the information maintained on the hard drives, then we conclude any such information is subject to the Act, to the extent it constitutes public information as defined by section 552.002. *See* Gov't Code § 552.002(a); *but see* Open Records Decision No. 635 at 4 (1995) (Gov't Code § 552.002 not applicable to personal information unrelated to official business and created or maintained by state employee involving *de minimis* use of state resources). In that event, any public information maintained on the employees' hard drives must be released, unless it falls within the scope of an exception to disclosure. *See* Gov't Code §§ 552.221; Open Records Decision No. 664 (2000). In this instance, you have neither submitted any information represented to be maintained on the employees' hard drives nor claimed an exception to the disclosure of any such information. *See* Gov't Code §§ 552.301(a), .302. Therefore, if the requestor seeks access to information maintained on the employees' hard drives, then the city must release any such information, to the extent it constitutes public information under section 552.002 of the Government Code, except to the extent the submitted information is representative of any public information maintained on the hard drives and is held to be excepted from disclosure in the rest of this ruling.

We next note some of the submitted information falls within the scope of section 552.022(a) of the Government Code, which provides for required public disclosure of the following types of information, unless the information is made confidential under the Act or 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 [of the Government Code];

(2) the name, sex, ethnicity, salary, title, and dates of employment of each employee and officer of a governmental body;

...

(8) a statement of the general course and method by which an agency's functions are channeled and determined, including the nature and requirements of all formal and informal policies and procedures; [and]

(15) information regarded as open to the public under an agency's policies[.]

Gov't Code § 552.022(a)(1), (2), (8), (15). In this instance, the submitted information includes completed reports encompassed by section 552.022(a)(1), information related to city employees encompassed by section 552.022(a)(2), an organization chart encompassed by section 552.022(a)(8), and an executive order published on the city's internet website subject to section 552.022(a)(15). The city must release the information encompassed by section 552.022(a), which we have marked, unless the information is made confidential under the Act or other law or is encompassed by section 552.022(a)(1) but excepted from disclosure under section 552.108 of the Government Code. The city does not claim section 552.108. Section 552.103 of the Government Code, which the city does claim, is a discretionary exception to 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 at 475-76; Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 does not make information confidential for purposes of section 552.022(a). Therefore, none of the information encompassed by section 552.022(a) may be withheld under section 552.103.

We note some of the information encompassed by section 552.022(a) is or may be protected by sections 552.101, 552.117, or 552.130 of the Government Code.³ These exceptions make information confidential for purposes of section 552.022(a). Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses common-law privacy, which protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. *See 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. In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the court applied common-law privacy to records of an investigation of alleged sexual harassment. The information at issue in *Ellen* included witness statements, an affidavit in which the individual accused of misconduct

³This office will raise sections 552.101, 552.117, and 552.130 on behalf of a governmental body, as these sections are mandatory exceptions to disclosure. *See* Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

responded to the allegations, and the conclusions of the board of inquiry that conducted the investigation. *See* 840 S.W.2d at 525. The court upheld the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating the disclosure of such documents sufficiently served the public's interest in the matter. *Id.* But the court concluded "the public does 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, the identities of the victims and witnesses in an investigation of alleged sexual harassment must be withheld from the public under common-law privacy and the decision in *Ellen*. We note supervisors are generally not witnesses for purposes of *Ellen*, except where their statements appear in a non-supervisory context. The identity of the individual accused of sexual harassment is not protected from public disclosure, 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. *See* Open Records Decision Nos. 438 (1986), 405 (1983), 230 (1979), 219 (1978).

In this instance, one of the reports encompassed by section 552.022(a)(1) is a summary of an investigation of alleged sexual harassment. Therefore, in accordance with *Ellen*, the city must generally release the investigation summary, which we have marked, except for the information we have marked that identifies the victim and witness of the alleged sexual harassment. We note the requestor may be the victim's attorney. If so, the requestor has a right of access to the identity of her client. *See* Gov't Code § 552.023(a) ("A person or a person's authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person's privacy interests."); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself). Thus, if the requestor is the victim's attorney, his identity must be released pursuant to section 552.023 of the Government Code. If the requestor is not the victim's attorney, then his identity must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy. In either event, the city must withhold the witness's identity on that basis.

This office has determined certain types of personal financial information are protected by common-law privacy under section 552.101 of the Government Code. Financial information related only to an individual ordinarily satisfies the first element of the common-law privacy test, but the public has a legitimate interest in the essential facts about a financial transaction between an individual and a governmental body. *See* Open Records Decision Nos. 600 at 9-12 (1992) (identifying public and private portions of certain state personnel records), 545 at 4 (1990) (attorney general has found kinds of financial information not excepted from public disclosure by common-law privacy to generally be those regarding receipt of governmental funds or debts owed to governmental entities), 523 at 4 (1989) (noting distinction under common-law privacy between confidential background financial information furnished to public body about individual and basic facts regarding particular financial transaction between individual and public body), 373 at 4 (1983) (determination of

whether public's interest in obtaining personal financial information is sufficient to justify its disclosure must be made on case-by-case basis). The city must withhold the personal financial information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.117(a)(1) of the Government Code 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 information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code §§ 552.117(a)(1), .024. Section 552.117(a)(1) encompasses an official's or employee's personal cellular telephone or pager number if the official or employee pays for the telephone or pager service with his or her personal funds. *See* Open Records Decision No. 506 at 5-6 (1988) (statutory predecessor to Gov't Code § 552.117 not applicable to numbers for cellular mobile phones installed in county officials' and employees' private vehicles and intended for official business). 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). Information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or 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 official or employee who did not timely request confidentiality under section 552.024. We have marked information the city must withhold under section 552.117(a)(1) of the Government Code to the extent the information falls within the scope of section 552.117 and pertains to city employees who timely requested confidentiality for the information under section 552.024 of the Government Code.

Section 552.130 of the Government Code excepts from disclosure information related to a motor vehicle operator's or driver's license or permit or title or registration issued by an agency of this state or another state or country. *See* Gov't Code § 552.130(a)(1)-(2). We have marked information the city must withhold under section 552.130 of the Government Code to the extent the information is related to an operator's or driver's license or permit or a motor vehicle title or registration.

Lastly, we address your claim under section 552.103 of the Government Code for the submitted information that is not encompassed by section 552.022(a). 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 section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information at issue. 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).*

To establish 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.” *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.⁴ *See Open Records Decision No. 555 (1990); see also Open Records Decision No. 518 at 5 (1989)* (litigation must be “realistically contemplated”). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See Open Records Decision No. 331 (1982).* Further, the fact a potential opposing party has hired an attorney who makes a request for information does not establish litigation is reasonably anticipated. *See Open Records Decision No. 361 (1983).*

You contend the information not encompassed by section 552.022(a) is related to anticipated litigation to which the city would be a party. You have provided an affidavit in which another assistant city attorney states that the city anticipates litigation with an employee who filed a complaint of discrimination with the Equal Employment Opportunity Commission (the “EEOC”). The affidavit explains the city anticipates litigation because both the EEOC and the Texas Workforce Commission have issued notices of the employee’s right to sue.

⁴In addition, this office has concluded 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).*

The affidavit also states the information not encompassed by section 552.022(a) is related to the anticipated litigation. Based on your representations and the affidavit, we conclude the information not encompassed by section 552.022(a) is related to litigation the city reasonably anticipated on the date of its receipt of the present request for information. We therefore conclude the city may withhold the information in question under section 552.103 of the Government Code.

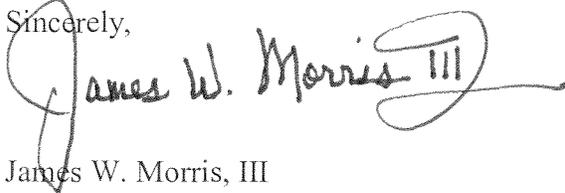
In reaching this conclusion, we assume the opposing party in the anticipated litigation has not seen or had access to any of the information in question. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information related to litigation through discovery procedures. *See* ORD 551 at 4-5. If the opposing party has seen or had access to information related 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 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).

In summary: (1) if the requestor actually seeks access to copies of the two named employees' hard drives themselves, as tangible physical items, then the hard drives are not public information, for purposes of the Act, and need not be released; (2) if the requestor seeks access to information maintained on the employees' hard drives, then the city must release any such information, to the extent it constitutes public information under section 552.002 of the Government Code, except to the extent the submitted information is representative of any public information maintained on the hard drives and is held to be excepted from disclosure in the rest of this ruling; (3) the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy, unless the requestor has a right of access to the identity of the victim of the alleged sexual harassment under section 552.023 of the Government Code; (4) the city must withhold the information we have marked under section 552.117(a)(1) of the Government Code to the extent the information falls within the scope of section 552.117 and pertains to city employees who timely requested confidentiality for the information under section 552.024 of the Government Code; (5) the city must withhold the information we have marked under section 552.130 of the Government Code to the extent the information is related to an operator's or driver's license or permit or a motor vehicle title or registration; (6) the city must release the rest of the marked information encompassed by section 552.022(a)(1), (2), (8), and (15) of the Government Code; and (7) the city may withhold the rest of the submitted information 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,

A handwritten signature in black ink that reads "James W. Morris III". The signature is written in a cursive style with a large initial "J" and a long horizontal flourish at the end.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/em

Ref: ID# 449467

Enc: Submitted documents

c: Requestor
(w/o enclosures)