



May 7, 1999

Ms. Barbara G. Heptig
Assistant City Attorney
City of Arlington
200 West Abram Street
Arlington, Texas 76004-0231

OR99-1243

Dear Ms. Heptig:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 123965.

The City of Arlington (the "city") received a request for information relating to a particular complaint investigated the by the city's human resources department. You inform us that most of the responsive information, including the investigative report and supporting affidavits, will be released to the requestor. You contend that the remaining information, one page of the investigator's handwritten notes and one witness affidavit, are excepted from disclosure under sections 552.101, 552.102, and 552.103 of the Government Code. We have considered the exceptions you claim and have reviewed the documents at issue.

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 city 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. *University of Tex. Law Sch. v. Texas Legal Found.*,

958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *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). The city must meet both prongs of this test for information to be excepted under 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). This office has concluded that litigation was reasonably anticipated when the potential opposing party filed a complaint with the Equal Employment Opportunity Commission. Open Records Decision No. 336 (1982). In this case, the complainant filed an EEOC complaint against the city. The EEOC dismissed the complaint and issued the complainant her right to sue notice. The ninety-day period during which the complainant may bring suit has not expired. Under these circumstances, we conclude that the city reasonably anticipates litigation relating to the complaint. Having reviewed the documents at issue, we agree that they relate to the anticipated litigation. Therefore, the city may withhold the documents from disclosure under section 552.103(a) at this time.

We note, however, that if the opposing party in the anticipated litigation has seen or had access to the documents at issue, there would be no justification for withholding them from disclosure pursuant to section 552.103. Open Records Decision Nos. 349 (1982), 320 (1982). In addition, the applicability of section 552.103 ends once the litigation has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). Because we are able to resolve this matter under section 552.103, we do not consider at this time whether the witness statement is also excepted from disclosure under sections 552.101 and 552.102.

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 upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,



Karen E. Hattaway
Assistant Attorney General
Open Records Division

KEH/ch

Ref: ID# 123965

encl. Submitted documents

cc: Mr. Laura Parent
213 Shadowcreek Lane
Burleson, Texas 76028
(w/o enclosures)