



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 4, 2008

Mr. Christopher Gregg  
Gregg & Gregg  
16055 Space Center Boulevard, Suite 150  
Houston, Texas 77062

OR2008-15070

Dear Mr. Gregg:

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# 326833.

The City of Webster (the "city"), which you represent, received a request for "all sustained Internal Affairs complaints filed and disciplinary action taken related [to a named individual] from June 1, 2008 to [the] present." You claim that the requested information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that a portion of the submitted information is subject to a previous ruling issued by this office. On October 10, 2008, this office issued Open Records Letter No. 2008-13988 (2008), in which we ruled that the city must withhold some of the information at issue under sections 552.101 and 552.117 and must release the remaining information. You do not inform us that the pertinent facts and circumstances have changed since the issuance of that prior ruling. Thus, we determine that the city must continue to rely on our ruling in Open Records Letter No. 2008-13988 as a previous determination and withhold or release the requested information in accordance with that decision. *See* Open Records Decision No. 673 (2001) (governmental body may rely on previous determination when the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D); the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general; the prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Act; and the law, facts, and circumstances on which the prior ruling was based have not changed since the issuance of the ruling).

You assert that the remaining submitted information, which consists of a memorandum regarding disciplinary action, is subject to section 552.103, which provides in relevant part 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). The city has the burden of providing relevant facts and documents to show that the section 552.103 exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date that the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. 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). The city must meet both prongs of this test for information to be excepted under section 552.103.

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See 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. *See* Open Records Decision No. 555 (1990); *see also* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that, if an individual publicly threatens to bring suit against a governmental body but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983).

In this instance, you provide this office with a complaint letter from three city employees who claim that they were sexually harassed by the individual named in the present request

for information. This letter states that these employees "may seek an alternative resolution" if their complaints are not addressed, and you inform this office that the requestor is an attorney hired by these employees. However, beyond a general statement that the city anticipates litigation in this instance based on the correspondence from the employees and their representation by the requestor, you have failed to demonstrate that any individual has taken an objective step towards filing suit against the city. *See* ORD Nos. 331, 361. Accordingly, we conclude that you have failed to establish by concrete evidence that the city reasonably anticipated litigation in this instance.

You also assert that the city anticipates litigation because the named individual has not exhausted his administrative remedies regarding the disciplinary action taken, and that the individual still has a right to appeal the disciplinary action. This office has held that "litigation" within section 552.103 includes contested cases conducted in a quasi-judicial forum. *See, e.g.*, Open Records Decision Nos. 474 (1987), 368 (1983), 336, 301 (1982). For instance, this office has held that cases conducted under the Texas Administrative Procedure Act, chapter 2001 of the Government Code, are "litigation" for purposes of section 552.103. *See, e.g.*, Open Records Decision Nos. 588 (1991) (former State Board of Insurance proceeding), 301 (1982) (hearing before Public Utilities Commission). This office has focused on the following factors in determining whether an administrative proceeding is conducted in a quasi-judicial forum: 1) whether the dispute is, for all practical purposes, litigated in an administrative proceeding where (a) discovery takes place, (b) evidence is heard, (c) factual questions are resolved, and (d) a record is made; and 2) whether the proceeding is an adjudicative forum of first jurisdiction, *i.e.*, whether judicial review of the proceeding in district court is an appellate review and not the forum for resolving a controversy on the basis of evidence. *See* Open Records Decision No. 588 (1991). However, you have not provided this office with the city's rules regarding its procedures concerning appeals filed by city employees, nor have you explained how these procedures amount to "litigation" for purposes of section 552.103. Therefore, we cannot determine whether such a proceeding is conducted in a quasi-judicial forum. Consequently, we have no basis on which to determine whether litigation was anticipated at the time of the request.

Accordingly, we find that the city did not reasonably anticipate litigation on the date the request for information was received; therefore no information may be withheld under section 552.103.

You also assert that the information at issue is excepted from disclosure pursuant to section 552.101 of the Government Code "in conjunction with . . . various other state and federal statutes[.]" 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 section encompasses information protected by other statutes. However, you have not directed our attention to any state or federal statute, nor are we aware of any such statute, that makes the submitted information confidential. *See, e.g.*, Open Records Decision No. 478 at 2 (1987) (statutory confidentiality).

We understand you to raise section 552.101 in conjunction with the common-law right of privacy, which protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public.<sup>1</sup> *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976).

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 investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *Ellen*, 840 S.W.2d at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the public's interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held that "the public did 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*, along with the statement of the accused, but the identities of the victims and witnesses of the alleged sexual harassment must be redacted, and their detailed statements must be withheld from disclosure. *See Open Records Decision Nos. 393 (1983), 339 (1982).*

The memorandum at issue pertains to an investigation into a sexual harassment allegation, but the submitted information does not contain an adequate summary of the investigation. Therefore, the memorandum is not confidential in its entirety under common-law privacy. The memorandum at issue also does not contain any information that identifies the victims and witnesses of the alleged sexual harassment. Thus, no portion of the memorandum is confidential under the common-law right to privacy and it may not be withheld under section 552.101 of the Government Code on that basis. *See Ellen*, 840 S.W.2d at 525.

In summary, the city must continue to rely on our ruling in Open Records Letter No. 2008-13988 as a previous determination and withhold or release the requested information in accordance with that decision. The remaining 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

---

<sup>1</sup>Section 552.101 also encompasses the doctrine of common-law privacy.

governmental body wants to challenge this ruling, the governmental body must file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3). If the governmental body does not file suit over 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).

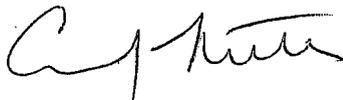
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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 challenge 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,



Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/jh

Ref: ID# 326833

Enc. Submitted documents

c: Mr. Christian Samuelson  
Samuelson Law Firm  
955 Gemini  
Houston, Texas 77058  
(w/o enclosures)