



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 16, 1997

Mr. Bob Ramirez
Escamilla & Poneck, Inc.
1200 South Texas Building
603 Navarro Street
San Antonio, Texas 78205-1826

OR97-2060

Dear Mr. Ramirez:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 109038.

The Harlandale Independent School District (the "school district"), which you represent, received a request from a school district employee for a copy of her personnel file and copies of all statements taken during the investigation of her sexual harassment complaint. You have released the personnel file. However, you contend that the statements taken from employees regarding the alleged sexual harassment are excepted from disclosure under section 552.103(a) of the Government Code. We have considered the exception you claim and have reviewed the documents at issue.

Section 552.103(a) excepts from disclosure information relating to litigation to which a governmental body is or may be a party. The governmental body has the burden of providing relevant facts and documents to show that section 552.103(a) is applicable in a particular situation. In order to meet this burden, the governmental body must show 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.

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 (1986) at 4. 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.¹ Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 (1989) at 5 (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). 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 No. 452 (1986) at 4.

Having considered the totality of the circumstances presented in this case, we find that you have not provided this office with concrete evidence to substantiate the claim that the school district reasonably anticipates litigation at this time. We conclude that the requested statements are not excepted from disclosure under section 552.103(a).

You have not raised any other exceptions to disclosure. However, this office will raise section 552.101 on behalf of a governmental body when necessary to protect third-party interests. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987). Here, we must consider whether the requested statements are excepted from disclosure under section 552.101 of the Government Code in conjunction with the common-law right to privacy.

Section 552.101 excepts from required public disclosure information that is considered confidential by law, either constitutional, statutory, or by judicial decision. The common-law right of privacy is incorporated into the Open Records Act by section 552.101. For information to be protected by common-law privacy it must meet the criteria set out in *Industrial Foundation of the South v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The *Industrial Foundation* court held that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. 540 S.W.2d at 685.

In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied), the court addressed the applicability of the right of common-law privacy to the files of a sexual harassment investigation. 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

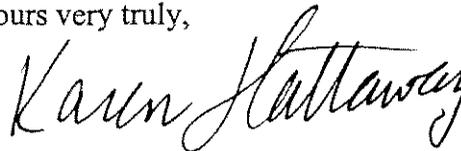
¹In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney 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).

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.*

According to *Ellen*, the requestor, as a member of the public, has a legitimate interest in the statement of the individual accused of misconduct. The accused’s statement must be released in its entirety to the requestor.² The requestor is also entitled to the investigating body’s summary of the alleged incident, or, if such documents do not exist, other documents that adequately summarize the allegations and findings. *See id.* It does not appear from the submitted documents that a summary of the alleged incident exists. Therefore, the requestor is entitled to copies of the witnesses’ statements with information that identifies the witnesses redacted. The witnesses’ statements may only be redacted to the extent necessary to protect their identities.³

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 any questions about this ruling, please contact our office.

Yours very truly,



Karen E. Hattaway
Assistant Attorney General
Open Records Division

KEH/ch

Ref: ID# 109038

Enclosures: Submitted documents

²Because the requestor is also the victim of the alleged sexual harassment, her identity should not be redacted from the copy of the accused’s statement that the school district provides to her. *See* Gov’t Code § 552.023. However, if the school district receives requests from other persons for the accused’s statement, in accordance with *Ellen*, the victim’s identity must be redacted from the statement before it is released.

³We note that in certain circumstances an individual’s handwriting may identify him/her. *See* Open Records Decision No. 224 (1979). We acknowledge that in such a case, the individual’s statement would have to be withheld from disclosure in its entirety in order to protect the individual’s identity.

