



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

April 9, 1998

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

OR98-0930

Dear Mr. Ramirez:

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# 113888.

The Harlandale Independent School District (the "district") received a request for

any correspondence, letters, memos, including the final report from Peggy Pou on the investigation of police Sgt. Juan Villarreal's grievance filed at Harlandale School District Aug. 22.

You state, by copy of your letter to this office, that the requestor amended and narrowed her request to include only "Ms. Pou's written report and the exhibits that she makes reference to in her report." See Gov't Code § 552.222(b). In addition, you state that "the requestor is now requesting a copy of the results of Ms. Pou's investigation and invoice," but not the appendix. You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, and 552.107 of the Government Code and as attorney work product. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state or a political subdivision is or may be a party. The governmental body 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 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 governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986) 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. 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. After reviewing your arguments, we conclude that you have not made the requisite showing that litigation is reasonably anticipated. Accordingly, you may not withhold the requested information pursuant to section 552.103.

We next address your claim that the report and exhibits submitted as Exhibit "C" may be excepted from disclosure as attorney work product. In Open Records Decision No. 647 (1996), this office held that a governmental body may withhold information as attorney work product if the governmental body can show 1) that the information was created for civil trial or in anticipation of civil litigation under the test articulated in *National Tank v. Brotherton*, 851 S.W.2d 193 (Tex. 1993), or after a civil lawsuit is filed, and (2) that the work product consists of or tends to reveal an attorney's "mental processes, conclusions, and legal theories." Open Records Decision No. 647 (1996) at 5. You have not made this showing for any of the information submitted in Exhibit "C." Consequently, the district may not withhold any of the requested information as attorney work product.

Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. Open Records Decision No. 574 (1990) at 5. When communications from attorney to client do not reveal the client's communications to the attorney, section 552.107 protects them only to the extent that such communications reveal the attorney's legal opinion or advice. *Id.* at 3. In addition, basically factual communications from attorney to client, or between attorneys representing the client, are not protected. *Id.* Moreover, the voluntary disclosure of privileged material to outside parties results in waiver of the attorney-client privilege. Open Records No. 630 (1994) at 4. Exhibit "C" is not excepted from disclosure because it consists of factual information compiled by

an attorney acting as an investigator. We agree, however, that a portion of the information in Exhibit "C" contains an attorney's legal advice or opinion, and therefore may be withheld from public disclosure under section 552.107(1). We have marked this information accordingly.

We now address whether portions of the fee bills submitted to this office for review as Exhibit "D" may be withheld under section 552.107(1) as client confidences or legal advice or opinions rendered to the client or to associated attorneys. See Open Records Decision No. 574 (1990) at 5-7. In this regard, we note that section 552.107(1) does not except from disclosure the factual recounting in attorneys' fee bills of events or the documentation of calls made, meetings attended, and memos sent. *Id.* at 5. Furthermore, the voluntary disclosure of privileged material to outside parties results in waiver of the attorney-client privilege. Open Records Decision Nos. 630 (1994) at 4, 589 (1991) at 2. You have demonstrated that some of the information in the fee bills constitutes client confidences or an attorney's legal advice or opinion. We have marked the information in Exhibit "D" which the district may withhold from disclosure under section 552.107(1).<sup>1</sup>

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 Tex. 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 Exhibit "C," you argue that it contains "information relating to personnel matters [that] should be excepted from disclosure pursuant to section 552.102 as being an unwarranted invasion of personal privacy." Although information relating to an investigation of a public employee may be embarrassing, the public generally has a legitimate interest in the job performance of public employees. See Open Records Decision Nos. 444 (1986), 405 (1983).

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<sup>1</sup>Although you claim that section 552.101 excepts some of the information from disclosure pursuant to the attorney-client privilege, the attorney-client privilege is properly claimed under section 552.107. Open Records Decision No. 574 (1990) at 2.

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. Exhibit "C" includes a summary of the allegations similar to the records required to be disclosed by the *Ellen* court.

Although the *Ellen* court recognized that the person accused of sexual misconduct may in some instances have a privacy interest in information contained within investigatory files, we think in this case the public's interest in disclosure of the information outweighs the accused's privacy interest. *See id.* However, the identities of victims and witnesses to 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 alleged victims and witnesses must be withheld under common-law privacy. *See Morales v. Ellen*, 840 S.W.2d 519, 525 (Tex. App.--El Paso 1992, writ denied). We have marked the types of information which must be withheld from public disclosure under section 552.101.

Finally, we observe that some of the submitted information may be protected from disclosure under section 552.117 of the Government Code. Sections 552.024 and 552.117 provide that a current or former public employee or official can opt to keep private his or her home address, home telephone number, social security number, and information that reveals that the individual has family members. You must withhold this information if, as of the time of the request for the information, the employee had elected to keep this information private. Open Records Decision Nos. 530 (1989) at 5, 482 (1987) at 4, 455 (1987). In addition, section 552.117(2) excepts from required public disclosure information relating to the home address, home telephone number, and social security number of a peace officer as defined by article 2.12 of the Code of Criminal Procedure, as well as whether the peace officer has family members. Therefore, you must redact such information wherever it appears in the submitted documents.

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 on as a previous

determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Vickie Prehoditch  
Assistant Attorney General  
Open Records Division

VDP/glg

Ref.: ID# 113888

Enclosures: Marked documents

cc: Ms. Anastacia Lunsford  
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(w/o enclosures)