



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 23, 2006

Ms. Alison Holland
Olson & Olson L.L.P.
2727 Allen Parkway, Suite 600
Houston, Texas 77019

OR2006-00744

Dear Ms. Holland:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 240539.

The City of Sealy (the "city"), which you represent, received three requests for (1) personnel and disciplinary records relating to the police chief, including information relating to employee complaints and the chief's suspension; (2) information relating to the retention of a private investigation firm and an investigation involving the city police department, including the investigative report; and (3) correspondence involving a former employee of the police department and the city manager. You inform us that the city has released some of the requested information. You claim that other responsive information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.108, 552.111, 552.117, 552.1175, and 552.137 of the Government Code.¹ We have considered the exceptions you claim and have reviewed the information you submitted. We also have considered the comments we received from one of the requestors. See Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

¹We note that section 552.024 of the Government Code, which you also raised, is not an exception to public disclosure under the Act. Instead, this section permits a current or former official or employee of a governmental body to request that certain personal information be withheld from the public under section 552.117 of the Government Code. See Gov't Code § 552.024.

We first note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a)(1) provides that a “completed report, audit, evaluation, or investigation made of, for, or by a governmental body” is subject to required public disclosure, unless the information is excepted from disclosure under section 552.108 or expressly confidential under other law. Gov’t Code § 552.022(a)(1). Section 552.022(a)(3) provides for required public disclosure of “information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body,” unless the information is expressly confidential under other law. *Id.* § 552.022(a)(3). In this instance, the submitted information includes a completed investigation, completed performance evaluations, and a contract relating to the expenditure of public or other funds.

Although the city seeks to withhold the submitted information under section 552.103 of the Government Code, this section is a discretionary exception to disclosure that protects a governmental body’s interests and may be waived. *See* Gov’t Code § 552.007; *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 Gov’t Code § 552.103); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Section 552.103 is not other law that makes information expressly confidential for the purposes of section 552.022. Therefore, the city may not withhold any of the submitted information that is subject to section 552.022(a)(1) or section 552.022(a)(3) under section 552.103 of the Government Code. Sections 552.101, 552.117, 552.1175, and 552.137 of the Government Code are confidentiality provisions, however, for purposes of section 552.022. Therefore, we will consider your arguments under these exceptions with respect to the information that is subject to section 552.022, as well as your claim under section 552.108 of the Government Code.

Section 552.108 excepts from public disclosure “[a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution . . . if . . . the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication[.]” Gov’t Code § 552.108(b)(2). A governmental body that claims an exception to disclosure under section 552.108 must reasonably explain how and why this exception is applicable to the information in question. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). Section 552.108(b)(2) is applicable only if the information in question relates to a concluded criminal case that did not result in a conviction or deferred adjudication.

You state that the submitted information relates to an investigation that did not result in conviction or deferred adjudication. We note, however, that this information pertains to an administrative investigation. Section 552.108 of the Government Code is generally not applicable to records of 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) (addressing statutory predecessor). You do not indicate,

nor does it otherwise appear to this office, that the administrative investigation to which the submitted information pertains resulted in a criminal investigation or prosecution. We therefore conclude that the city may not withhold any of the submitted information under section 552.108 of the Government Code.

With respect to the information that is not subject to section 552.022 of the Government Code, we address your claim under section 552.103. This exception 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.

(b) For purposes of this section, the state or a political subdivision is considered to be a party to litigation of a criminal nature until the applicable statute of limitations has expired or until the defendant has exhausted all appellate and postconviction remedies in state and federal court.

(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 governmental body that raises section 552.103 has the burden of providing relevant facts and documents sufficient to establish the applicability of this exception to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. 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.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

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.”²
Id.

You assert that the city reasonably anticipates civil litigation because the submitted information pertains to allegations of a hostile work environment, sexual harassment, and discrimination in the workplace. You state that “[t]he Complainant informed the City . . . that ‘I am fully prepared to take this information and complaint to the next level.’” You also state that a number of employees who witnessed the alleged harassment have stated that they were aggrieved. Additionally, you contend that the submitted information relates to anticipated criminal litigation. We find, however, after considering all of your arguments, that you have not established that the city reasonably anticipated any civil or criminal litigation on the dates of its receipt of these requests for information. *See* Gov’t Code § 552.103(c); Open Records Decision No. 331 (1982) (reasonable anticipation of litigation not established by requestor’s public statements on more than one occasion of intent to file suit). We therefore conclude that the city may not withhold any of the submitted information under section 552.103 of the Government Code.

Next, we address section 552.101 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.” Gov’t Code § 552.101. This exception encompasses information that another statute makes confidential. You raise section 552.101 in conjunction with section 1702.133 of the Occupations Code. Chapter 1702 of the Occupations Code, the Private Security Act, relates to the licensing of investigations companies and security services contractors. Section 1702.133 provides as follows:

(a) A license holder or an officer, director, partner, or manager of a license holder may not disclose to another information obtained by the person for an employer or client except:

(1) at the direction of the employer or client; or

(2) as required by state law or court order.

(b) A license holder or an officer, director, partner, or manager of a license holder shall disclose to a law enforcement officer or a district attorney, or that

²Among 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).

individual's representative, information the person obtains that relates to a criminal offense.

Occ. Code § 1702.133. You assert that information generated for the city by a licensed private security agency is confidential under section 1702.133. We note, however, that section 1702.133 governs the circumstances under which a private security agency may disclose information obtained for its client. *Id.* Section 1702.133 does not address the public disclosure of information held by the client, *i.e.*, the city. In this instance, the submitted information that was generated by the private security agency was provided to and is held by the city. Section 1702.133 does not prohibit the public disclosure of such information when it is in the city's possession or otherwise make information held by the city confidential. We therefore conclude that the city may not withhold any of the submitted information under section 552.101 of the Government Code on the basis of section 1702.133 of the Occupations Code. *See also* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality provision must be express, and confidentiality requirement will not be implied from statutory structure), 649 at 3 (1996) (language of confidentiality provision controls scope of its protection), 478 at 2 (1987) (statutory confidentiality requires express language making certain information confidential or stating that information shall not be released to public).

You also raise section 552.101 of the Government Code in conjunction with the Americans with Disabilities Act of 1990 (the "ADA"). Title I of the ADA provides that information about the medical conditions and medical histories of applicants or employees must be (1) collected and maintained on separate forms, (2) kept in separate medical files, and (3) treated as a confidential medical record. *See* 42 U.S.C. § 12101 *et seq.* Information obtained in the course of a "fitness for duty examination," conducted to determine whether an employee is still able to perform the essential functions of his or her job, is to be treated as a confidential medical record as well. *See* 29 C.F.R. § 1630.14(c); Open Records Decision No. 641 (1996). Furthermore, the federal Equal Employment Opportunity Commission (the "EEOC") has determined that medical information for the purposes of the ADA includes "specific information about an individual's disability and related functional limitations, as well as general statements that an individual has a disability or that an ADA reasonable accommodation has been provided for a particular individual." *See* Letter from Ellen J. Vargyas, Legal Counsel, EEOC, to Barry Kearney, Associate General Counsel, National Labor Relations Board, 3 (Oct. 1, 1997). Having considered your arguments and reviewed the information that you believe is confidential under the ADA, we find that the federal law is not applicable to that information. We therefore conclude that the city may not withhold any of the submitted information under section 552.101 of the Government Code on the basis of the ADA.

Next, we address your claims under section 552.101 and the common law right to privacy. Information must be withheld from the public under section 552.101 in conjunction with common law privacy when the information is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no

legitimate public interest. See *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). 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 alleged 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 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 also 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 investigation summary must be released under *Ellen*, but the identities of the victims of and witnesses to the alleged sexual harassment 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, then all of the information relating to the investigation must ordinarily be released, except for information that would identify the victims and witnesses. In either case, the identity of the individual accused of sexual harassment is not protected from public 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).

In this instance, most of the submitted information relates to an investigation of alleged sexual harassment. We find that *Morales v. Ellen* is applicable to that information. We also note that the information in question includes an adequate summary of the investigation and the statement of the individual who was accused of sexual harassment. However, the investigation summary and the statement contain information that identifies the victim of the alleged sexual harassment and the witnesses in the investigation. The city must withhold the information that identifies the victim and witnesses, along with the rest of the information that relates to the sexual harassment investigation, under section 552.101 of the Government Code in conjunction with common law privacy under *Morales v. Ellen*. We have marked the information that the city must withhold on this basis.³ The remaining information in the summary and statement is not private under *Ellen* and may not be withheld on that basis under section 552.101.

Common law privacy also protects the specific types of information that are held to be intimate or embarrassing in *Industrial Foundation*. See 540 S.W.2d at 683 (information

³As we are able to make this determination, we need not address your claim under section 552.137 of the Government Code.

relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). The identity of a victim of alleged sexual harassment is private under section 552.101 and *Morales v. Ellen*. Common law privacy also protects information compiled by a governmental entity that relates to a particular individual as a possible criminal suspect, arrested person, or defendant, because the compiled information takes on a character that implicates the individual's right to privacy in a manner that the same information in an uncompiled state does not. *See U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989). We have marked additional information that the city must withhold under section 552.101 in conjunction with common law privacy.

You also raise section 552.107 of the Government Code. Section 552.107(1) protects information that comes within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See Open Records Decision No. 676 at 6-7 (2002)*. First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. *See TEX. R. EVID. 503(b)(1)*. The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *See In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element.

Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E)*. Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained.

Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein). You state that the information submitted as Exhibit F is a communication between an attorney for the city and his client that was made in connection with the rendition of professional legal services. You also state that this communication was intended to be and remains confidential. Based on your representations, we conclude that the city may withhold Exhibit F under section 552.107(1) of the Government Code.⁴

Next, we address your claims under sections 552.117 and 552.1175 of the Government Code. Section 552.117(a)(2) excepts from disclosure the home address, home telephone number, and social security number of a peace officer, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer complies with sections 552.024 or 552.1175. Section 552.117(a)(2) adopts the definition of peace officer found at article 2.12 of the Code of Criminal Procedure. To the extent that the information that we have marked under section 552.117 relates to a peace officer employed by the city, that information must be withheld under section 552.117(a)(2).

Section 552.117(a)(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 this information be kept confidential under section 552.024. Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See Open Records Decision No. 530 at 5 (1989)*. Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or employee of a governmental body who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who did not make a timely election under section 552.024 to keep the information confidential. To the extent that the information that we have marked under section 552.117 relates to a current or former city official or employee who timely requested confidentiality for the information under section 552.024, the city must withhold the marked information under section 552.117(a)(1).

Section 552.1175 of the Government Code provides in part:

- (a) This section applies only to:

⁴As we are able to make this determination, we do not address your claim with respect to Exhibit F under section 552.111 of the Government Code.

(1) peace officers as defined by Article 2.12, Code of Criminal Procedure[.]

(b) Information that relates to the home address, home telephone number, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

(1) chooses to restrict public access to the information; and

(2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Gov't Code § 552.1175(a)-(b). The city must withhold the information that we have marked under section 552.1175 if it is the home telephone number of a peace officer of another governmental entity and if the officer elects to restrict access to the information in accordance with section 552.1175(b).

We note that the submitted documents contain a social security number. Section 552.147 of the Government Code provides that "[t]he social security number of a living person is excepted from" required public disclosure under the Act.⁵ The city must withhold the social security number that we have marked under section 552.147.

Lastly, we address section 552.130 of the Government Code.⁶ Section 552.130 excepts from disclosure information that relates to a motor vehicle operator's or driver's license or permit issued by an agency of this state[.] See Gov't Code § 552.130(a)(1). We have marked Texas driver's license information that the city must withhold under section 552.130.

In summary: (1) the city must withhold the marked information that is confidential under section 552.101 of the Government Code in conjunction with common law privacy on the basis of *Morales v. Ellen*; (2) the city also must withhold the other marked information that is protected by common law privacy under section 552.101; (3) the city may withhold the marked information that is protected by the attorney-client privilege under section 552.107(1)

⁵We note that section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

⁶Unlike other exceptions to disclosure, this office will raise section 552.130 on behalf of a governmental body, as it is a mandatory exception and may not be waived. See Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

of the Government Code; (4) the information marked under section 552.117 of the Government Code must be withheld under section 552.117(a)(2) to the extent that it relates to a peace officer employed by the city; (5) the information marked under section 552.117 must be withheld under section 552.117(a)(1) to the extent that it relates to a current or former city official or employee who timely requested confidentiality for the information under section 552.024; (6) the information marked under section 552.1175 of the Government Code must be withheld if it is the home telephone number of a peace officer of another governmental entity who elects to restrict access to the information in accordance with section 552.1175(b); (7) the city must withhold the marked social security number under section 552.147 of the Government Code; and (8) the marked Texas driver's license information must be withheld under section 552.130 of the Government Code. The rest of the 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).

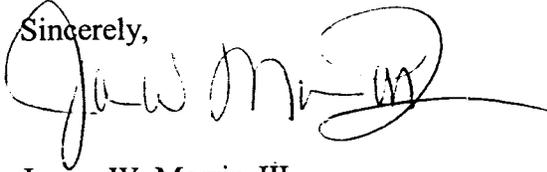
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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,



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

JWM/sdk

Ref: ID# 240539

Enc: Submitted documents

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