



March 2, 2001

Ms. Lauralee Vallon
City Attorney
City of Hillsboro
P.O. Box 568
Hillsboro, Texas 76645

OR2001-0805

Dear Ms. Vallon:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 144588.

The City of Hillsboro (the "city") received a request for "a copy of the disk that shows illegal activity on city computers within all city departments." You claim that the requested information is excepted from disclosure under sections 552.102 and 552.103 of the Government Code. We have considered the exceptions you raise and have reviewed the information you submitted.¹

As section 552.103 of the Government Code is the more inclusive exception you raise, we address that exception first. Section 552.103, the "litigation exception," provides in relevant part:

- (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature 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.

...

¹You also ask this office to "closely evaluate the content of the material to determine whether reproduction or disclosure of these disks would constitute a violation of criminal law." Chapter 552 of the Government Code does not authorize this office to make such determinations. See Gov't Code § 552.306.

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body that raises section 552.103 has the burden of providing relevant facts and documents that are sufficient to establish the applicability of the exception to the information that the governmental body seeks to withhold. To sustain this burden, the governmental body must demonstrate that: (1) litigation was pending or reasonably anticipated on the date that the governmental body received the written request for information and (2) the requested information is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App. – Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App. – Houston [1st Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 at 4 (1990). Both elements of the test must be established in order for information to be excepted from disclosure under section 552.103. *Id.*

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To establish that litigation is reasonably anticipated, the governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *Id.* Among other examples, this office has concluded that litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission (“EEOC”), *see* Open Records Decision No. 336 (1982); (2) hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and (3) threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

In this instance, you inform this office that the city discovered the requested information in the course of investigating improper use of city computers. You explain that “several employees were found to have offensive materials on their computers.” You indicate that the city discharged those employees and preserved the materials in question on computer disks, as “the former City Manager was concerned about the potential for future litigation arising from the separation of the affected employees.” You state that “[t]he threat of litigation was eminent [sic] and the disks were preserved as evidence in the event a lawsuit was filed by the aggrieved employees.” We have considered these arguments. We note, however, that you do not assert that the requested information relates to any litigation that was pending or reasonably anticipated on the date of the city’s receipt of the request for the information. Therefore, we conclude that the city has not demonstrated that the information in question is excepted from disclosure under section 552.103. *See* Gov’t Code § 552.103(c); Open Records Decision Nos. 518 at 5 (1989) (mere chance that litigation may ensue will not trigger litigation exception), 328 at 2 (1982) (litigation exception requires concrete evidence that possibility of litigation is more than mere conjecture).

You also raise section 552.102 of the Government Code, which excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]” Gov’t Code § 552.102(a). The privacy that section 552.102(a) provides to personnel records corresponds to the protection that section 552.101 provides in conjunction with the common law right to privacy. See *Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information must be withheld under section 552.101 in conjunction with common law privacy 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. Employee privacy under section 552.102(a) is narrower than common law privacy under section 552.101, however, because of the greater legitimate public interest in matters involving public employees. See *Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref’d n.r.e.); Open Records Decision Nos. 473 at 3 (1987), 444 at 3-4 (1986), 423 at 2 (1984). Generally, section 552.102(a) protects employee information from disclosure only when that information reveals “intimate details of a highly personal nature.” See Open Records Decision No. 423 at 2 (1984).

In raising section 552.102, you contend that as “the material on the disks is clearly not job related, it can be presumed to be of a personal nature, the disclosure of which was certainly not contemplated by the employees.” You acknowledge, however, that “the disks in question became part of the personnel records of the employees who were the primary users of the computer.” You also indicate that the disks contain information that city employees had stored in city computers. In light of these representations, we find that the public has a legitimate interest in the information at issue, even if that information may be intimate or embarrassing to the individuals involved. We therefore conclude that the requested information is not excepted from disclosure under section 552.102 and must be released. See Open Records Decision Nos. 405 at 2 (1983) (stating that information relating to manner in which public employee performed his or her job cannot be said to be of minimal public interest), 423 at 2 (1984) (stating that information may not be withheld under section 552.102 if it is of sufficient legitimate public interest, even if person of ordinary sensibilities would object to release on grounds that information is highly intimate or embarrassing), 444 at 5 (1986) (stating that public has legitimate interest in knowing reasons for dismissal, demotion, or promotion of a public employee).

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days.

Id. § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

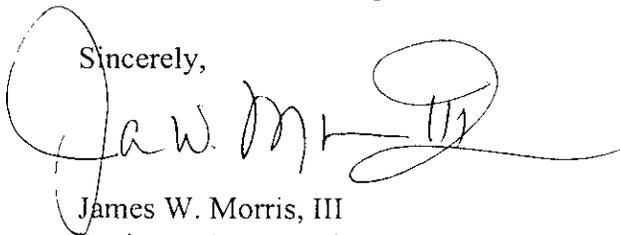
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(c).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "James W. Morris, III". The signature is written in a cursive style with a large initial "J" and "M".

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/er

Ref: ID# 144588

Encl: Submitted information

cc: Mr. Chad Murray
c/o Lauralee Vallon
(w/o enclosures)