



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 29, 2003

Mr. Brad Norton  
Assistant City Attorney  
City of Austin - Law Department  
P.O. Box 1546  
Austin, Texas 78767-1546

OR2003-6102

Dear Mr. Norton:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 186883.

The City of Austin (the "city") received a written request for all records pertaining to any complaints filed against a named city employee.<sup>1</sup> You contend that the requested information is exempted from required disclosure pursuant to sections 552.101, 552.102, and 552.103 of the Government Code.

Because your section 552.103 claim is the most inclusive, we will address it first. Section 552.103 of the Government Code is known as the "litigation" exception. A governmental body has the burden of providing relevant facts and documents to show that section 552.103 is applicable in a particular situation. Under section 552.103(a) and (c), the test for meeting this burden is a showing that (1) litigation involving the governmental body is pending or reasonably anticipated on the date the governmental body received the records request, and (2) the information at issue is related to that litigation. *See also University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997,

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<sup>1</sup>Although the requestor also seeks the results of any criminal background check the city performed on the employee, you inform us that no such records exist. The Public Information Act (the "Act") does not require a governmental body to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986). Nor does the Act require a governmental body to obtain new information in order to comply with a request. Open Records Decision No. 561 (1990).

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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103.

You contend that the requested information relates to reasonably anticipated litigation involving the city. The mere chance of litigation will not trigger section 552.103. Open Records Decision No. 452 at 4 (1986). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); 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 threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4.

In this instance, you have provided this office with the following representations:

the requestor's letter states that the requestor is an attorney who represents an employee who has made [a] complaint of sexual harassment [against the named employee]. Immediately after delivering her attorney's letter, the requestor's client went to the City's Human Resources Department. She informed City staff that she did not want to speak to the City investigators but wanted to file a complaint regarding sexual harassment with the Texas Commission on Human Rights (TCHR) and the U.S. Equal Employment Opportunity Commission (EEOC). HRD staff informed the employee that she could file a complaint with TCHR and EEOC by speaking to the Austin Human Rights Commission (AHRC) staff located only a short distance away on the same floor. The HRD employee who had provided the information regarding an individual's ability to file a complaint with EEOC and/or TCHR by speaking with the AHRC then observed the employee walk over to the AHRC intake desk.

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AHRC is a local deferral agency with responsibility for enforcement of the Texas Commission on Human Rights Act as well as Title VII and the federal Fair Housing Act. AHRC does not investigate complaints against the City of Austin, but takes a complaint and forwards it to one or both of the other agencies (TCHR or EEOC).

We conclude that the above representations do not establish that a complaint has been filed with either the TCHR or the EEOC. Furthermore, you have not established from the totality of the circumstances that the city reasonably anticipated litigation on the date the city received the current records request. We therefore conclude that you have not met your burden under section 552.103 and that the city may not withhold any of the submitted information under that exception.

You also contend that portions of the submitted documents are excepted from public disclosure pursuant to section 552.101 of the Government Code in conjunction with the common-law right of privacy. Section 552.101 protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," including information coming within the common-law right of privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976) (common-law privacy protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and is of no legitimate concern to the public).

The submitted documents consist of tape recordings of witness interviews, witness statements, and investigator notes concerning a sexual harassment complaint. In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the court addressed 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 are exactly the types 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. *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, noting that the public interest in the matter was sufficiently served by disclosure of such documents and that in that particular instance "the public [did] not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements." *Id.*

In this instance, however, after reviewing the documents you submitted to this office, we conclude that none of the documents at issue consist of an adequate summary of the investigation. We therefore conclude that the city must withhold pursuant to common-law privacy the identities of the interviewed witnesses, whose privacy interests are implicated here. We generally agree that the information you have marked as being excepted from public disclosure must be withheld pursuant to section 552.101, and we have marked additional information that must be withheld under this exception in accordance with *Ellen*. We note, however, that the requestor has a special right of access to the alleged victim's identity contained in those documents, *see* Gov't Code § 552.023, and that the city must release the identity of the accused in all of the submitted documents in accordance with *Ellen*. The remaining portions of the submitted documents must be released to the requestor. However, because the submitted tape recordings of witness interviews would necessarily reveal the identities of the witnesses, we conclude that the submitted tape recordings must be withheld in their entirety pursuant to section 552.101.<sup>2</sup>

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,

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<sup>2</sup>Because we resolve this aspect of your request under section 552.101, we need not address the applicability of section 552.102 of the Government Code, which generally protects the same common-law privacy interests of governmental employees as section 552.101.

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,



Sarah I. Swanson  
Assistant Attorney General  
Open Records Division

SIS/RWP/seg

Ref: ID# 186883

Enc: Submitted documents and tape recordings

c: Adrian Jonrowe  
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(w/o enclosures)