



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

August 16, 1994

Mr. Richard D. Monroe
Deputy General Counsel
Texas Department of Transportation
Dewitt C. Greer State Highway Bldg.
125 East 11th Street
Austin, Texas 78701-2483

OR94-436

Dear Mr. Monroe:

The Texas Department of Transportation (the "department") received two requests for information. You have asked if this information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. This request was assigned ID# 25037.

One request was from a former employee and the other request was by a representative of the employee. The requests ask for the former employee's personnel records and for the reports, recommendations and attachments "that were needed to substantiate the report prepared as a result of the charges" that were filed by the former employee. The department contends that the information is excepted from disclosure under section 552.103(a) of the Open Records Act. To show the applicability of section 552.103(a), a governmental entity must show that (1) litigation is pending or reasonably anticipated and (2) the information at issue is related to that litigation. *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 (1990) at 4. The department must meet both prongs of this test for information to be excepted under section 552.103(a).

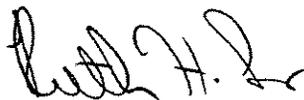
You have supplied information showing that the former employee in question has filed a complaint with the Equal Employment Opportunity Commission ("EEOC") against the department. Since this office has stated that a pending EEOC complaint indicates litigation is reasonably anticipated, the department has met the first prong of the section 552.103(a) test. Open Records Decision Nos. 386 (1983) at 2; 336 (1982) at 1.

You also submitted to this office a "sample of information" responsive to the request.¹ A review of the documents submitted indicates that they are related to the anticipated litigation.² However, it appears that the opposing party to the litigation has already seen or had access to some of these documents. Absent special circumstances, once information has been obtained by all parties to the litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 (1982) at 2. The department may withhold from disclosure records that have not already been disclosed to the opposing party in the anticipated litigation.³

We note that the applicability of section 552.103(a) also ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982) at 3. Since the section 552.103(a) exception is discretionary with the governmental entity asserting the exception, it is within the department's discretion to release this information to the requestor. Gov't Code § 552.007; Open Records Decision No. 542 (1990) at 4.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with an informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact this office.

Yours very truly,



Ruth H. Soucy
Assistant Attorney General
Open Government Section

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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, 497 (1988) (where requested documents are numerous and repetitive, governmental body should submit representative sample; but if each record contains substantially different information, all must be submitted). This letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that these records contain substantially different types of information than that submitted to this office.

²We have marked one document that appears to be non-responsive to the requests. We did not review this document.

³We note that under section 552.102 of the Open Records Act, information in a personnel file "is to be made available to that employee or the employee's designated representative as public information is made available under this chapter." However, this provision does not override the section 552.103(a) exception from disclosure. Open Records Decision No. 288 (1981).

Ref.: ID# 25037

Enclosures: Submitted documents

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