



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

August 31, 1994

Mr. C. Ed Davis
Deputy Administrator for Legal Affairs
Texas Employment Commission
101 East 15th Street
Austin, Texas 78778-0001

OR94-530

Dear Mr. Davis:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, Government Code chapter 552. We assigned your request ID# 27045.

The Texas Employment Commission (the "commission") has received a request for information relating to a certain report prepared by the manager of the commission's Sweetwater office. Specifically, the requestor seeks "copies of reports or correspondence from the manager of Sweetwater TEC to you or any other person in your agency concerning a horrendous, false accusation on May 12, 1994 by Ms. Jones and my subsequent complaint concerning it." You have submitted the requested information to us for review and claim that sections 552.103, 552.108, and 552.111 of the Government Code except it from required public disclosure.

First, we address your assertion that section 552.103 of the Government Code excepts the requested information from required public disclosure. Section 552.103(a) excepts information

(1) relating to litigation of a civil or criminal nature or settlement negotiations, 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; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

For information to be excepted from public disclosure by section 552.103(a), litigation must be pending or reasonably anticipated and the information must relate to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 (1990) at 5. Although section 552.103(a) gives the attorney for a governmental body discretion to determine whether section 552.103(a) should be claimed, that determination is subject to review by the attorney general. Open Records Decision Nos. 551 at 5; 511 (1988) at 3.

You claim that section 552.103(a) is applicable in this instance because the commission has threatened to file harassment charges against the requestor under section 42.07(a)(4) of the Penal Code and because the requestor has on several occasions raised the prospect of filing an Equal Employment Opportunity Commission ("EEOC") complaint against the commission. A surmise that litigation will occur is not enough; there must be some concrete evidence pointing to litigation. Attorney General Opinion JM-266 (1984) at 4; Open Records Decision Nos. 518 (1989) at 5; 328 (1982). The mere contemplation of future litigation by a governmental body is not sufficient to invoke section 552.103(a). Open Records Decision No. 557 (1990). Thus, the mere fact that the commission may file a criminal complaint against the requestor is no basis for withholding the requested information under section 552.103(a). While we do not dispute that an EEOC complaint may be reasonably anticipated in this instance, you have not explained how the requested information might relate to such a complaint. We note that the governmental body claiming an exception is responsible for submitting in writing the reasons it believes the requested information is excepted from disclosure. Attorney General Opinion H-436 (1974). If a governmental body does not claim an exception or fails to show how it applies to the records, it will ordinarily waive the exception unless the information is deemed confidential by the act. *See* Attorney General Opinion JM-672 (1987). In this instance, you have failed to demonstrate the applicability of section 552.103(a). Accordingly, the commission may not withhold the requested information under that exception.

Next, we address your contention that section 552.108 of the Government Code excepts the requested information from required public disclosure. Section 552.108 excepts:

(a) A record of a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution.

When applying section 552.108, this office distinguishes between information relating to cases that are still under active investigation and other information. Open Records Decision No. 611 (1992) at 2. In cases that are still under active investigation, section 552.108 excepts from disclosure all information except that generally found on the first page of the offense report. See generally *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), writ *ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976); Open Records Decision No. 127 (1976). Otherwise, when the "law enforcement" exception is claimed, the agency claiming it must reasonably explain, if the information does not supply the explanation on its face, how release would unduly interfere with law enforcement. Open Records Decision No. 434 (1986) at 3 (citing *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977)). Similarly, if an investigation by an administrative agency reveals possible criminal conduct that the agency intends to report or already has reported to the appropriate law-enforcement agency, then section 552.108 will apply to the information gathered by the administrative agency when its release would unduly interfere with law enforcement. Attorney General Opinion MW-575 at 1-2; Open Records Decision No. 493 at 2. Whether information falls within the section 552.108 exception must be determined on a case-by-case basis. *Id.* at 2.

The commission is not a law enforcement agency. On the other hand, although you explain that you have given a copy of the memorandum to the police department, you do not claim that the submitted information relates to an ongoing law enforcement investigation and have not explained how release of the requested information would unduly interfere with law enforcement. After a review of the document, we conclude that its release would not unduly interfere with law enforcement. Therefore, the commission has no basis for withholding the requested information under section 552.108 of the Government Code.

Finally, we address your claim that the requested information is excepted from required public disclosure by section 552.111 of the Government Code, which excepts information that constitutes an "interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined section 552.111 and held that it excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the deliberative or policymaking processes of the governmental body at issue. An agency's policymaking functions, however, do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 at 5-6. Furthermore, section 552.111 does not

except from disclosure purely factual information. *Id.* The information at issue here is purely factual in nature. Accordingly, we conclude that section 552.111 does not except it from required public disclosure. The commission must release the requested information in its entirety.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this 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,



Loretta R. DeHay
Assistant Attorney General
Open Government Section

LRD/GCK/rho

Enclosures: Submitted documents

Ref.: ID# 27045

cc: Mr. Ronald R. Green
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(w/o enclosures)