



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 4, 1996

Ms. Claudia Nadig
Assistant General Counsel
Texas Workers' Compensation Commission
Southfield Building, MS-4D
4000 South IH-35
Austin, Texas 78704

OR96-481

Dear Ms. Nadig:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 38126.

The Texas Workers' Compensation Commission (the "agency") received a request for records evidencing:

1. The total number of all sexual harassment and discrimination complaints filed at the agency between the dates of January 1, 1990 and January 1, 1996 as well as other related information.
2. To be included with the sexual harassment and discrimination complaints are the names of the complainant(s) and accused person(s); the dates and places of each alleged harassment and discrimination occurrence; what occurred in each case and the action taken on each of the complaints.

You have submitted a marked representative sample of the requested records for our review and claim that the information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.108 and 552.111 of the Government Code. We have considered the exceptions you claim, reviewed the documents at issue, and address your arguments in turn.

Section 552.101 protects information when disclosure of the information would constitute the common-law tort of invasion of privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977); Open Records Decision Nos. 628 (1994) at 4, 579 (1990) at 2, 562 (1990) at 9. Information may be withheld under section 552.101 in conjunction with the common-law right of privacy if: (1) the information contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and (2) the information is of no legitimate concern to the public. See Open Records Decision No. 628 (1994).

You reference *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied), in which 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.*

To the extent you have marked certain documents which contain the identities of witnesses or victims in sexual harassment matters, the identities of the witnesses and victims are excepted under common-law privacy as incorporated by section 552.101. Open Records Decision No. 400 (1983) at 2 (information that is confidential by law may not be released even if previously disclosed). The remaining portions of the marked documents you submitted do not meet either criterion as the information generally relates to actions of public employees and matters of public business and as such is of legitimate public interest. See, e.g., Open Records Decision No. 444 (1986) at 4 (legitimate public interest in information relating to public employees). Additionally, the information is not of a highly intimate or embarrassing nature about a person's private affairs. Therefore, the documents, excluding the documents we have marked, cannot be withheld under section 552.101.

Additionally, we note that some employees home addresses and phone numbers are revealed in the documents and we have marked those for possible exception under section 552.117. Although you did not raise the 552.117 exception, we note that section 552.117 excepts from disclosure the home addresses and telephone numbers of all current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Therefore, section 552.117 requires you to withhold any home address or telephone number of an official, employee, or former employee who requested that this information be kept confidential under section 552.024. See Open Records Decision Nos. 622 (1994), 455 (1987). You may

not, however, withhold the home address or telephone number of an official or employee who made the request for confidentiality under section 552.024 after this request for the documents was made. Whether a particular piece of information is public under section 552.117 must be determined at the time the request for it is made. Open Records Decision No. 530 (1989) at 5. The same observation is made with employee social security numbers revealed in the representative documents which we have marked.¹

In conjunction with section 552.101, you assert that section 402.092 of the Labor Code establishes the confidentiality of investigative files which pertain to the commission's in-house investigations of sexual harassment and discrimination among its own employees. We disagree. The primary purpose of the Workers' Compensation Act is to provide prompt remuneration for employees who sustain injuries in the course and scope of their employment.² See *Darensburg v. Tobey*, 887 S.W.2d 84 (Tex.App.--Dallas 1994, writ denied). The Labor Code provision, Subchapter E entitled "Records and Employee Information" contains provisions dealing with injury records, maintenance of injury information, confidentiality of injury information, well as section 402.092 that you assert. See Lab. Code 402.081. The statute makes confidential the commission's investigation files concerning compliance with Texas worker's compensation laws. You seek to apply the confidentiality provision to a different framework, that of the agency's internal sexual harassment and discrimination claims which do not involve investigations into worker's compensation laws. Thus, section 552.092 does not make confidential these other internal records.

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. The commission has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this

¹In addition, a social security number or "related record" may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(vii). In relevant part, the 1990 amendments to the federal Social Security Act make confidential social security account numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. See Open Records Decision No. 622 (1994). We caution, however, that an employer may be required to obtain an employee's social security number under laws that predate October 1, 1990; a social security number obtained under a law that predates October 1, 1990, is not made confidential by the 1990 amendments to the Social Security Act. Based on the information that you have provided, we are unable to determine whether the social security numbers contained in the submitted documents are confidential under federal law. We note that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Therefore, prior to releasing *any* social security number, you should ensure that it was not obtained or is not being maintained pursuant to a law enacted on or after October 1, 1990. We note, however, that hiring an individual after October 1, 1990, is not the same as obtaining an individual's social security number pursuant to a law enacted on or after October 1, 1990.

²The Legislature codified the Workers' Compensation Act into the Labor Code in 1993, Act of May, 1993, 73rd Leg., R.S., ch. 269, §1, 1993 Tex. Gen. Laws 987 (codified as Lab. Code §§401.001-417.004). Prior to the codification, the Act had been located at V.T.C.S. article 8306-8309i.

burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *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 (1990) at 4. The commission must meet both prongs of this test for information to be excepted under section 552.103(a). You include what appears to be a compilation of complaints "as of January 17, 1996."³ The compilation shows, without further elaboration, that some of the complaints are pending with the Equal Employment Opportunity Commission ("EEOC"), in which employees have complained of discrimination and or sexual harassment in the workplace. This office has previously held that a pending complaint before the EEOC indicates a substantial likelihood of potential litigation. Open Records Decision Nos. 386 (1983), 336 (1982), 281 (1981). To the extent that some of the complaints are still pending before EEOC, the agency has met the first prong of the section 552.103(a) test as applied to those complaints. Therefore, the agency may withhold from required public disclosure the marked portions of the submitted EEOC representative documents and the marked names within the summary document under section 552.103(a). We note that when the opposing party in the litigation has seen or had access to any of the information in these records, there is no justification for withholding that information from the requestor pursuant to section 552.103(a). Open Records Decision Nos. 349 (1982), 320 (1982). In addition, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We conclude after reviewing the remaining marked documents which do not pertain to a complaint before the EEOC, that they do not meet the litigation threshold test as you have not provided any specific information which indicates imminent or actual litigation other than one letter from an employee's attorney states that the matter "may" soon be in litigation. You may not withhold those documents which do not pertain to an EEOC complaint under this exception.

Next, we address your assertion that section 552.107 of the Government Code excepts some of the requested information from required public disclosure. Section 552.107(1) excepts from disclosure:

information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct.

³Ordinarily, the Open Records Act applies only to information in existence at the time of the request and does not require a government body to prepare new information. Open Records Decision No. 530 (1989), 605 (1992). Thus, you did not have to create this document. As it is responsive to the request, we address it in this ruling.

Information may be withheld under section 552.107(1) only to the extent that it documents confidences of a governmental representative to its attorney or reveals the attorney's legal advice and opinions. Open Records Decision Nos. 589 (1991), 574 (1990). We have reviewed the document in which you claim the section 552.107 exception and conclude you may not withhold the document under this exception as no information is provided either through your brief or apparent from the document itself which reveals whether it is a confidence directed to an attorney or how it constitutes legal advice coming from an attorney.

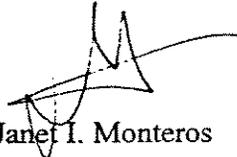
You also contend that section 552.108 of the Government Code excepts the submitted information from required public disclosure. Section 552.108(a) excepts from disclosure records of law enforcement agencies or prosecutors that deal with criminal investigations and prosecutions. Typically, a law enforcement agency is a police department, sheriff of a county or even a criminal district attorney's office. See Open Records Decision No. 369 (1983) (where it was observed that a criminal district attorney's office is a law enforcement agency for purposes of section 552.108); Open Records Decision No. 199 (1978) (an agency whose function is essentially regulatory in nature is not a "law enforcement agency" under section 552.108, even though it is charged with the duty of enforcing its own statute). Nonetheless, agencies charged with the duty for administrative enforcement have invoked section 552.108. See Open Records Decision No. 493 (1988) (if investigation by a board indicates criminal conduct that the board intends to report to law enforcement officials, section 552.108 may be invoked). When section 552.108(b) is claimed, the agency claiming it must reasonably explain, if the information does not supply the explanation on its face, how releasing the information would unduly interfere with law enforcement. Open Records Decision No. 434 (1986) at 3.

You have not disclosed how or whether the commission intends to refer the requested information to a district attorney or a county attorney's office for criminal prosecution. You have not provided any correspondence or complaint status as pending before a county or district attorney for criminal prosecution. Moreover, you do not explain how release of the requested information would unduly interfere with law enforcement. We conclude that the commission may not withhold any of the marked information under section 552.108 of the Government Code.

Section 552.111 excepts from disclosure "only those internal agency communications consisting of advice, recommendations, opinions and other material reflecting the deliberative or policymaking processes of the governmental body at issue." Open Records Decision No. 615 (1993) at 5. This section does not protect facts, written observations of facts or administrative personnel materials. Open Records Decision No. 615 (1993) at 5. The documents you submitted for review invoking section 552.111 contain factual information and personnel information and thus may not be withheld under this exception.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Janet I. Monteros
Assistant Attorney General
Open Records Division

JIM/rho

Ref.: ID# 38126

Enclosures: Marked documents

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