



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 8, 1997

Ms. Elizabeth Lutton
Assistant City Attorney
City of Arlington
P.O. Box 231
Arlington, Texas 76004-0231

OR97-0741

Dear Ms. Lutton:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 105245.

The City of Arlington (the "city") received a request for "all documents of rulings or responses to allegations of discrimination by Arlington police officers in reference to the September lieutenant promotional process." You contend that the documents are excepted from public disclosure by sections 552.022(1) and 552.103(a) of the Government Code. You have submitted a representative sample of the requested information for our review.¹

Initially, we consider your assertion that the requested information is not subject to the Open Records Act (the "act") because it relates to an investigation which is currently on appeal to the City Manager for resolution. In claiming that the information is not public information until the appeal is completed, you refer us to section 552.022(1), which specifically makes public "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body." In Open Records Decision No. 321 (1982) at 2, this office determined that the fact that information has not yet been put into "final" form is not dispositive of whether it constitutes public information. The threshold question is whether material that is requested from a governmental body falls within the act's definition of "public information." *Id.* Section 552.021 of the Government Code defines public information and provides as follows:

¹In reaching our conclusion here, we 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 (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.

(a) Information is public information if, under a law or ordinance or in connection with the transaction of official business, it is collected, assembled, or maintained:

(1) by a governmental body; or

(2) for a governmental body and the governmental body owns the information or has a right of access to it.

Gov't Code § 552.021. The records submitted to us for review were created "in connection with the transaction of official business," *i.e.*, in the course of the city's investigation.

Thus, merely because section 552.022(1) provides that "completed" reports or investigations made for or by governmental bodies are public information does not mean that records related to incomplete investigations, or investigations that have not been resolved by a governmental body, are automatically excepted from required disclosure. *See* Open Records Decision No. 460 (1987) at 2-3. The city may withhold the requested records from public disclosure only if one of the exceptions to required public disclosure as provided by chapter 552 of the Government Code applies. *See, e.g.*, Open Records Decision Nos. 565 (1990), 535 (1989). Accordingly, we conclude that the information submitted to us for review is public information subject to the act.

We will now address your assertion that section 552.103(a) excepts the requested information from disclosure. Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state or a political subdivision is or may be a party. The city 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 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 city must meet both prongs of this test for information to be excepted under section 552.103(a).

The mere chance of litigation will not trigger section 552.103(a). Open Records Decision No. 452 (1986) at 4 and authorities cited therein. 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.* Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986) at 4.

You contend that the requested information relates to reasonably anticipated litigation because several news articles attribute statements to a number of city police officers that they will pursue remedies against the city for alleged acts of discrimination.² This office has

²We note that you have provided this office with copies of the news articles to which you refer.

determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Nor does the mere fact that an individual hires an attorney and alleges damages serve to establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983) at 2.

You further assert that the complaints are by their very nature allegations that the city has violated equal employment opportunity law. This office has previously held in prior open records decisions that the pendency of a complaint before the Equal Employment Opportunity Commission (the "EEOC") indicates a substantial likelihood of litigation and is therefore sufficient to satisfy the requirements of section 552.103. *See* Open Records Decision No. 386 (1983) and authorities cited therein. The logic of those decisions, however, does not apply here, where you have submitted to this office no evidence that there are any complaints currently pending with the EEOC. Absent a showing of concrete evidence of anticipated litigation, we conclude that you have not met your burden of demonstrating the applicability of section 552.103, and the city must release the requested information.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Vickie Prehoditch
Assistant Attorney General
Open Records Division

VDP/alg

Ref.: ID# 105245

Enclosures: Submitted documents

cc: Ms. Deanna D. Boyd
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(w/o enclosures)