



November 5, 2001

Ms. Janice Mullenix
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR2001-5079

Dear Ms. Mullenix:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 154380.

The Texas Department of Transportation (the "department") received a request for "all documents relating to the job performance of" two named department employees, including but not limited to the named employees' personnel files "and correspondence or memoranda evidencing any and all evaluations or disciplinary actions relating to" the named employees. You claim that the requested information is excepted from disclosure in its entirety under section 552.103 of the Government Code, and that portions of the information are also excepted under sections 552.101, 552.117 and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that section 552.022 of the Government Code makes certain information expressly public, unless it is confidential under other law. One category of expressly public information under section 552.022 is "the name, sex, ethnicity, salary, title, and dates of employment of each employee and officer of a governmental body[.]" Gov't Code § 552.022(a)(2). Another is "information regarded as open to the public under an agency's policies." Gov't Code § 552.022(a)(15). Some of the information in Exhibit B consists of job descriptions as well as a department employee's salary information. This salary information and the job descriptions, which we have marked, must be released to the requestor unless they are confidential under other law. Section 552.022 also makes "a completed report, audit, evaluation, or investigation made of, for, or by a governmental

body" public information unless expressly made confidential under other law or "except as provided by [s]ection 552.108[.]" Gov't Code § 552.022(a)(1). Exhibit C contains completed performance evaluations, which come within the ambit of section 552.022(a)(1). Section 552.103 is a discretionary exception under the Public Information Act and is, therefore, not "other law" for purposes of section 552.022. See Open Records Decision No. 551 (1990) (statutory predecessor to section 552.103 serves only to protect a governmental body's position in litigation and does not itself make information confidential). Therefore, the department may not withhold the information we have marked in Exhibit B (see yellow flags) or the evaluations contained in Exhibit C under section 552.103 of the Government Code. For the remainder of the submitted information not subject to section 552.022, we will address your argument under section 552.103.

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

In this case, you inform us that litigation is pending between the department and two entities represented by the requestor. In support, you have provided us with a copy of a petition you state was filed in the case of the *State of Texas vs. Patrick Media Group D.B.A. Eller Media Company, Et Al* filed in the district court of Bexar County, Texas. In addition, you have provided us with a copy of a request for an administrative hearing submitted to the department by Duke-Keller Outdoor Advertising, Inc., a matter you state is now pending before the State Office of Administrative Hearings. Based on these representations, we conclude you have established that litigation was pending on the date the department received the request for information.

You further inform us that

each of these cases involves the regulation of billboards by [the department] in its San Antonio District. The [department] employees singled out by the request . . . are principally responsible for administering the regulation of billboards for [the department] in the San Antonio District. The issues in these cases include whether these [department] employees have properly administered the law. Therefore, this request for their personnel files is obviously related to allegations leveled against them individually and against [the department].

Upon review of the submitted information and your arguments, we agree that the submitted information is related to the pending litigation. Therefore, with the exception of the information that is subject to section 552.022, the submitted information is excepted from disclosure under section 552.103(a).

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the pending litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, 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). As we resolve your request under section 552.103, we need not address your arguments under sections 552.101, 552.117 or 552.130.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/seg

Ref: ID# 154380

Enc. Submitted documents

c: Ms. Gay Gueringer
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(w/o enclosures)