



KEN PAXTON  
ATTORNEY GENERAL OF TEXAS

December 6, 2019

Ms. Linda Butler Arrigucci  
Staff Attorney  
Texas Juvenile Justice Department  
P.O. Box 12757  
Austin, Texas 78711-2757

OR2019-34459

Dear Ms. Arrigucci:

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# 800432 (ORR# 34366).

The Texas Juvenile Justice Department (the "department") received a request for specified information related to an investigation and a named employee. You claim the submitted information is excepted from disclosure under sections 552.103 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note a portion of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides, in relevant part, the following:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or 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 completed evaluations and completed investigations. The department must release this information pursuant to section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code, or is made confidential under the Act or other law. *See id.* Although you seek to withhold the information at issue under section 552.103 of the Government

Code, this section is discretionary and does not make information confidential under the Act. *See 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 No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the department may not withhold the information subject to section 552.022(a)(1) under section 552.103 of the Government Code. As you raise no further exceptions for the completed evaluations we indicated, the department must release them pursuant to section 552.022(a)(1). As previously noted, section 552.022(a)(1) states information subject to that section may be withheld under section 552.108. Additionally, we note some of the information subject to section 552.022(a)(1) contains information that is subject to section 552.101 of the Government Code, which makes information confidential under the Act.<sup>1</sup> Thus, we will address the applicability of section 552.101 of the Government Code to this information as well as your argument under section 552.108 of the Government Code. We will also consider your arguments for the information that is not subject to section 552.022(a)(1).

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). A governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing (1) litigation was 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, orig. proceeding); *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(a).

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

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 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.” *Id.* This office has stated 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 state, and provide documentation showing, prior to the department’s receipt of the instant request for information, the requestor filed a complaint with the EEOC against the department for sexual harassment. We note the EEOC issued a Dismissal and Notice of Rights letter dated September 24, 2019. We also note the 90-day period to file suit had not expired when the department received the instant request. You indicate the information at issue is directly related to the anticipated litigation because it pertains to the underlying claims in the EEOC complaint. Based on your representations and our review of the information at issue, we find the department reasonably anticipated litigation on the date this request was received and the information at issue is related to the anticipated litigation for purposes of section 552.103(a). Therefore, the department may withhold the submitted information not subject to section 552.022(a)(1), which we indicated, under section 552.103(a) of the Government Code.<sup>2</sup>

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing parties in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

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. Section 552.101 encompasses the doctrine of common-law privacy, which protects information that (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 (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

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<sup>2</sup> As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

public's interest was sufficiently served by the disclosure of such documents. *Id.* 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. We note that, because 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, the identity of the individual accused of sexual harassment is not protected from public disclosure. *See* Open Records Decision Nos. 438 (1986), 405 (1983), 230 (1979), 219 (1978). We also note supervisors are generally not witnesses for purposes of *Ellen*, except where their statements appear in a non-supervisory context.

In this instance, the remaining information pertains to sexual harassment investigations and, thus, is subject to the ruling in *Ellen*. Upon review, we find the remaining information includes adequate summaries of the investigations, as well as statements by the person accused of sexual harassment. The summaries and statements of the accused are not confidential under section 552.101 in conjunction with common-law privacy. *See Ellen*, 840 S.W.2d at 525. Therefore, with the exception of the adequate summaries and the statements of the accused at issue, the department must withhold the remaining information under section 552.101 in conjunction with common-law privacy and the holding in *Ellen*.<sup>3</sup> We note, however, information within the summary and accused's statements that identifies the victims and witnesses is confidential under common-law privacy. *See Ellen*, 840 S.W.2d at 525. The requestor is one of the alleged sexual harassment victims. Section 552.023 of the Government Code states a person has a special right of access to information that relates to the person and that is protected from disclosure by laws intended to protect the person's privacy interest. *See* Gov't Code § 552.023(a); Open Records Decision No. 481 at 4 (1987) (governmental body may not deny access to whom information relates or person's authorized representative on grounds that information is considered confidential by privacy principles). Thus, the requestor has a special right of access to her own information, and the department may not withhold this information in the summary or the accused's statements from the requestor. Accordingly, only the identifying information of the other victims and the witnesses in the adequate summaries and the accused's statements, which we marked, must be withheld from the requestor under section 552.101 in conjunction with common-law privacy and the holding in *Ellen*.

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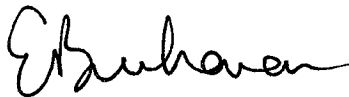
<sup>3</sup> As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

In summary, the department must release the completed evaluations we indicated pursuant to section 552.022(a)(1) of the Government Code. The department may withhold the submitted information not subject to section 552.022(a)(1) of the Government Code under section 552.103(a) of the Government Code. With the exception of the adequate summaries and the statements of the accused, which must be released, the department must withhold the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy and the holding in *Ellen*. The department must also withhold the identifying information of the victims and the witnesses we marked in the adequate summaries and the accused's statements under section 552.101 in conjunction with common-law privacy. The department must release the remaining information.<sup>4</sup>

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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,



Emily Buchanan  
Assistant Attorney General  
Open Records Division

EBO/gw

Ref: ID# 800432

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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<sup>4</sup> We note the information being released contains social security numbers. 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. See Gov't Code § 552.147(b).