



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

February 13, 2012

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

OR2012-02246

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# 445238 (DSHS# 19660-2012).

The Texas Department of State Health Services (the "department") received a request for certain information pertaining to inspections, violations, and enforcement of Chapter 341 of the Health and Safety Code during a specified period. You state the department will withhold some of the responsive information pursuant to our ruling in Open Records Letter No. 2011-10090A (2011). *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 prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes information is or is not excepted from disclosure). You claim the submitted 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 representative sample of information.<sup>1</sup> We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments to this office stating why the information at issue should or should not be released).

Initially, we note some of the submitted information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2012-01589 (2012). We have no indication the law, facts, or circumstances on which that previous ruling

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<sup>1</sup>We assume 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 those records contain substantially different types of information than those submitted to this office.

were based have changed. Thus, with regard to the information we have marked, we conclude the department may continue to rely on Open Records Letter Nos. 2012-01589 as a previous determination and withhold or release the information we have marked in accordance with that ruling. *See* ORD 673.

We now turn to your arguments for the remaining submitted information. 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). The governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. 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.); Open Records Decision No. 551 at 4 (1990). The 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 that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* This office has concluded that litigation was reasonably anticipated when the potential opposing party filed a complaint with the Equal Employment Opportunity Commission (the "commission"). *See* Open Records Decision No. 336 (1982). You state, and provide documentation showing, the requestor had filed a complaint with the commission alleging employment discrimination prior to the department's receipt of the request for information. You state 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 this request was received, and the information at issue is related to the anticipated litigation. Accordingly, the department may

withhold the remaining submitted information under section 552.103 of the Government Code.

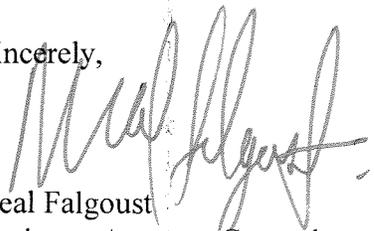
We note that once the information has been obtained by all parties to the anticipated or pending litigation, through discovery or otherwise, no section 552.103 interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note information accessed in the usual scope of employment is not considered to have been obtained by the opposing party to the litigation and may therefore be withheld under section 552.103. Finally, we note the applicability of section 552.103 ends when the litigation is concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

In summary, the department may continue to rely on Open Records Letter No. 2012-01589 as a previous determination and withhold or release the information we have marked in accordance with that ruling. The department may withhold the remaining submitted 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 responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](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,



Neal Falgoust  
Assistant Attorney General  
Open Records Division

NF/agn

Ref: ID# 445238

Enc. Submitted documents

c: Requestor  
(w/o enclosures)