



Office of the Attorney General  
State of Texas

April 8, 1997

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ATTORNEY GENERAL

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Dear Mr. Poneck:

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# 105420.

The San Antonio Housing Authority (the "housing authority"), which you represent, received two requests from the same requestor for information concerning complaints against the housing authority president, Apolonio Flores.<sup>1</sup> You submitted to this office for our review a document entitled "Release and Settlement Agreement" in response to a request (the "first request") for "all documents, correspondence, memoranda, statements, minutes, dates, reports, report numbers, case files, titles, settlements, agreements, affidavits and exhibits from a sexual harassment/discrimination complaint two or three years ago reportedly involving [housing authority] CEO and President Apolonio Flores and a female employee/associate." In response to a second request (the "second request") for "all documents, correspondence, memoranda, statements, minutes, dates, reports, report numbers, case files, titles, agreements, affidavits and exhibits relating to the sexual harassment/discrimination complaint filed against SAHA CEO and President Aponio [sic] Flores. [sic] (this complaint considered since December 20 by the SAHA Board of Directors)," you submitted for our review a multi-part document entitled "San Antonio Housing Authority Confidential Investigation Report." You contend that the documents are excepted from public disclosure by sections 552.101, 552.102, 552.103, 552.107, and 552.111 of the Government Code.

Initially, we note that a governmental body may not withhold information, including settlement agreements, simply because it has agreed to do so. Open Records Decision No. 444 (1986) at 6. Chapter 522 of the Government Code requires the release of all information collected, assembled, and maintained by a governmental body unless one of the act's specific

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<sup>1</sup>This office has consolidated both of the requests under one number, ID# 105420, as it was unclear from your original correspondence that the housing authority had received two separate requests from the same requestor.

exceptions protects the information from disclosure. Gov't Code § 552.021; Open Records Decision No. 514 (1988) at 1-2. Therefore, a confidentiality provision in a settlement agreement is generally not enforceable against a governmental body.

We now consider whether any of the exceptions which you claim protect the requested information from public disclosure. Section 552.103(a) excepts from disclosure information:

(1) relating to litigation of a civil or criminal nature or settlement negotiations, 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; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

To secure the protection of section 552.103(a), a governmental body must demonstrate that requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision No. 551 (1990). Litigation cannot be regarded as "reasonably anticipated" unless there is more than a "mere chance" of it--unless, in other words, we have concrete evidence showing that the claim that litigation may ensue is more than mere conjecture. Open Records Decision Nos. 452 (1986), 331 (1982), 328 (1982). This office has determined, for example, 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). Nor does the mere fact that an individual hires an attorney and alleges damages serve to establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983) at 2. Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision Nos. 452 (1986), 350 (1982).

Having reviewed your arguments 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. 551 (1990), 349 (1982), 320 (1982). It appears that the claimant and/or the claimant's representative has seen the Release and Settlement Agreement (the "settlement agreement") submitted in response to the first request. 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). Therefore, the settlement agreement may not be withheld from disclosure based on section 552.103(a).

Further, the housing authority has not demonstrated that litigation is reasonably anticipated regarding the San Antonio Housing Authority Confidential Investigation Report (the "investigation report") submitted to this office in response to the second request.

Consequently, the documents submitted in response to the second request are not excepted from disclosure under section 552.103(a).

Section 552.107(1) excepts from disclosure communications that reveal client confidences or the attorney's legal opinion, advice, or recommendation. Open Records Decision Nos. 589 (1991) at 1, 574 (1990) at 3, 462 (1987) at 9-11. However, section 552.107(1) does not protect from disclosure factual information compiled by an attorney acting on behalf of a governmental entity in the capacity of an investigator rather than a legal advisor. Open Records Decision No. 462 (1987). The investigation report, submitted in response to the second request, is not excepted from disclosure because it consists of factual information compiled by an attorney acting as an investigator. We agree, however, that a small portion of a sub-part of the investigation report, entitled "Conclusion," is protected from disclosure pursuant to section 552.107(1) because it contains an attorney's legal advice or opinion. We have marked the information that may be withheld from disclosure. The remainder of the investigation report may not be withheld under section 552.107(1).

In addition, it appears that the settlement agreement was disclosed to the claimant and/or the claimant's representatives. Therefore, the housing authority may not withhold that information, as section 552.107(1) is waived by disclosure of the information to persons outside the attorney-client relationship. Open Records Decision No. 630 (1994) at 4.

Section 552.111 excepts "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), 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), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. An agency's policymaking functions, however, do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 (1993) at 5-6. In addition, section 552.111 does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Id.* at 4-5. After reviewing the information submitted to this office in response to both requests, we conclude that the information you seek to withhold relates to internal administrative or personnel matters. See Open Records Decision No. 615 (1993). Consequently, you may not rely on section 552.111 to withhold any of the requested information.

Section 552.101 excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. Under common-law privacy, information may be withheld under section 552.101 if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

You also raise section 552.102, which protects "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The protection of section 552.102 is the same as that of the common-law right to privacy under section 552.101. *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.). Consequently, we will consider these two exceptions together.

Regarding the investigation report submitted in response to the second request, you argue that the requested information "contains allegations of employment misconduct by the former President and CEO of the San Antonio Housing Authority," and "may contain information which is of a private and personal nature." Although information relating to an investigation of a public employee may be embarrassing, the public generally has a legitimate interest in knowing about the job performance of public employees. See Open Records Decision Nos. 444 (1986), 405 (1983).

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 investigatory files in *Ellen* contained individual witness and victim statements, an affidavit by the high-ranking police officer accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *Id.* The court ordered the release of the affidavit of the police officer 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.* at 525.

The *Ellen* decision controls the release of most of the documents you have submitted for our review. We believe there is a legitimate public interest in the substance of the investigation of the allegations of sexual harassment. The document authored by attorney Peggy J. Pou which you submitted to this office, provides a summary of the allegations similar to the records required to be disclosed by the *Ellen* court.

However, the identities of the victim and witnesses to the alleged sexual harassment are excepted from disclosure by the common-law privacy doctrine as applied in *Ellen* and *Industrial Foundation*. In addition, the statements of the alleged victim and of the witnesses, as well as other identifying information regarding those individuals, must be withheld under common-law privacy. We note, however, that the statement of Mr. Flores, in Tab 12 of the investigation report, must be disclosed to the requestor, although the names of the alleged victim and of the witnesses must be redacted. We have marked the type of information in Tab 12 which must be withheld from public disclosure. See *Morales v. Ellen*, 840 S.W.2d 519, 525 (Tex. App.--El Paso 1992, writ denied). Further, although the settlement agreement does not on its face appear to implicate allegations of sexual harassment, to the extent that it may in fact do so, we have determined that the identity of the claimant must be protected from

public disclosure. For your convenience, we have marked the types of information in the requested documents that must be withheld under the doctrine of common-law privacy.

In addition, we observe that certain personnel documents submitted in Tab 3 of the investigation report are excepted from disclosure by common-law privacy. We have marked the information in Tab 3 which must be withheld under the common-law privacy doctrine.<sup>2</sup> You must release the remaining information in Tab 3 of the report. We further observe that Tabs 25-32 of the investigation report contain information concerning personnel procedures and, therefore, must be released to the requestor.

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,



Vickie Prehoditch  
Assistant Attorney General  
Open Records Division

VDP/ glg

Ref: ID# 105420

Enclosures: Marked documents/submitted documents

cc: Mr. Thomas Edwards  
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(w/o enclosures)

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<sup>2</sup>Some types of information protected by common-law privacy extends to information that reveals a personal financial decision that does not involve a transaction with a governmental body, including information that identifies beneficiaries of insurance or retirement, forms showing an employee's decision to participate in a deferred compensation plan, forms showing an employee direct deposit authorization, and forms showing an employee's bank account and credit card numbers. See Open Records Decision No. 600 (1992).