



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

OR2012-02258

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# 445241 (DSHS File 19694/2012).

The Texas Department of State Health Services (the "department") received a request for all documentary evidence pertaining to the requestor and the school cafeteria program, as well as Food and Drug Strategy Cross-functional Workgroup information pertaining to the school cafeteria program from August 1, 2011 through November 30, 2011. You state the department has or will release some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.103 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹ We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note some of the submitted information was the subject of a previous request for a decision, in response to which this office issued Open Records Letter No. 2012-01835 (2012). In that ruling, we concluded that portions of the submitted information may be withheld under section 552.111 of the Government Code, and the remaining information must be released. Accordingly, as we have no indication that the law, facts, or circumstances

¹We 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 that those records contain substantially different types of information than that submitted to this office.

on which our prior ruling was based have changed, you may continue to rely on that prior ruling as a previous determination and withhold or release the information we have marked in accordance with Open Records Letter No. 2012-01835. *See* Open Records Decision No. 673 at 6-7 (2001) (so long as law, facts, 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 that information is or is not excepted from disclosure).

Next, we address your claim under Section 552.103 of the Government Code for the remaining information at issue. Section 552.103 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 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 section 552.103 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). *See* ORD 551 at 4.

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 instant request, the requestor filed a discrimination claim against the department with the

EEOC. You explain the EEOC claim is still pending. 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. Therefore, we conclude the department may withhold the remaining responsive information under section 552.103 of the Government Code.²

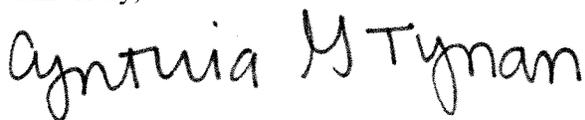
We note that once the information has been obtained by all parties to the anticipated or pending litigation, through discovery or otherwise, no section 552.103 interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note information accessed in the usual scope 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. 2012-01835 as a previous determination and withhold or release the previously ruled upon information in accordance with the prior ruling. The department may withhold the remaining information at issue 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, 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,



Cynthia G. Tynan
Assistant Attorney General
Open Records Division

CGT/em

²As our ruling is dispositive, we need not address your remaining arguments against disclosure.

Ref: ID# 445241

Enc. Submitted documents

c: Requestor
(w/o enclosures)