



Office of the Attorney General  
State of Texas

August 3, 1998

DAN MORALES  
ATTORNEY GENERAL

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

OR98-1829

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# 117064.

The Texas Department of Criminal Justice (the "department") received a request for "one copy of the EEO Division files, Charge #95-0538 and Charge #96-0396, the discrimination and harassment and retaliation claims" filed by the requestor. You submit to this office the documents you believe responsive to the request. You assert that the requested materials are excepted from required public disclosure based on sections 552.101, 552.102, 552.103, 552.107, 552.108 and 552.111 of the Government Code.

You assert that the investigation material may be withheld under section 552.108. Section 552.108 excepts from disclosure:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime;

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication; or

(3) it is information that:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation;

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

Gov't Code § 552.108(a). We have considered your section 552.108 claim and conclude you have not met your burden as the matter in the instant case does not deal with the detection, investigation or prosecution of crime. Therefore, the department may not withhold the requested information under section 552.108.

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 complaints were filed with the Texas Commission on Human Rights and the Equal Employment Opportunity Commission ("EEOC") as well as with the department. You have provided this office with a copy of the department complaints No.95-5538 and No.96-0396, a gender discrimination and a retaliation complaint, respectively. 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 that the EEOC complaints alleging gender discrimination and retaliation were 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.”<sup>1</sup>

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.

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 a 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 information requested under section 552.103. *See*, Open Records Letter No. 98-1678 (1998).

You also claim that section 552.111 of the Government Code protects the information from disclosure. Section 552.111 excepts “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. An agency’s policymaking functions, however, do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 (1993) at 5-6. The requested information merely involves internal administrative or personnel matters. Thus, the department may not withhold the materials based upon section 552.111.

You also contend that some of the requested report may be protected from disclosure

---

<sup>1</sup>The EEOC’s “Dismissal and Notice of Rights” sent to the complainant and the department is dated February 17, 1998 and May 18, 1998 is the 90<sup>th</sup> day from the signature date.

by section 552.101 which, among other items, encompasses information protected by common-law privacy and excepts from disclosure private facts about an individual. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Additionally, section 552.102 of the Government Code excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Section 552.102 excepts information in personnel files only if it meets the test articulated under section 552.101 for common-law invasion of privacy. *Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.). Accordingly, we will consider your section 552.101 and section 552.102 claims together. Information may be withheld under section 552.101 in conjunction with the common-law right of privacy if: (1) the information contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and (2) the information is of no legitimate concern to the public. *See* Open Records Decision No. 628 (1994). The documents that you submitted do not meet either criterion. The submitted information generally relates to actions of public employees and matters of public business and as such is of legitimate public interest. *See, e.g.*, Open Records Decision No. 444 (1986) at 4 (legitimate public interest in information relating to public employees). Additionally, the information is not of a highly intimate or embarrassing nature about a person's private affairs. Therefore, the information may not be withheld under sections 552.101 or 552.102.<sup>2</sup>

We also note that the requested documents contain social security numbers which may be confidential under federal law. A social security number is excepted from required public disclosure under section 552.101 of the act in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if it was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994). Based on the information you have provided, we are unable to determine whether the social security numbers are confidential under this federal statute. We note, however, that section 552.352 of the Open Records Act imposes criminal penalties for the release of confidential information.

Additionally we observe that sections 552.024 and 552.117 provide that a public employee or official can opt to keep private his or her home address, home telephone number, social security number, or information that reveals that the individual has family members. You must withhold this information if, as of the time of the request for the information, the employee had elected to keep the information private. Open Records Decision Nos. 530 (1989) at 5, 482 (1987) at 4, 455 (1987).

Finally you contend that the requested information is protected from disclosure by

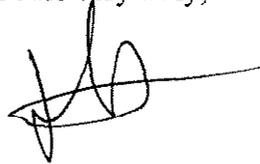
---

<sup>2</sup>We also note that the requestor, as the subject of the requested information may have a right of access to the information requested. *See*, section 552.023 of the Government Code.

section 552.107. Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. *Id.* at 5. When communications from attorney to client do not reveal the client's communications to the attorney, section 552.107 protects them only to the extent that such communications reveal the attorney's legal opinion or advice. *Id.* at 3. In addition, basically factual communications from attorney to client, or between attorneys representing the client, are not protected. *Id.* The documents at issue do not contain client confidences or attorney advice or opinion. Therefore, the documents may not be withheld pursuant to section 552.107. The requested information must, therefore, be released.

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/nc

Ref.: ID# 117064

Enclosures: Submitted documents:

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