



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 14, 2009

Mr. Jerry Wallace
Blanco, Ordonez & Wallace, P.C.
5715 Cromo Drive
El Paso, Texas 79912

OR2009-04910

Dear Mr. Wallace:

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# 339810.

The City of Socorro (the "city"), which you represent, received a request for any complaints made by a named former employee from January 2006 to the present and any complaints made against the named employee filed between 2003 to the present. You claim the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we note the submitted information includes copies of the minutes of civil service commission (the "commission") meetings. The notices, agendas, and minutes of a governmental body's public meetings are specifically made public under the Open Meetings Act, chapter 551 of the Government Code. *See id.* § 551.022 (minutes and tape recordings of open meeting are public records and shall be available for public inspection and copying on request to governmental body's chief administrative officer or officer's designee). As a general rule, the exceptions to disclosure found in the Act are not applicable to information that other statutes make public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Therefore, the commission meeting minutes we have marked must be released pursuant to section 551.022 of the Government Code.

Next, we note some of the submitted information is made expressly public under section 552.022 of the Government Code, which provides, in relevant part, as follows:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The submitted information contains a completed report, completed evaluation, and completed investigations. Although you seek to withhold the report, evaluation, and investigations under section 552.103 of the Government Code, that section is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See id.* § 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); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 473 (1987) (governmental body may waive section 552.103). As such, section 552.103 is not other law that makes information expressly confidential for the purposes of section 552.022, and the report, evaluation, and investigations we have marked may not be withheld under section 552.103. However, some of the information subject to section 552.022 is also subject to sections 552.101, 552.117, and 552.137 of the Government Code.¹ These sections are other laws for the purposes of section 552.022, and we will address whether they apply to the information subject to section 552.022.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses the common-law right of privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. This office has found personal financial information not relating to a financial transaction between an individual and a governmental body is generally intimate and embarrassing. *See* Open Records Decision Nos. 600 (1992), 545 (1990) (attorney general has found kinds of financial information not excepted from public disclosure by common-law privacy to be generally those regarding receipt of governmental funds or debts owed to governmental entities), 523 (1989) (information related to an

¹The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

individual's mortgage payments, assets, bills, and credit history is excepted from disclosure under the common-law right to privacy). In addition, this office has found medical information or information indicating disabilities or specific illnesses is excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps).

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.* at 525. In concluding, the *Ellen* court held "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*, 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). However, when no adequate summary exists, detailed statements regarding the allegations must be released, but the identities of witnesses and victims must still be redacted from the statements. In either case, the identity of the individual accused of sexual harassment is not protected from public disclosure. We note supervisors are generally not witnesses for purposes of *Ellen*, except where their statements appear in a non-supervisory context.

In this instance, we find one of the completed investigations relates to a sexual harassment investigation. We find this investigation contains an adequate summary of the investigation and a statement of the accused. The summary and statement of the accused are not confidential; however, information within the summary and statement identifying the victim and witness must be redacted and the rest of the sexual harassment investigation must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy. *See Ellen*, 840 S.W.2d at 525. The city must also withhold the information we have marked in the other completed investigations under section 552.101 in conjunction with common-law privacy.

Portions of the remaining information subject to section 552.022 are subject to section 552.117 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 section 552.024 or 552.1175 of the Government

Code. Gov't Code § 52.117(a)(2). Section 552.117(a)(2) adopts the definition of peace officer found at article .12 of the Code of Criminal Procedure. However, we are unable to determine from the information provided whether the individuals whose information is at issue are currently licensed peace officers. To the extent the individuals at issue are currently licensed peace officers as defined by article 2.12, the city must withhold the information we have marked under section 552.117(a)(2) of the Government Code.

If the individuals are not currently licensed peace officers, section 552.117(a)(1) may apply to the information at issue. Further, some of the information subject to section 552.022 contains personal information of city employees and may also be subject to section 552.117(a)(1). Section 552.117(a)(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 request this information be kept confidential under section 552.024 of the Government Code. *Id.* § 552.117(a)(1). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 30 at 5 (1989). The city may only withhold the information at issue under section 552.117(a)(1) if the individuals in question elected confidentiality under section 52.024 prior to the date on which the request for this information was made. If the individuals made a timely election under section 552.024, the city must withhold the information we have marked under section 552.117(a)(1). If the employees did not make a timely election under section 552.024, the information at issue may not be withheld under section 552.117(a)(1) of the Government Code.

Next, we note the remaining information subject to section 552.022 includes an e-mail address subject to section 552.137 of the Government Code, which excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body," unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). Gov't Code § 552.137(a)-(c). The e-mail address in the remaining information is not specifically excluded by section 552.137(c). As such, this e-mail address, which we have marked, must be withheld under section 552.137, unless the owner of the address has affirmatively consented to its release. *See id.* § 552.137(b).

Next, we address your claim under section 552.103 with respect to the information not subject to section 552.022. Section 552.103 of the Government Code 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). The governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date 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 governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

This office has stated that a pending complaint with the Equal Employment Opportunity Commission (the "EEOC") indicates litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982). You have submitted information which establishes that, prior to the city's receipt of the request for information, the employee at issue filed discrimination complaints with the EEOC against the city. Based on your representations and our review of the submitted documents, we find you have demonstrated litigation was reasonably anticipated when the city received the request for information. Our review of the information at issue also shows that it is related to the anticipated litigation for purposes of section 552.103(a). Thus, section 552.103 is generally applicable to the submitted information.

We note, however, the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to the litigation to obtain such information through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). Thus, when the opposing party has seen or had access to information relating to anticipated litigation, through discovery or otherwise, there is no interest in withholding that information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). In this instance, communications seen or accessed by the opposing party in the anticipated litigation are included among the submitted information. Thus, the opposing party to the anticipated litigation has already seen or had access to this particular information. As such, the city may not withhold this information, which we have marked for release, under section 552.103. We further note the applicability of section 552.103 ends once the related litigation concludes or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). Accordingly, with the exception of the communications we have

marked that the opposing party has seen or had access to, the city may withhold the information not subject to section 552.022 under section 552.103.

In summary, the commission meeting minutes we have marked must be released pursuant to section 551.022 of the Government code. With the exception of the summary of the investigation and the statement of the accused, the completed sexual harassment investigation must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy. In releasing the summary and statement, the city must redact the identifying information of the sexual harassment victim and witness. The completed report, evaluation, and remaining investigation we have marked must generally be released under section 552.022(a)(1) of the Government Code. However, within these documents, the city must withhold (1) the information we have marked under section 552.101 in conjunction with common-law privacy, (2) the personal information we have marked under section 552.117(a)(2) to the extent the individuals at issue are currently licensed peace officers, (3) the personal information we have marked under section 552.117(a)(1) to the extent the individuals at issue made timely elections under section 552.024, and (4) the e-mail address we have marked under section 552.137 to the extent the owner of the address has not affirmatively consented to its release. Except for the information to which the opposing party had access, which we have marked for release, the city may withhold the remaining information under section 552.103 of the Government Code.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Emily Sitton
Assistant Attorney General
Open Records Division

EBS/eeg

Ref: ID# 339810

Enc. Submitted documents

c: Requestor
(w/o enclosures)