



April 4, 2000

Mr. Jeffrey A. Davis
McGinnis, Lochridge & Kilgore, L.L.P.
3200 One Houston Center
1221 McKinney Street
Houston, Texas 77010

OR2000-1292

Dear Mr. Davis:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Texas Government Code. Your request was assigned ID#133137.

The Spring Branch Independent School District (“the district”) received two requests for information pertaining to a former district employee. Specifically, the requestor seeks the former employee’s personnel file, an unredacted copy of a specific investigation file, and all correspondence sent to the State Board for Educator Certification (“SBEC”) concerning the former employee or another named individual. You explain that the requested personnel file and portions of the investigation file have been released. You claim, however, that the remaining responsive information is protected from public disclosure under sections 552.101, 552.103, 552.107, and 552.108 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

We note at the outset that much of the information at issue was addressed by this office in Open Records Letter No. 98-3191 (1998). In that opinion, we determined that section 552.101 of the Government Code, as cited in *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), recognized the common law privacy interests of victims and witnesses in sexual harassment investigations. *See also Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied). We, therefore, concluded that the release of a summary of the sexual harassment investigation, with identifying information redacted, sufficed to protect the public’s interest. You explain that you have released the investigative file in accordance with the Open Records Letter No. 98-3191 (1998).

You now seek a ruling on additional information relating to the sexual harassment investigation. Specifically, you seek to withhold pursuant section 552.101 and *Ellen*, copies of two videotapes and the correspondence from the district to SBEC. Regarding the videotapes, you attest that they are nothing more than the recordings of the same witness and victim interviews governed by our previous ruling. Based on your representation, we conclude that the rationale applied to the facts before us in Open Records Letter No. 98-3191 (1998), applies equally to witness statements recorded on the videotapes. Consequently, the videotapes must be withheld under section 552.101.

The SBEC correspondence consists of a letter from the district's superintendent to SBEC with the witness affidavits describing the incidents of alleged sexual harassment attached. After careful review, we conclude that the letter, which does not identify the victims or witnesses, amounts to a summary of the sexual harassment allegations and is, therefore, not protected from disclosure under section 552.101. The attached affidavits, however, are the type of detailed statements the *Ellen* court found to be "highly intimate or embarrassing" and, as such, must be withheld from disclosure under section 552.101.

You also assert that some of the submitted records are excepted from disclosure under section 552.103. To show the applicability of section 552.103(a), the district must demonstrate that (1) litigation *involving the district* is pending or reasonably anticipated and (2) the information at issue is related to that litigation. *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). Contested cases conducted under the Administrative Procedure Act, chapter 2001 of the Government Code, are considered litigation under section 552.103. Open Records Decision No. 588 at 7 (1991). You assert that the district has filed a complaint against the former employee with SBEC and that the complaint is pending. You further assert that SBEC's contested hearings are governed by the Administrative Procedures Act. However, you do not indicate, nor is it apparent, that the district is a party to the contested hearing. Therefore, we find that you may not withhold any of the submitted information under section 552.103. *See* Open Records Decision Nos. 638 (1996) (stating that purpose of section 552.103(a) is to protect litigation interests of governmental body claiming exception), and 551 (1990) (asserting that section 552.103 enables governmental body to protect its interest in litigation).

Finally, you assert that some of the submitted documents contain information that is protected from disclosure under section 552.107. Section 552.107 provides in relevant part that information is excepted from required public disclosure if

it is information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct.

Gov't Code § 552.107(1). Although the scope of section 552.107(1) would appear to be co-extensive with that of rule 1.05 of the Texas Disciplinary Rules of Professional Conduct, which prohibits an attorney from divulging "confidential information," this office has concluded that such an interpretation of rule 1.05 would be in potential conflict with the purposes of chapter 552 of the Government Code. *See* Open Records Decision No. 574 at 4-5 (1990) (construing predecessor statute). Accordingly, this office has determined that section 552.107(1) protects only what rule 1.05 describes as "privileged" information, *i.e.*, information that represents confidential communications between attorney and client. *Id.* at 5. "Unprivileged" information, as defined by rule 1.05, is not excepted from disclosure under section 552.107(1). *Id.* Thus, section 552.107(1) excepts from disclosure only factual information or requests for legal advice communicated by the client to the attorney and legal advice or opinion rendered by the attorney to the client or to an associated attorney in the course of rendering legal services to the client. *Id.* at 7-8. You explain that documents marked B90-B105 consist of the legal opinions and advice provided to the district by its attorneys and information the district related to its attorneys through its director of personnel. Based on our review of these records, we conclude that some of the information contained in these documents is excepted from disclosure under section 552.107(1). We have marked the information that the district may withhold under section 552.107. The remaining information must be released.

In summary, you must continue to withhold all information that this office ruled was protected from disclosure in Open Records Letter No. 98-3191 (1998). You must also withhold the videotaped victim and witness interviews and the affidavits that were sent to SBEC. The district may withhold under section 552.107 those portions of the submitted documents that we have marked. The remaining information must be released to the requestor.

Because we have resolved your request under the foregoing provisions, we need not consider your additional arguments. 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

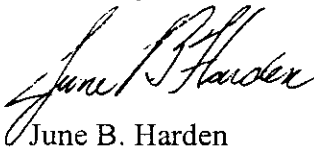
have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

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 Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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,



June B. Harden
Assistant Attorney General
Open Records Division

JBH/ch

Ref: ID# 133137

Encl. Marked documents

cc: Mr. Kevin P. Riley
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(w/o enclosures)