



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 16, 1996

Mr. Leonard W. Peck, Jr.
Legal Affairs Division
Texas Department of Criminal Justice
P.O. Box 99
Huntsville, Texas 77342-0099

OR96-0554

Dear Mr. Peck:

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# 39317.

The Texas Department of Criminal Justice (the "department") received a request for copies of documents relating to an employee of the department. You assert that the information being requested is excepted from disclosure by sections 552.101 and 552.103 of the Government Code and have submitted the responsive documents to our office for review.

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. A 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, 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. A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You state that the requestor has filed a complaint against the department with the Equal Employment Opportunity Commission regarding sexual harassment. You have submitted a copy of the complaint for our information. This office has held that the pendency of a complaint before the commission indicates a substantial likelihood of potential litigation, and is therefore sufficient to satisfy the first prong of the 552.103 test. Open Records Decision No. 386 (1983) at 2. Additionally, in the letter that contains the request for information at issue, the lawfirm representing the requestor states that the firm

was hired "to assist in bringing charges of sexual harassment and retaliation against TDCJ . . . and others. We have requested and are waiting to receive [the employee's] right to sue letter from the EEOC." Thus, you have met the first prong and have shown that litigation is reasonably anticipated. Additionally, the information relates to the subject matter of the complaint and threatened litigation, thus satisfying the second prong of the test to determine the applicability of the litigation exception. Therefore, you may withhold this information under section 552.103 of the Government Code.

In reaching this conclusion, however, we assume that the opposing party to the anticipated 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), 320 (1982). If the opposing parties in the anticipated 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 also 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).¹

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Robert W. Schmidt
Assistant Attorney General
Open Records Division

RWS/ch

Ref.: ID# 39317

Enclosures: Submitted documents

¹ Because we resolve this matter under section 552.103 of the Government Code, we do not specifically address the other exception that you raise. We note, however, that certain information contained within the requested documents appears to be confidential under section 552.101. A governmental body may not release confidential information. Gov't Code § 552.353.

cc: Ms. Peggy S. Bittick
Hirsch & Westheimer, P.C.
900 Louisiana, 25th Floor
Houston, Texas 77002
(w/o enclosures)

