



February 12, 1999

Mr. Robert A. Schulman
Schulman, Walheim, & Heidelberg, Inc.
112 East Pecan, Suite 3000
San Antonio, Texas 78205-1528

OR99-0445

Dear Mr. Schulman:

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# 122014.

The United Independent School District (the "district"), which you represent, received a request for certain documents relating to a sexual harassment investigation. You explain that certain information relating to an employee's grievance was addressed in Open Records Letter No. 98-2490 (1988). You state that the EEOC notice of charge and the investigative file are excepted from disclosure under sections 552.101, 552.103, and 552.111 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

Initially, you argue that all of the submitted information may be withheld under section 552.103 of the Government Code. To show that section 552.103 is applicable, the district 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 at 4 (1990). Section 552.103 requires concrete evidence that litigation may ensue. To demonstrate that litigation is reasonably anticipated, the district must furnish evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 at 5 (1989). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

You explain that an employee of the district filed an EEOC complaint. This complaint was subsequently withdrawn. You claim, however, that the employee has indicated a desire to file a new complaint. 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). It does not appear in this instance that the employee has taken steps toward filing another EEOC complaint. We conclude that you have not shown that litigation is reasonably anticipated; therefore, you may not withhold the

submitted information under section 552.103. *See also* Open Records Decision No. 139 (1976) (concluding that identity of complainant and nature of EEOC complaint may not be withheld under section 552.103).

Next, you argue that Exhibits 5 and 7 are excepted from disclosure by section 552.107. 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. *Id.* at 5. When communications from an attorney to a 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 an attorney to a client, or between attorneys representing the client, are not protected. *Id.* Moreover, section 552.107(1) does not protect from disclosure factual information compiled by a governmental attorney acting in the capacity of an investigator rather than a legal advisor. Open Records Decision No. 462 (1987). We find that some of the submitted information may be withheld under section 552.107 because it contains an attorney’s legal advice or opinion. We have marked the information that may be withheld under section 552.107.

You also contend that the entire investigative file is excepted from disclosure because it constitutes attorney work product. A governmental body may withhold attorney work product from disclosure under section 552.111 if it demonstrates that the material was 1) created for trial or in anticipation of civil litigation, and 2) consists of or tends to reveal an attorney’s mental processes, conclusions and legal theories. Open Records Decision No. 647 (1996). The first prong of the work product test, which requires a governmental body to show that the documents at issue were created in anticipation of litigation, has two parts. A governmental body must demonstrate that 1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and 2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. Open Records Decision No. 647 at 4 (1996). The second prong of the work product test requires the governmental body to show that the documents at issue tend to reveal the attorney’s mental processes, conclusions and legal theories.

We note that with the exception of the information that was addressed under section 552.107, the remaining documents do not suggest trial strategy or legal reasoning. Moreover, it appears that the investigative file consists mostly of summaries and other information pertaining solely to the facts of the case. This office has stated that the work product privilege does not extend to “facts an attorney may acquire.” *See* Open Records Decision No. 647 at 4 (1996) (citing *Owens-Corning*, 818 S.W.2d at 750 n.2). Consequently, we conclude that the district may not withhold any additional information as attorney work product.

Finally, you argue that much of the submitted information is protected by common-law privacy. Section 552.101 incorporates the common-law right of privacy which excepts from disclosure private facts about an individual. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Therefore, information may be withheld from the

public when (1) it is 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 at 1 (1992). Although information relating to an internal investigation of sexual harassment claims involving public employees may be highly intimate or embarrassing, the public generally has a legitimate interest in knowing the details of such an investigation. Open Records Decision No. 444 (1986).

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 files of an investigation of allegations of sexual harassment. 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 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.*

When there is an adequate summary of the investigation, the summary must be released, but the identities of the victims and witnesses must be redacted and their detailed statements must be withheld from disclosure. However, we believe that when no adequate summary exists, detailed statements regarding the allegations must be released, but the identities of witnesses and victims must still be redacted from the statements. After careful review, we have determined that the "Status of Fact Finding to Date" from the Preliminary Report serves as an adequate summary of the investigation.

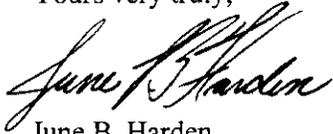
We note, however, that the district claims and, we agree, that this portion of the submitted documents is excepted from disclosure under section 552.107. Therefore, if you choose to assert your 552.107 claim, the district must release pages 1 - 43 of the Preliminary Report with the identities of the victim and witnesses to the sexual harassment redacted from these documents. On the other hand, if you choose to waive your section 552.107 claim, the district must release only a de-identified version of the "Status of Fact Finding to Date" to the requestor. Regardless of your decision, the district must also release Attachments M, Y, and redacted versions of C, I, L, and X.¹ The remaining documents 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

¹We note that Attachments I, Y and X contain information that may be protected by section 552.117 of the Government Code. Section 552.117 excepts from public disclosure the home address, home telephone number, social security number, and information about family members of current or former employees of a governmental body who have complied with section 552.024 of the Government Code. If, at the time the district received the request for information, the employees had chosen to keep their section 552.117 information confidential, the district must not release this information. You may not, however, withhold this information for a current or former employee who made a request for confidentiality under section 552.024 after this request for information was made.

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,

A handwritten signature in black ink, appearing to read "June B. Harden". The signature is written in a cursive style with a large initial "J".

June B. Harden
Assistant Attorney General
Open Records Division

JBH/ch

Ref.: ID# 122014

Enclosures: Marked documents

cc: Mr. Sergio "Keko" Martinez
1420 San Bernardo
Laredo, Texas 78040
(w/o enclosures)