



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 7, 2012

Ms. Barbara H. Owens
Assistant General Counsel
Texas Department of State Health Services
P.O. Box 149347
Austin, Texas 78714-9347

OR2012-01880

Dear Ms. Owens:

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# 444782.

The Texas Department of State Health Services (the "department") received two requests from the same requestor for "any and all e-mails sent or received" by a named individual where the requestor "is mentioned by name" between April 1, 2011 and November 15, 2011.¹ You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

Initially, we note some of the submitted information is not responsive to the instant requests because it does not involve the named individual and the requestor. We have marked the submitted information which is responsive to the requests. The department need not release

¹The first request was received on November 16, 2011, while the second request was received on November 17, 2011.

²We assume the "representative sample" of information 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 those records contain substantially different types of information than those submitted to this office.

nonresponsive information in response to these requests, and this ruling will not address that information.

Next, we note portions of the remaining information were the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2012-01709 (2012). As we have no indication that the law, facts, or circumstances on which the prior ruling was based has changed, the department must continue to rely on this ruling as a previous determination and withhold or release the previously ruled upon information in accordance with this prior ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). However, we will consider your arguments for the information not subject to the previous determination.

Section 552.103 of the Government Code provides 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). 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 section 552.103(a).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To demonstrate litigation is reasonably anticipated, the governmental body must furnish concrete evidence litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* This office has found that a pending complaint filed with the Equal Employment Opportunity Commission (the “EEOC”) indicates litigation is reasonably anticipated. *See, e.g.*, Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982).

You state, and provide documentation showing, prior to the department’s receipt of the two instant requests, the requestor filed a discrimination claim against the department with the EEOC. You explain the EEOC claim is still pending. You state, and the documents at issue reflect, the remaining information is related to the requestor’s claim of discrimination. Based on your representations and our review, we find the department reasonably anticipated litigation on the date the two requests were received, and the information at issue is related to the anticipated litigation. Therefore, we conclude the department may withhold the remaining responsive information under section 552.103 of the Government Code.³

We note that the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to that litigation to obtain it through discovery procedures. *See* ORD 551 at 4-5. Therefore, 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 note the information accessed in the usual scope of employment is not considered to have been obtained by the opposing party to the litigation and may therefore still be withheld under section 552.103. We also note that 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).

In summary, the department must continue to rely on Open Records Letter No. 2012-01709 as a previous determination and withhold or release the previously ruled upon information in accordance with this prior ruling. The department may withhold the remaining responsive information under section 552.103 of the Government Code.

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

³As our ruling is dispositive, we need not address your remaining arguments against disclosure.

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,

A handwritten signature in cursive script that reads "Sean Opperman".

Sean Opperman
Assistant Attorney General
Open Records Division

SO/dls

Ref: ID# 444782

Enc. Submitted documents

c: Requestor
(w/o enclosures)