ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 14, 2005

Ms. Maleshia B. Farmer
Assistant City Attorney
Office of the City Attorney
1000 Throckmorton Street
Fort Worth, TX 76102

OR2005-00493

Dear Ms. Farmer:

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# 217035.

The City of Fort Worth (the "city") received a request for information regarding a city employee's computer and communications and documents involving specified city employees. You state that you will release some of the requested information, but you claim that the remaining requested information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We begin by addressing the scope of this ruling. You inform us that a portion of the submitted information is subject to previous rulings by this office. *See* Open Records Letter Nos. 2004-8456 (2004) and 2004-9331 (2004). You indicate that the facts and circumstances surrounding those rulings have not changed. To the extent that the present request seeks records that were at issue in Open Records Letter Nos. 2004-8456 (2004) and 2004-9331 (2004), the city must comply with our prior rulings. *See* Open Records Decision No. 673 at 6-7 (2001) (criteria of previous determination regarding specific information previously ruled on). To the extent the submitted records are not subject to the previous rulings, we will address your arguments.

We first address the city's argument that the remaining submitted information is excepted from public disclosure under section 552.103 of the Government Code. This section provides in relevant part:

> (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.
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> (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). A governmental body 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 was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. 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). A governmental body must meet both prongs of this test for information to be excepted under 552.103(a). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

You provide documents that indicate that the city is currently involved in pending litigation with one city marshal, and that two other city marshals have filed complaints with the Equal Employment Opportunity Commission ("EEOC"). This office has concluded that litigation is reasonably anticipated where the prospective opposing party has filed an EEOC complaint. *See* Open Records Decision No. 336 (1982). The documents you provide indicate that three EEOC complaints were filed with both the EEOC and the Civil Rights Division of the Texas Workforce Commission ("TWC") prior to the date the city received the present request. You indicate that aspects of these complaints remain pending. The EEOC generally defers jurisdiction to the TWC over complaints alleging employment discrimination. The TWC operates as a federal deferral agency under section 706(c) of title VII, 42 U.S.C. § 2000e-5. Based on your representations and our review of the submitted documents, we find that the city was party to litigation and reasonably anticipated other litigation on the date it received the present request. We also find that the submitted information relates to this pending and anticipated litigation. We therefore conclude that the city may generally withhold this information pursuant to section 552.103.

We note, however, that 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 all other parties in these proceedings 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 or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, to the extent that the present request seeks information on which we have previously ruled, the city must continue to follow Open Records Letter Nos. 2004-8456 (2004) and 2004-9331 (2004) with regard to this information. The remaining submitted information may be withheld pursuant to section 552.103 of the Government Code to the extent it has not been seen by all parties to the pending and anticipated litigation. As our ruling on these issues is dispositive, we need not address your remaining arguments.

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,

Elizabeth A. Stephens
Assistant Attorney General
Open Records Division

EAS/krl

Ref: ID#217035

Enc. Submitted documents

c: Mr. Aaron Doss
c/o Ms. Maleshia B. Farmer
Assistant City Attorney
Office of the City Attorney
1000 Throckmorton Street
Fort Worth, TX 76102
(w/o enclosures)