



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

July 16, 1998

Mr. Leonard W. Peck, Jr.  
Assistant General Counsel  
Office of the General Counsel  
Texas Department of Criminal Justice  
P.O. Box 4004  
Huntsville, Texas 77342-4004

OR98-1678

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# 116562.

The Texas Department of Criminal Justice (the "department") received a request for "copies of all correspondence including any and all letters, memorandums, IOCs, etc. you received from Jack Douglas, Art Puckett, Frank Hoke, Virginia Wilson and Macel Joost relating to me in any way whether personal or professional during any and all times you were Assistant Director over the Access to Courts and Counsel Substitute Programs." You submit to this office a representative sample of the requested information.<sup>1</sup> You assert that the requested materials are excepted from required public disclosure based on section 552.103 of the Government Code.

The Office of the Attorney General will raise mandatory exceptions like section 552.101. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987). Thus we observe that section 552.101 excepts from required public disclosure information that is considered confidential by law, either constitutional, statutory, or by judicial decision.

---

<sup>1</sup>In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988) (where requested documents are numerous and repetitive, governmental body should submit representative sample; but if each record contains substantially different information, all must be submitted). This open records letter 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 that submitted to this office.

only if the information is highly intimate or embarrassing *and* it is of no legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). We have marked a portion of the information which must be withheld under section 552.101.

Section 552.103(a) excepts from disclosure information:

(1) relating to litigation of a civil or criminal nature or settlement negotiations, 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; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

The department 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. The department must meet both prongs of this test for information to be excepted under 552.103(a).

In this instance, you state that a complaint has been filed with the Equal Employment Opportunity Commission ("EEOC"). You have provided this office with a copy of the complaint. This office has previously held that a pending complaint before the EEOC indicates a substantial likelihood of litigation. Open Records Decision Nos. 386 (1983), 336 (1982), 281 (1981). However, the documents reveal the EEOC complaint was resolved through the EEOC's Dismissal and Notice of Rights sent to the complainant and the department. A pertinent notice provision advises the complainant that "[I]f you want to pursue your charge further, you have the right to sue the respondent(s) named in your charge in U. S. District court. If you decide to sue, you must sue WITHIN 90 DAYS FROM YOUR RECEIPT OF THIS Notice; otherwise your right to sue is lost." More than 90 days have elapsed since the date of this notice, but you have not notified this office of any change in circumstances regarding litigation status in this matter. Open records Decision No. 638.

Litigation cannot be regarded as "reasonably anticipated" unless there is more than a "mere chance" of it -- unless, in other words, we have concrete evidence showing that the claim that litigation may ensue is more than mere conjecture. Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision Nos. 452 (1986), 350 (1982).

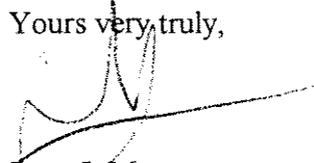
Litigation has been found to be reasonably anticipated when an individual has hired

an attorney who demands damages and threatens to sue the governmental entity. Open Records Decision No. 551 (1990) at 2. This office has found that litigation was not reasonably anticipated when an applicant who was rejected for employment hired an attorney, and the attorney as part of his investigation asked for information as to why his client was rejected. Open Records Decision No. 361 (1983).

In this situation the prospect of litigation is too speculative for section 552.103(a) to be applicable. Open Records Decision No. 518 (1989) at 5 (governmental body must show that litigation involving specific matter is realistically contemplated). Given the circumstances that you have shown, we find that the department has not met the first prong of the section 552.103(a) test which weighs whether litigation is reasonably anticipated. The department may not withhold the requested information under section 552.103.

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 should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Janet I. Monteros  
Assistant Attorney General  
Open Records Division

JIM/ch

Ref: ID# 116562

Enclosures: Submitted documents

cc: Ms. Sherry A. McDugle  
502 Hickory Drive  
Huntsville, Texas 77340  
(w/o enclosures)