



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 2, 2011

Mr. Tyler F. Wallach
Assistant City Attorney
City of Fort Worth
1000 Throckmorton Street, Third Floor
Fort Worth, Texas 76102

OR2011-07788

Dear Mr. Wallach:

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# 419576 (PIR No. W007427).

The City of Fort Worth (the "city") received a request for ten categories of information relating to two specified job postings by the city fire department and the resulting interviews.¹ You claim the requested information is excepted from disclosure under sections 552.103 and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the information you submitted. We also have considered the comments we received from the requestor.²

Section 552.103 of the Government Code, the "litigation exception," provides in 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

¹We note the requestor also asks a question. Although a governmental body is not required to answer factual questions in responding to a request for information under the Act, a governmental body must make a good-faith effort to relate a request to information that is within the governmental body's possession or control. We assume the city has done so. *See* Open Records Decision Nos. 563 at 8 (1990), 555 at 1-2 (1990), 561 at 8-9 (1990).

²*See* Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

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). A governmental body that claims section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information at issue. To meet this burden, the governmental body must demonstrate that (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 the pending or anticipated 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.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

You contend the submitted information is related to anticipated litigation. Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See Open Records Decision No. 452 at 4 (1986).* To establish that litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *Id.* This office has stated a pending Equal Employment Opportunity Commission ("EEOC") complaint indicates litigation is reasonably anticipated. *See Open Records Decision Nos. 386 at 2 (1983), 336 at 1(1982).*

You inform us the requestor filed an EEOC complaint against the city prior to its receipt of his request for information. You have provided a copy of the complaint. You state the requestor alleges the city discriminated against him on the basis of his race and age in denying him a promotion. You also state the submitted information is related to the requestor's complaint. Based on your representations and documentation and our review of the submitted information, we find the information at issue is related to litigation the city reasonably anticipated when it received this request for information. We therefore conclude the city may withhold the submitted information under section 552.103 of the Government Code.³

In reaching this conclusion, we assume the requestor, as the opposing party in the anticipated litigation, has not seen or had access to any of the submitted information. The purpose of

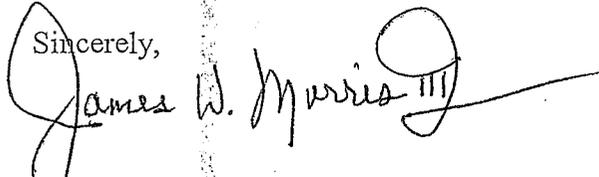
³As we are able to make this determination, we need not address the other exception you claim.

section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* ORD 551 at 4-5. If the opposing party has seen or had access to information relating to anticipated litigation through discovery or otherwise, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). We also note the applicability of section 552.103 ends once the related litigation concludes or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); 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,



James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/em

Ref: ID# 419576

Enc: Submitted documents

c: Requestor
(w/o enclosures)