



Office of the Attorney General

State of Texas

July 31, 1998

DAN MORALES
ATTORNEY GENERAL

Mr. John R. Adamo
Human Resources Attorney
Texas Department of Protective
and Regulatory Services
8100 Cameron Road, Suite 150
Mail Code Y-966
Austin, Texas 78754-3814

OR98-1818

Dear Mr. Adamo:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 116990

The Texas Department of Protective and Regulatory Services (the "department") received a request for investigation records related to an employee complaint. In response to the request, you submit to this office for review a copy of the responsive records. You assert that the submitted records are protected from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered your arguments and have reviewed the information submitted.

To show that section 552.103(a) is applicable, the department must demonstrate 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. Section 552.103 requires concrete evidence that litigation may ensue. To demonstrate that litigation is reasonably anticipated, the department must furnish evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 (1989) at 5. Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986) at 4.

In this situation, you explain that "[t]he litigation exception, § 552.103, . . . , applies to the records in this case because the requester has filed an employment discrimination complaint with this Department's internal [Office of Civil Rights and Investigation]." However, there is no evidence that the requestor has taken concrete steps toward litigation. Given the information provided, the prospect of litigation is at this point 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 specific matter is realistically contemplated); *cf.* Open Records Decision Nos. 386 (1983) (pendency of complaint before EEOC indicates substantial likelihood of litigation). Therefore, the submitted information may not be withheld under section 552.103. However, some of the information at issue is private and may not be disclosed.

We next consider to what extent section 552.101 of the Government Code excepts any of the submitted information. Section 552.101 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 pertaining to an investigation of allegations of sexual harassment. The investigatory files at issue in *Ellen* contained individual witness and victim statements, an affidavit given by the individual accused of the misconduct in response to the allegations, and the conclusions of the board of inquiry that conducted the investigation. *Id.* The court held that the names of witnesses and their detailed affidavits regarding allegations of sexual harassment was exactly the kind of information specifically excluded from disclosure under the privacy doctrine as described in *Industrial Foundation*. *Id.* at 525. However, the court ordered the release of the summary of the investigation with the identities of the victims and witnesses deleted from the documents, noting that the public interest in the matter was sufficiently served by disclosure of such documents and that in that particular instance “the public [did] not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements.” *Id.* at 525.

In this instance, however, it is not clear to this office whether or to what extent the department has previously released to the public details of the alleged sexual harassment. Consequently, we have no basis for concluding that the department has sufficiently informed the public of the details of the allegations against the department employee. Although this office feels compelled to follow the *Ellen* decision with regard to the complainant’s identity, we nevertheless recognize the public’s legitimate interest in being made aware of the actions of its department officials. In reviewing the submitted records, we have identified and tagged one document which serves as an adequate *summary* of the underlying sexual harassment investigation. Pursuant to the *Ellen* decision, this summary must be released with the identities of the victims and witnesses to the sexual harassment investigation redacted. We also note that the submitted affidavit given by the individual accused of the

misconduct, the requestor in this case, must be redacted and released. *See* Gov't Code § 552.023. Therefore, except for the redacted summary and the requestor's affidavit in response to the allegations, all remaining information contained in the investigation file must be withheld.

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,

A handwritten signature in black ink that reads "Sam Haddad". The signature is written in a cursive style with a large, looping initial "S".

Sam Haddad
Assistant Attorney General
Open Records Division

SH/mjc

Ref: ID# 116990

Enclosures: Submitted documents

cc: Mr. Walter Jones
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(w/o enclosures)