



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 15, 1998

Mr. Vernon M. Arrell
Commissioner
Texas Rehabilitation Commission
4900 North Lamar Boulevard
Austin, Texas 78751-2399

OR98-1668

Dear Mr. Arrell:

You have asked whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 116740.

The Texas Rehabilitation Commission (the "commission") received two requests for various letters, memoranda, and investigation reports. You assert that the commission does not have certain requested records. We note while the commission has an obligation to make a good faith effort to locate requested records, Open Records Decision No. 561 (1990) at 8, the commission is not required to provide information that it does not possess or that does not exist. Open Records Decision Nos. 561 (1990) at 9 (governmental body does not have to obtain new information); 483 (1987) at 2, 452 (1986) at 3 (open records request applies to information in existence when request is received); 362 (1983) at 2 (governmental body does not have to supply information which does not exist). You assert that the records which are responsive to the request are protected from disclosure under section 552.103 of the Government Code.

To show that section 552.103(a) is applicable, a governmental entity must show that (1) litigation is pending or reasonably anticipated and (2) the information at issue is related to the 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. You submitted to this office information showing that the requestor, who is a former commission employee, has at various times implied, suggested, or threatened that he would hire an attorney and sue the commission. We note that the submitted information contained at least a suggestion that the requestor may have filed a complaint of discrimination with the Equal Employment Opportunity Commission ("EEOC"). However, you do not assert to this office that the requestor has filed such any such complaint, nor did you submit a copy of any EEOC complaint filed by the requestor. Your letter to this office states only that the requestor has

made verbal statements expressing his intent to sue the commission and that it is on this basis you believe that litigation is reasonably anticipated.

A mere threat to sue is not sufficient to establish that litigation is reasonably anticipated. *See* Open Records Decision No. 331 (1982). There must be some objective indication that the potential party intends to follow through with the threat. *See* Open Records Decision No. 452 (1986) at 5. Thus, several threats to sue and the hiring of an attorney for the purpose of carrying out these threats is evidence that litigation is reasonably anticipated against a governmental body. *See* Open Records Decision No. 346 (1982). Litigation also may be reasonably anticipated when an individual has hired an attorney who demands damages and the attorney threatens to sue the governmental entity. Open Records Decision No. 551 (1990) at 2.

In this situation, you have demonstrated only that the requestor has made threats to sue the commission, but not that he has taken concrete steps toward litigation, such as hiring an attorney to bring suit. Given the information provided, the prospect of litigation at this point is too speculative for section 552.103(a) to be applicable. Open Records Decision No. 518 (1989) at 5 (governmental body must show that litigation involving a specific matter is realistically contemplated). However, some of the information at issue is private and may not be disclosed.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by constitutional or common-law privacy and under certain circumstances excepts from disclosure private facts about individuals. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information must be withheld from public disclosure under a common-law right of privacy when the information is (1) highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 (1992) at 1.

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 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.* at 525.

The court in *Ellen* did not reach the issue of whether the public employee who was accused of the harassment had any inherent right of privacy to his identity. However, the court held that the public possesses a legitimate interest in full disclosure of the facts surrounding employee discipline in this type of situation. *Id.* at 525. We believe that there

is a legitimate public interest in the identity of public employees accused of sexual harassment in the workplace and the details of the complaint, regardless of the outcome of the investigation. See Open Records Decision Nos. 470 (1987) at 4 (public has legitimate interest in job performance of public employees); 423 (1984) at 2 (scope of public employee privacy is generally narrow).

In compliance with *Ellen*, you must release the December 18, 1995 report from the commission's Management Audit Division and the January 2, 1996 memorandum concerning the investigation and allegation, as these documents serve as the investigation summary and conclusion. However, prior to releasing these documents the names of the witnesses and victim, as labeled on the documents, must be redacted. The remaining sexual harassment investigation documents must be withheld in their entirety, as marked.

We also believe that the identity of clients receiving services through the commission is generally protected from disclosure under a common-law right of privacy. This identifying information must be redacted prior to release of the documents, as marked.

Included in the information submitted are telephone numbers of various individuals and companies. The information indicates that at least one number is the telephone number of a former employee. Sections 552.024 and 552.117 of the Government Code provide that a former or current public employee can opt to keep private his or her home address, home telephone number, social security number, or information that reveals that the individual has family members. You must withhold the home telephone numbers of any current or former employees who, as of the time of the request for the information, had elected to keep the information private. Open Records Decision Nos. 530 (1989) at 5, 482 (1987) at 4, 455 (1987).

The remaining information must be released.

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,



Ruth H. Soucy
Assistant Attorney General
Open Records Division

Ref: ID# 116740

Enclosures: Submitted documents

cc: Mr. Willie Jones