



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 23, 2010

Ms. Elizabeth P. West
Personnel Attorney
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

OR2010-05848

Dear Ms. West:

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# 378965.

The Texas Commission on Environmental Quality (the "commission") received four requests from the same requestor for information regarding the names and positions of all employees that transferred to other positions within the commission's Tyler Regional Office, the application and/or transfer forms for a list of named employees, the succession plan for management positions within the Tyler Regional Office, the names and positions of all African American employees in management positions within the commission, and information regarding employee salaries, promotions, merit increases, and one-time merit payments for a list of named employees, all for a specified time period. You claim that the requested information is exempt from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.¹

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Initially, we note the submitted information consists, in part, of a list of the names, salary and merit pay increases, job titles, and division of certain commission employees. We note that this information is subject to section 552.022(a)(2) of the Government Code, which provides:

[T]he following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

...

(2) 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). Accordingly, the commission may withhold the information that is subject to section 552.022(a)(2) only if it is "expressly confidential under other law." Although you raise section 552.103 of the Government Code, this section is a discretionary exception to disclosure that protects the governmental body's interests and which may be waived. See *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.— Dallas 1999, no pet.) (governmental body may waive section 552.103); see also Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 (1999) (governmental body may waive section 552.103). As such, section 552.103 is not "other law" that makes information confidential for the purposes of section 552.022. Therefore, the commission may not withhold any of the information that is subject to section 552.022 under section 552.103. As you raise no other exceptions to disclosure, the commission must release the information that is subject to section 552.022 to the requestor. However, we will address your claims under section 552.103 for the remaining information that is not subject to section 552.022.

Section 552.103 of the Government Code provides:

(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). When a governmental body receives a request for information that relates to pending or anticipated litigation, it may raise section 552.103 as an exception to disclosure in order to protect its litigation interests. *See* Gov't Code 552.103; Open Records Decision No. 551 at 4 (1990) (noting that predecessor to section 552.103 protects discovery process and avoids interference in matters properly resolved in court by excepting from disclosure information when access to such material is more appropriately sought through discovery). The governmental body claiming this exception bears the burden of providing relevant facts and documents to demonstrate the applicability of the exception. The test for meeting this burden is a showing that (1) litigation is 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.); ORD 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You state, and provide documentation showing, that the requestor filed a lawsuit against the commission on July 30, 2009 alleging racial discrimination. You state that the requestor's claims include denial of promotions and broader race discrimination against himself and other African-American employees. You argue that the remaining information directly relates to the requestor's discrimination claims. Upon review, we find the remaining information relates to litigation that was pending on the date the commission received the request. Therefore, the commission may withhold the remaining information under section 552.103 of the Government Code.

We note, however, that once the information at issue has been obtained by all parties to the pending litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to the information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, any information at issue that has either been obtained from or provided to all opposing parties in the pending litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and

responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,



Kate Hartfield
Assistant Attorney General
Open Records Division

KH/dls

Ref: ID# 378965

Enc. Submitted documents

c: Requestor
(w/o enclosures)