



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

July 25, 1994

Mr. Richard D. Monroe  
Deputy General Counsel  
Texas Department of Transportation  
Dewitt C. Greer State Highway Building  
125 E. 11th Street  
Austin, Texas 78701-2483

OR94-396

Dear Mr. Monroe:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 24871.

The Texas Department of Transportation (the "department") received an open records request for a copy of a report, and related information, prepared in response to a complaint filed with the Equal Employment Opportunity Commission ("EEOC") by a former employee of the department. The requestor also seeks a copy of the former employee's personnel file. You contend that these records, a representative sample of which you submitted to this office for review, may be withheld from disclosure pursuant to section 552.103(a) of the Open Records Act.<sup>1</sup>

Section 552.103(a) provides an exception for information relating to litigation to which the governmental body is or may be a party. To secure the protection of section 552.103(a), a governmental body must demonstrate that (1) litigation 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 (1990) at 4. In this instance you have made the requisite showing that the requested information relates to pending litigation for purposes of section 552.103(a).

---

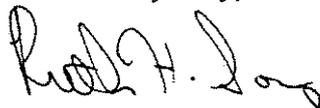
<sup>1</sup>According to the requestor's letter, she submitted a "representation authorization form" from the former employee, to give authorization for her to get a copy of the former employee's personnel records. We note that where section 552.103(a) is applicable, the governmental entity claiming the exemption can withhold personnel file information even from the individual who is the subject of the file. Open Records Decision Nos. 386 (1983); 326 (1982). See Gov't Code § 552.023.

You provided this office a copy of the complaint which was filed with the EEOC, and submitted information indicating that a hearing on that complaint is pending. This office has held that the pendency of a complaint before EEOC indicates a substantial likelihood of potential litigation, and thus satisfies the first prong of the section 552.103(a) test. Open Records Decision Nos. 386 (1983); 336 (1982); 266 (1981). You contend that the information you submitted as responsive to the request is directly related to the anticipated litigation. We agree. Since you have satisfied both prongs of the section 552.103(a) test, this information may be excepted from disclosure.<sup>2</sup>

In reaching this conclusion, however, we assume that the opposing party to the litigation has not previously had access to the records at issue; absent special circumstances, once information has been obtained by all parties to the litigation, *e.g.*, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982). If the opposing parties in the litigation have seen or had access to any of the information in these records, there would be no justification for now withholding that information from the requestor pursuant to section 552.103(a). We note that 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) at 3. Also, since the section 552.103(a) exception is discretionary with the governmental entity asserting the exception, it is within the city's discretion to release this information to the requestor. Gov't Code § 552.007; Open Records Decision No. 542 (1990) at 4.<sup>3</sup>

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact our office.

Yours very truly,



Ruth H. Soucy  
Assistant Attorney General  
Open Government Section

---

<sup>2</sup>In determining that these documents may be withheld, we assume that the representative samples of information you supplied to this office are truly representative of the requested records as a whole. *See* Open Records Decision Nos 499, 497 (1988) (where requested documents are numerous and repetitive, governmental body can submit representative sample; but if each record contains substantially different information, all must be submitted.) This decision does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than what was submitted to this office.

<sup>3</sup>You also argue that the information at issue is excepted from disclosure by section 552.111. Since this information may be excepted from disclosure under section 552.103(a), we do not at this time address your section 552.111 argument.

RHS/rho

Ref.: ID# 24871

Enclosure: Submitted documents

cc: Ms. Teresa Pérez-Wiseley  
International Union Representative  
AFSCME  
815 Brazos Street, Suite 500  
Austin, Texas 78701  
(w/o enclosures)

Ms. Sharon Schweitzer  
Assistant Attorney General  
Texas Department of Transportation  
Dewitt C. Greer State Highway Bldg.  
125 E. 11th Street  
Austin, Texas 78701  
(w/o enclosures)