



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

April 8, 2003

Mr. Mike McEntire
City Attorney
City of Roanoke
201 Bowie Street
Roanoke, Texas 76262

OR2003-2371

Dear Mr. McEntire:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 178984.

The City of Roanoke (the "city") received three requests for information relating to the police chief and various other matters. The first request is for (1) complaints filed against the police chief by current and past employees of his department; (2) a list of all employees of the police department for the past six months; and (3) a list of all police department employees who have been paid, and how much, for the past six months. The second request is for (1) the names of any employees who have filed charges or complaints against another employee since January 1, 2002; (2) a list of employees who have left city employment since May 1, 2002; (3) detailed billing statements for cell phones used by/assigned to three named individuals from May 1, 2002 to the date of the request; and (4) a copy of the police chief's current contract. The third request is for a formal complaint filed against the police chief and any responses or communications related to the complaint. You inform us that the city has released most of the requested information. You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, and 552.108 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted.

As sections 552.103 and 552.108 of the Government Code are the more inclusive exceptions you claim, we will address them first. Section 552.103, "the litigation exception," provides in 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.

...

(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). The governmental body has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information *and* (2) that the information at issue 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 met 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, a 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).

You assert that section 552.103 is applicable in this instance because the submitted information relates to potential civil causes of action and possible criminal liability. You do not inform us, however, that the submitted information relates to any civil or criminal litigation that was pending when the city received these requests for information. Likewise, you do not inform us that the information at issue relates to any civil or criminal litigation that the city reasonably anticipated when it received these requests. Therefore, we conclude that you have not demonstrated that the submitted information is excepted from disclosure

under section 552.103. *See also* Open Records Decision Nos. 452 at 4 (1986) (section 552.103 requires concrete evidence showing that claim that litigation may ensue is more than mere conjecture), 331 at 1-2 (1982) (mere chance of litigation not sufficient to trigger section 552.103).

You also seek to withhold the submitted information under section 552.108 of the Government Code. Section 552.108(a)(1) excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain, if the requested information does not supply an explanation on its face, how and why section 552.108 is applicable to the information. *See Gov’t Code § 552.301(e)(1)(A); Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986).

You state that the submitted information relates to a matter that has been turned over to the city’s law enforcement agency and an outside investigation agency. You indicate that the matter is the subject of an ongoing investigation. You do not inform us, however, of the specific nature of the investigation. Section 552.108(a)(1) is applicable only if the release of requested information would interfere with the detection, investigation, or prosecution of *crime*. *See Gov’t Code § 552.108(a)(1); Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases). Section 552.108 is not applicable to information that relates to an administrative investigation that did not result in a criminal investigation or prosecution. *See Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.—El Paso 1992, *writ denied*) (statutory predecessor not applicable to internal investigation that did not result in criminal investigation or prosecution). You state that “[t]he ongoing investigation could result in a determination that criminal charges be brought under Texas Penal Code Section 39.03(a)(3), as further defined in Section 39.03(a).” However, you do not inform us that the submitted information in fact relates to an investigation of alleged or suspected criminal conduct. Likewise, you do not inform us that the information at issue relates to an administrative investigation that has resulted in a criminal investigation or prosecution. Therefore, having considered your representations and reviewed the submitted information, we conclude that you have not demonstrated that this information is excepted from disclosure under section 552.108.

You also raise sections 552.101 and 552.102 of the Government Code. Section 552.101 excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” You claim that section 552.101 is applicable to the submitted information in conjunction with the doctrine of false light privacy. We note, however, that false light privacy is not an actionable tort in Texas. *See Cain v. Hearst Corp.*, 878 S.W.2d 577, 579 (Tex. 1994). Thus, information may not be withheld from the public merely because its release might place an individual in a false light. *See Open Records Decision No. 579* (1990).

Section 552.102 excepts from public 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). This exception is applicable to information that relates to public officials and employees. *See* Open Records Decision No. 327 at 2 (1982) (anything relating to employee’s employment and its terms constitutes information relevant to person’s employment relationship and is part of employee’s personnel file). The test of privacy under 552.102(a) is the same as the test under section 552.101 in conjunction with common-law privacy. *See Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 551 (Tex. App.—Austin 1983, writ ref’d n.r.e.). Common-law privacy protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, *and* (2) of no legitimate public interest. *See Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Because of the greater legitimate public interest in information that relates to public employees, privacy under section 552.102(a) is confined to information that reveals “intimate details of a highly personal nature.” *See Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d at 549-51; *see also* Open Records Decision Nos. 470 at 4 (1987) (public employee’s job performance does not generally constitute that individual’s private affairs), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of governmental employees, particularly those involved in law enforcement), 423 at 2 (1984) (statutory predecessor to section 552.102 applicable when information would reveal intimate details of highly personal nature), 400 at 5 (1983) (statutory predecessor to section 552.102 protects information only if release would lead to clearly unwarranted invasion of privacy). Thus, privacy under section 552.102(a) is “very narrow.” *See* Open Records Decision No. 400 at 5 (1983).

In *Morales v. Ellen*, the court applied the common-law right to privacy to information relating to an investigation of alleged sexual harassment. *See* 840 S.W.2d at 521-25. The investigation files at issue in *Ellen* contained third-party witness statements, an affidavit in which the individual accused of the misconduct responded to the allegations, and the conclusions of the board of inquiry that conducted the investigation. *See* 840 S.W.2d at 525. The court upheld the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the disclosure of such documents sufficiently served the public’s interest in the matter. *Id.* The court further held, however, that “the public does 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.*

Thus, if there is an adequate summary of an investigation of alleged sexual harassment, the summary must be released under *Ellen*, but the identities of the victims and witnesses must be redacted, and their detailed statements must be withheld from disclosure. *See also* Open Records Decision Nos. 393 (1983), 339 (1982). If no adequate summary of the investigation exists, all of the information relating to the investigation ordinarily must be released, with the exception of information that would tend to identify the victims and witnesses. In either

case, the identity of the individual accused of sexual harassment is not protected from disclosure. Common-law privacy does not protect information about a public employee's alleged misconduct on the job or complaints made about a public employee's job performance. *See* Open Records Decision Nos. 438 (1986), 405 (1983), 230 (1979), 219 (1978).

We find that *Ellen* is applicable to the submitted information. In this instance, the information at issue does not include an adequate summary of the investigation. Therefore, the submitted information that would tend to identify a victim of or witness to the alleged sexual harassment must be withheld from disclosure under section 552.101 in conjunction with common-law privacy. We have marked the information that the city must withhold. The city must release the rest of the submitted information unless it falls within another exception to disclosure.

Some of the remaining information may be excepted from disclosure under section 552.117 of the Government Code. Section 552.117(2) excepts from disclosure the home address, home telephone number, social security number, and family member information of a peace officer, as defined by article 2.12 of the Code of Criminal Procedure, regardless of whether the peace officer complies with sections 552.024 or 552.1175 of the Government Code. We have marked information that the city must withhold under section 552.117(2) if the information relates to a peace officer.

The city may be required to withhold the marked information under section 552.117(1) if it relates to a current or former civilian official or employee. Section 552.117(1) excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that these specific types of information be kept confidential under section 552.024. Whether a particular item of information is protected by section 552.117 must be determined at the time that the request for the information is received by the governmental body. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the city may only withhold information under section 552.117(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date on which the city received the request for the information. For a current or former official or employee who timely elected to keep his or her personal information confidential, the city must withhold the employee's home address and telephone number, social security number, and any information that reveals whether the employee has family members. The city may not withhold these types of information under section 552.117(1) for a current or former official or employee who did not make a timely election to keep the information confidential. Thus, the city must withhold the marked information under section 552.117(1) if the information pertains to a current or former civilian official or employee who made a timely election under section 552.024 to keep the marked information confidential.

In summary, we have marked information that the city must withhold under section 552.101 of the Government Code in conjunction with common-law privacy. We have marked other information that the city may be required to withhold under section 552.117 of the Government Code. The rest of the submitted information is not excepted from disclosure and must be released.

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).

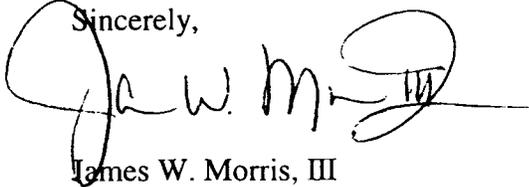
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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(e).

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 Dep't of Pub. 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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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 fluid and cursive, with a large initial "J" and "M".

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

JWM/sdk

Ref: ID# 178984

Enc: Submitted documents

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