



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

June 5, 2003

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

OR2003-3865

Dear Ms. Wright:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 182211.

The Texas Department of Transportation ("TxDOT") received a request for the following five categories of information:

1. Form 1938-97 (Employee Evaluation) dated January 1, 2002 to present, enclosed in the personnel file folders of [ten named individuals].
2. Form 1750-97 (Request for Out of Agency Training/Out of state travel) dated January 1, 2002 to present, enclosed in the personnel file folders of [ten named individuals].
3. Any memorandums [sic] dated January 1, 2002 to present, enclosed in the personnel file folders of [ten named individuals].
4. Any letters or memorandums [sic] addressing sexual misconduct, sexual harassment, or unwelcome physical conduct; [sic] submitted by [a named individual] dated January 1, 2002 to present date.
5. Form 1809A-97 submitted by [two named individuals].

You assert the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.117, and 552.130 of the Government Code. We have reviewed the information you submitted and we have considered the exceptions you claim.

Initially, we note that you did not submit information responsive to category five of the request. To the extent this information exists, we assume TxDOT has released it to the requestor. However, if TxDOT has not released this information, it must do so at this time. See Gov't Code §§ 552.301(a), .302.

Also, we note you have submitted unresponsive information for our review. Most of the information requested encompasses records from January 1, 2002 through March 20, 2003. Therefore, we conclude the submitted information dated prior to January 1, 2002 is outside the scope of this request. Accordingly, this ruling does not address the releasability of this information.

Next, we note Exhibit C includes information governed by section 552.022 of the Government Code. This provision delineates several categories of information that are not excepted from required disclosure unless they "are expressly confidential under other law." In pertinent part, this section reads as follows:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

....

(5) all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate;

....

(15) information regarded as open to the public under an agency's policies[.]

Exhibit C contains employee evaluations as contemplated by section 552.022(a)(1), request for training forms and supporting documentation considered working papers and information used to estimate the expenditure of public funds as described by section 552.022(a)(5), and

a job description regarded as an agency's policies subject to section 552.022(a)(15). Therefore, TxDOT may withhold this information only to the extent it is made confidential under other law or is otherwise protected by section 552.108 of the Government Code. TxDOT claims section 552.103, a discretionary exception that does not constitute other law for the purposes of section 552.022. *See* Open Records Decision Nos. 663 (1999) (governmental body may waive section 552.103), 473 (1987); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Accordingly, TxDOT may not withhold the employee evaluations, the training forms and related supplementary information, or the position description under section 552.103 of the Government Code.

However, sections 552.117 and 552.137 apply to the information made expressly public by section 552.022. Section 552.117 excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, TxDOT may only withhold information under section 552.117 on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 of the Government Code prior to the date on which the request for this information was made. You have submitted supporting documentation showing that all but one of the employees whose information has been requested made timely elections to keep their personal information confidential. The supporting documentation also indicates Deborah Hawthorne has authorized TxDOT to release her personal information. Therefore, section 552.117 requires TxDOT to withhold the social security numbers, home address, and home telephone number we have marked and you have marked from the information that must be released under section 552.022 of the Government Code. However, TxDOT must release Ms. Hawthorne's social security number, unless she revoked her authorization in writing prior to TxDOT's receipt of the present request for information. *See* Gov't Code § 552.024(e).

Section 552.137 states the following:

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code § 552.137. This provision makes certain e-mail addresses confidential. *See* Gov't Code § 552.137. You inform us that the member of the public has not affirmatively consented to the release of the e-mail address contained in the training form materials.

Therefore, TxDOT must withhold the e-mail address of the member of the public, which you have marked, under section 552.137 of the Government Code.

With respect to the remainder of the submitted information, we address your arguments under section 552.103 of the Government Code. This provision provides, in pertinent part, as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature 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.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information *and* (2) the information at issue is related to that litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103 of the Government Code. *Id.*

To establish the applicability of section 552.103, you provide supporting documentation showing that the requestor has filed a complaint with the Texas Commission on Human Rights (the "TCHR") alleging discrimination. The TCHR operates as a federal deferral agency under section 706(c) of title VII, 42 U.S.C. § 2000e-5. The Equal Employment Opportunity Commission ("EEOC") defers jurisdiction to the TCHR over complaints alleging employment discrimination. *Id.*

This office has stated that a pending EEOC complaint indicates litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982). By showing that the complaint filed with the TCHR was pending at the time TxDOT received the request for information, you have shown that litigation is reasonably anticipated. Further, our review

of the information remaining at issue indicates that it is related to the anticipated litigation for purposes of section 552.103(a). Thus, TxDOT may withhold Exhibit B and the remainder of Exhibit C under section 552.103(a).

However, we note that the opposing party has had access to some of the information. Once the information has been obtained by all parties to the pending litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). Thus, TxDOT must release the information that the opposing party provided or obtained. Also, the applicability of section 552.103(a) ends when the litigation is concluded. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

In summary, TxDOT must release the information we have marked in Exhibit C under section 552.022 of the Government Code, with redactions as required by sections 552.117 and 552.137. Except for the information seen by the opposing party, TxDOT may withhold Exhibit B and the remainder of the information in Exhibit C under section 552.103 of the Government Code.

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 Dep't of Pub. 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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Christen Sorrell
Assistant Attorney General
Open Records Division

CHS/seg

Ref: ID# 182211

Enc: Submitted documents

c: Mr. Damian Frazier
P.O. Box 1213
Pflugerville, Texas 78691
(w/o enclosures)