



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

July 18, 2003

Ms. Susan C. Rocha
Denton, Navarro, Rocha & Bernal
1700 Tower Life Building
310 South St. Mary's Street
San Antonio, Texas 78205-3111

OR2003-5004

Dear Ms. Rocha:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 184544.

The San Antonio Water System ("SAWS") received a request for all records relating to sexual harassment complaints and investigations. You advise and have provided documentation showing that you sent letters to the requestor on May 12 and May 29, 2003 requesting clarification of the request. *See* Gov't Code § 552.222(b) (stating that if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used). You state that you received a response from the requestor clarifying that he seeks records only for the period of January 1, 1999 to the present. In Open Records Decision No. 663 (1999), this office determined that during the interval in which a governmental body and a requestor communicate in good faith to narrow or clarify a request, the Public Information Act (the "Act") permits a tolling of the statutory ten business day deadline imposed by section 552.301. However, a governmental body's request for clarification or narrowing does not give that governmental body an additional ten full days from the date the requestor responds to the clarification request. Rather, "the ten-day deadline is tolled during the process but resumes, upon receipt of the clarification or narrowing response, on the day that the clarification is received." ORD 663 at 5. In this instance, you do not inform us of the date on which you received the clarification. Therefore, we will assume that you received

it on May 29, 2003, the date of your second request for clarification. You requested a ruling from this office on June 2, 2003. Accordingly, we find that SAWS' request to this office for a ruling was timely.

You advise that you are withholding portions of the records from the time period of January 1, 1999 to July 2, 2001 pursuant to a previous determination issued as Open Records Letter No. 2001-4632 (2001). *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). You claim that some of the remaining requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, and 552.137 of the Government Code.¹ We have considered the exceptions you claim and have reviewed the submitted information. We have also considered written comments submitted by the requestor and four individuals whose personnel information may be responsive to the request for information. *See* Gov't Code § 552.304 (providing that member of public may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

As you point out, this office previously ruled on some of the submitted information in Open Records Letter No. 2003-4269 (2003). In that decision, we ruled that certain information is excepted from disclosure under section 552.107 and Texas Rule of Evidence 503. As the current request seeks in part the identical information previously requested and ruled upon in Open Records Letter No. 2003-4269, and you indicate that the law, facts, and circumstances have not changed, we conclude you may rely on that ruling as a previous determination and withhold the information that this office ruled is excepted from disclosure under section 552.107 and Rule 503 in accordance with that decision. *See* Open Records Decision No. 673. Therefore, we do not address your remaining arguments in relation to this information.

We note that some of the submitted documents in Tabs 3 and 4 fall within the scope of section 552.022 of the Government Code. Section 552.022 provides in relevant part that:

the following categories of information are public information and are not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

¹ Although you also raise section 552.108, you do not submit arguments in support of a claim under section 552.108. Therefore, you have waived any claim of exception from disclosure under this section of the Government Code. Gov't Code §§ 552.301, .302; *see* Open Records Decision Nos. 586 (1991) (governmental body may waive section 552.108).

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body.

Gov't Code § 552.022(a)(3) (emphasis added). Therefore, the information we have marked as being subject to section 552.022(a)(3) must be released to the requestor unless it is confidential under other law. Section 552.103 is a discretionary exception under the Act and is, therefore, not "other law" that makes the information at issue confidential. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.--Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential). Therefore, you may not withhold any of the information that is subject to section 552.022 from disclosure under section 552.103 of the Government Code.

We now turn to your claim under section 552.103 of the Government Code in relation to the information not subject to section 552.022. Section 552.103 provides as follows:

(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). A governmental body that raises section 552.103 has the burden of providing relevant facts and documents sufficient to establish the applicability of the exception to the information that it seeks to withhold. To show that the litigation exception is applicable, a governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request and (2) the information at issue is related to that litigation. *See Gov't Code § 552.103(a), (c); see also University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *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).

You indicate that Tab 3, for which you claim section 552.103, relates to charges that have been filed with the EEOC alleging discrimination by SAWS, and you have submitted the relevant notice form. *See* Open Records Decision No. 336 (1982) (litigation was reasonably anticipated where opposing party filed complaint with the EEOC). Based on your representations and the information you provided, we find that SAWS has established that civil litigation was anticipated when it received this request for information. Further, we conclude that you have demonstrated that the information in Tab 3 relates to the anticipated litigation for purposes of section 552.103.

We note, however, that once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, any information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and must be disclosed.² Otherwise, SAWS may withhold the information in Tab 3 that is not subject to section 552.022 under section 552.103.

You also claim that portions of the submitted information in Tabs 1, 2, and 4 are excepted under section 552.101 of the Government Code. Section 552.101 protects “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Section 552.101 encompasses the doctrine of common-law privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App. – El Paso 1992, writ denied), the court applied the common-law right to privacy to an investigation of allegations of sexual harassment. 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 id.* 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.* In accordance with *Ellen*, with respect to investigations of sexual harassment, this office typically has required the release of a document analogous to the conclusions of the board of inquiry in *Ellen*, but has held that a governmental body must

² Further, the applicability of section 552.103(a) ends once the litigation has been concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

withhold both the identities of victims and witnesses of alleged sexual harassment and any information that would tend to identify such a victim or witness. *See also* Open Records Decision Nos. 393 (1983), 339 (1982).

Upon review of the submitted information, we find that the memorandum dated December 7, 2001 contained in the documents submitted as Tab 1 constitutes an adequate summary of the investigation into the relevant sexual harassment complaint. We conclude that the release of this memorandum serves the legitimate public interest in the harassment allegations. Based on *Ellen*, however, we agree that SAWS must withhold the identities of the alleged victim and witnesses from the information that must be released. We note, though, that the identity of the individual accused of sexual harassment is not protected from public disclosure, as common-law privacy does not protect information about a public employee's alleged misconduct on the job or complaints made about the employee's job performance. *See* Open Records Decision Nos. 438 (1986), 230 (1979), 219 (1978). In addition, some of the individuals whose identities you have highlighted within the summary are not witnesses in the sexual harassment investigation but rather, were acting solely in a supervisory capacity. Thus, you may not withhold information identifying these individuals. We have marked the identities of the victim and witnesses that you must withhold. Because the redacted memorandum adequately serves the public interest in the information at issue, we further conclude that the additional related documents in Tab 1 are excepted from disclosure under section 552.101 in conjunction with the common-law right to privacy. On the other hand, the information in Tab 2 and the information in Tab 4 that is not subject to the previous determination in Open Records Letter No. 2003-4269 does not contain adequate summaries of the investigations of the relevant sexual harassment complaints. Accordingly, we find that you must withhold the identities of alleged victims and witnesses in these investigations throughout the documents at issue under section 552.101 and common-law privacy. We have marked this information. The remaining information at issue in Tabs 2 and 4 must be released, except as noted below.

The documents in Tab 2 contain the social security number of a former SAWS employee. Section 552.117(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who timely request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, SAWS may only withhold the social security numbers under section 552.117 on behalf of the former employee if he made a request for confidentiality under section 552.024 prior to the date on which the request for this information was received by SAWS. SAWS may not withhold this information under section 552.117 if the former employee did not make a timely election to keep this information confidential.

In relation to this social security number, as well as another social security number that does not appear to belong to a current or former SAWS employee, we note that a social security number that is not otherwise excepted from disclosure under section 552.117 might nevertheless be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I).³ *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that the social security numbers are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 of the Act on the basis of that federal provision. We caution, however, that section 552.352 of the Act imposes criminal penalties for the release of confidential information. Prior to releasing the social security numbers, you should ensure that they were not obtained or are not maintained pursuant to any provision of law enacted on or after October 1, 1990.

Finally, the submitted information in Tab 4 contains a personal e-mail address that is excepted from disclosure under section 552.137 of the Government Code. Section 552.137 provides that “[a]n e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act].” *See* Gov’t Code § 552.137(a). As there is no indication that the individual to whom the e-mail address belongs has consented to its release, SAWS must withhold each instance of the e-mail address that we have marked under section 552.137 of the Government Code. *See* Gov’t Code § 552.137(b) (confidential information described by this section that relates to member of the public may be disclosed if member of public affirmatively consents to its release).

In summary, SAWS may rely on Open Records Letter No. 2003-4269 as a previous determination in withholding the information that this office previously ruled is excepted from disclosure under section 552.107 and Rule of Evidence 503. The information in Tab 3 that is not subject to section 552.022 may be withheld under section 552.103. SAWS must withhold the identities of an alleged sexual harassment victim and witnesses that we have marked in the memorandum dated December 7, 2001 in Tab 1 under section 552.101 and common-law privacy, and must release the remaining information in the memorandum. The remaining information in Tab 1 must be withheld under section 552.101 and common-law privacy. SAWS must withhold the identities of alleged victims and witnesses that we have marked in Tabs 2 and 4 under section 552.101 and common-law privacy. A former SAWS employee’s social security number must be withheld under section 552.117 if he made a timely election under section 552.024 to keep this information confidential. Otherwise, the social security number and the social security number of another individual may be excepted under section 552.101 in conjunction with the federal Social Security Act. SAWS must

³ Section 552.101 also encompasses information made confidential by statute.

withhold the private e-mail address that we have marked under section 552.137. The remaining submitted information 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).

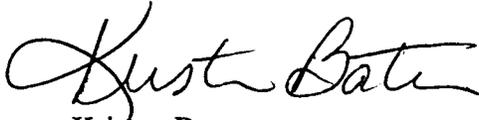
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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 that reads "Kristen Bates". The signature is written in a cursive, flowing style.

Kristen Bates
Assistant Attorney General
Open Records Division

KAB/lmt

Ref: ID# 184544

Enc. Submitted documents

c: Mr. Brian Collister
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(w/o enclosures)