



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 1, 2012

Ms. Linda Pemberton  
Paralegal  
City of Killeen  
P.O. Box 1329  
Killeen, Texas 76540-1329

OR2012-06293

Dear Ms. Pemberton:

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# 452559 (No. W007352).

The City of Killeen (the "city") received a request for (1) statements and complaints involving two named individuals; (2) the individuals' responses; and (3) Human Resources' responses. You claim the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the information you submitted.

Section 552.103 of the Government Code, the "litigation 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 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 [1<sup>st</sup> 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 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.” 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.<sup>1</sup> *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 submitted information is related to anticipated litigation with the requestor. You state the requestor, a former city employee, complained of alleged sexual harassment and discrimination, requested a cash settlement from the city, was transferred to another department at her request, and subsequently resigned. You assert the requestor is gathering information in order to pursue litigation against the city. You do not indicate, however, that the requestor has taken any objective steps toward the commencement of litigation. Thus, having considered your representations, we find you have not sufficiently demonstrated that the submitted information is related to any litigation the city reasonably anticipated on the date of its receipt of the present request for information. *See* ORD 452 at 4; *see also* ORD 331 at 1-2 (mere chance of litigation not sufficient to trigger statutory predecessor to Gov’t Code § 552.103). We therefore conclude the city may not withhold the submitted information under section 552.103 of the Government Code.

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<sup>1</sup>This office also 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).

We note some of the submitted information falls within the scope of section 552.101 of the Government Code.<sup>2</sup> 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). 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 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, if there is an adequate summary of an investigation of alleged sexual harassment, the investigation summary must be released under *Ellen*, but the identities of the victim of and any witnesses to the alleged sexual harassment must be redacted, and their detailed statements must be withheld. *See also* Open Records Decision Nos. 393 (1983), 339 (1982). If no adequate summary of the investigation exists, then all of the information related to the investigation must generally be released, except for information that would identify the victims and witnesses. In either event, the identity of the individual accused of sexual harassment is not protected from public disclosure. 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). We note supervisors are generally not witnesses for purposes of *Ellen*, except where their statements appear in a non-supervisory context.

Some of the submitted information is related to an investigation of alleged sexual harassment, and the information in question does not include an adequate summary of the investigation. Thus, in accordance with *Ellen*, the information related to the alleged sexual harassment must be released, except for the identities of the victim and any witnesses. In this instance, the requestor was the victim of the alleged sexual harassment. Because the requestor has a right of access to information the city would be required to withhold from the general public to protect her privacy, the victim’s identity may not be withheld on privacy grounds under section 552.101 of the Government Code. *See* Gov’t Code § 552.023; Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual

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<sup>2</sup>This office will raise section 552.101 on behalf of a governmental body, as this section is a mandatory exception to disclosure. *See* Gov’t Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

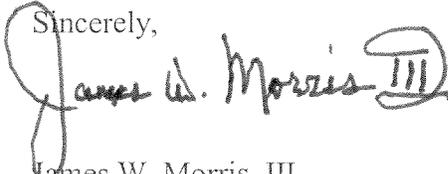
requests information concerning herself).<sup>3</sup> We have marked witnesses' names the city must withhold under section 552.101 in conjunction with common-law privacy. The rest of the submitted information related to the alleged sexual harassment must be released in accordance with *Ellen*.

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 *Morales v. Ellen*. The rest of the submitted information must be released.<sup>4</sup>

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,

A handwritten signature in black ink that reads "James W. Morris, III". The signature is written in a cursive style with a large, stylized initial "J".

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

JWM/em

Ref: ID# 452559

Enc: Submitted documents

c: Requestor  
(w/o enclosures)

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<sup>3</sup>Section 552.023 provides in part that “[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.” Gov’t Code § 552.023(a).

<sup>4</sup>Because the city would be required to withhold some of the remaining information from the general public to protect the requestor’s privacy, the city should resubmit the submitted information and request another ruling if it receives another request for this information from a different requestor. See Gov’t Code §§ 52.301(a), .302.