



July 20, 1999

Ms. Jeri Yenne
Criminal District Attorney
Brazoria County Courthouse
111 East Locust, Suite 4008A
Angleton, Texas 77515

OR99-2036

Dear Ms. Yenne:

You ask whether certain information is subject to required public disclosure under the Texas Public Information Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 125870.

The Brazoria County Criminal District Attorney received a request for the "EEOC charge/complaint and the county's response" in a matter involving a justice of the peace. You seek to withhold the requested information under sections 552.101, 552.103, and 552.111 of the Government Code.

Section 552.101 requires withholding information "considered to be confidential by law, either constitutional, statutory, or by judicial decision." You contend that the requested records are made confidential under federal law, 42 U.S.C. § 2000e. Although the EEOC is prohibited from releasing any information pertaining to a discrimination complaint unless a complainant files a lawsuit to remedy the discriminatory practice, *see* 42 U.S.C. § 2000e-8(e), this prohibition does not extend to an employer's disclosure of information relating to a claim of employment discrimination. Open Records Decision No. 155 (1977). Consequently, the requested records are not confidential under the federal law to which you cite.

Section 552.103(a) excepts from required public disclosure information

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

To secure the protection of section 552.103(a), a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation to which the governmental body is a party. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin 1997, no pet.); Open Records Decision No. 588 (1991).

You claim the protection of section 552.103 for the submitted "Position Statement." The information you have provided shows that there is a pending complaint with the Equal Employment Opportunity Commission (EEOC) against Brazoria County and one of its justices of the peace, alleging discrimination. This office has stated that a pending EEOC complaint indicates litigation is reasonably anticipated and therefore meets the first prong of the section 552.103(a) test. Open Records Decision Nos. 386 (1983), 336 (1982). Also, the "Position Statement" clearly relates to the EEOC proceeding. You may withhold the "Position Statement" under section 552.103(a).

We assume, however, that, as you represent, the "Position Statement" has not previously been made available to the opposing party in the anticipated litigation. Absent special circumstances, once information has been obtained by all parties to the litigation, either through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349, 320 (1982). To the extent the opposing party has seen or had access to the "Position Statement," there would be no justification for now withholding it from the requestor pursuant to section 552.103(a). Similarly, section 552.103(a) does not authorize withholding materials which have already been made available to the public. Open Records Decision No. 436 (1986). The applicability of section 552.103(a) ends once the litigation has concluded. Attorney General Opinion MW-575 (1982), Open Records Decision No. 350 (1982).

Section 552.101 also excepts from public disclosure information coming within the common-law right to privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy protects information if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, *and* it is of no legitimate concern to the public. *Id.* at 683-85.

You claim that the remaining document at issue here,¹ the "Notice of Charge of Discrimination" and the amendment thereto, must be withheld under *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied). In that opinion, the court addressed

¹We assume that you are not seeking to withhold the page "EEOC Rules and Regulations." That document appears to be generally available to the public and thus not subject to any exceptions to disclosure.

the applicability of the common-law privacy doctrine to files of 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. 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. Ellen*, 840 S.W.2d at 525. However, the court ordered the release of the affidavit of the person under investigation, in part because it ruled that he had waived any privacy interest he may have had in the information by publishing a detailed letter explaining his actions and state of mind at the time of his forced resignation. *Id.* The *Ellen* court also ordered the disclosure of the summary of the investigation with the identities of the victims and witnesses deleted from the documents. *Id.*

The material at issue here does not include investigatory materials or a summary such as were before the *Ellen* court. In our opinion, in order best to comport with the *Ellen* decision, you should release the "Notice of Charge of Discrimination" with the information identifying victims/witnesses redacted. We have marked those portions of the "Notice of Charge of Discrimination" which we believe must be withheld under *Ellen*. The remaining portions of that document must be released.²

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.

Sincerely,

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/nc

Ref.: ID# 125870

²Since we have permitted you to withhold the "Position Statement" under section 552.103(a), we do not address your claims that the document is also protected under *Ellen* or under section 552.111.

Encl.: Marked documents

cc: Ms. Peggy O'Hare
Staff Writer
The Facts
P.O. Box 549
Clute, Texas 77531
(w/o enclosures)