Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 16, 1997

Ms. Debra Esterak
Feldman & Rogers
Attorneys at Law
12 Greenway Plaza, Suite 1202
Houston, Texas 77046

OR97-2067

Dear Ms. Esterak:

As counsel for the Housing Authority of the City of Houston (the "housing authority"), you ask whether certain information is subject to required public disclosure under the Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 108538.

The housing authority received a request for twenty categories of information. You state that the housing authority does not have some of the information, specifically items 1, 9, and 17.[1] However, you assert that the remaining information is excepted from required public disclosure based on sections 552.101, 552.102, 552.103, 552.107 and 552.111 of the Government code. You have submitted a representative sample of the document for our review.[2]

Section 552.103(a) of the Government Code reads as follows:

> (a) Information is excepted from [required public disclosure] if it is 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

[1]The Open Records Act does not require a governmental body to make available information which does not exist. Open Records Decision No. 362 (1983).

[2]We assume that the "representative samples" 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.

> 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.

A governmental body has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. The test for establishing that section 552.103 applies is a two-prong 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 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.).

You state that the information relates to a pending Equal Employment Opportunity Commission ("EEOC") complaint. The pendency of a complaint before the EEOC indicates a substantial likelihood of litigation. *See* Open Records Decision No. 386 (1983). From the submitted records, specifically Attachment B, an EEOC complaint form, it is clear that this claim is pending at this time. Thus, assuming that the complainant has not dismissed his complaint, the housing authority may withhold from public disclosure the information requested under numbers 2, 3, 5, 6, 10, 11, 13, 14, and 19.[3] However, from the review of the information submitted in response to number 4, it is not apparent nor have you explained how those documents are "related" to the litigation and consequently item 4 may not be withheld under section 552.103.[4]

You also assert that the information requested under item number 4 is excepted from disclosure by sections 552.111 and 552.107. We observe that section 552.111 excepts from disclosure "only those internal agency communications consisting of advice, recommendations, opinions and other materials reflecting the deliberative or policymaking processes of the governmental body at issue." Open Records Decision No. 615 (1993) at 5. This exception is intended to protect advice and opinions given on policy matters and to encourage frank and open discussions within an agency in connection with the agency's decision making processes. *Texas Dep't of Pub. Safety v. Gilbreath,* 842 S.W.2d 408, 412 (Tex. App.-- Austin 1992, no writ) (citing *Austin v. City of San Antonio,* 630 S.W.2d 3991,

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[3]We note that when the opposing party in the litigation has seen or had access to any of the information in these records, there is no justification for withholding that information from the requestor pursuant to section 552.103(a). Open Records Decision Nos. 349 (1982), 320 (1982). In addition, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

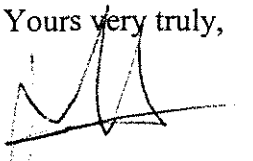
[4]Additionally, in the representative sample you have submitted to this office, we note that information responsive to items 8, 12, 18, or 20 is not contained within the representative sample you submit, and accordingly items 8, 18, and 20 must be released. Further, we observe that some of the information requested under item 12 may be confidential and accordingly should be withheld.

394 (Tex. App.--San Antonio 1982, writ ref'd n.r.e.)). It does not permit the withholding of information which relates solely to an internal personnel matter involving a particular individual. Open Records Decision No. 615 (1993).

"Attachment E" submitted in response to request number 4 reveals an investigation of a personnel matter involving a particular individual and may not be withheld under section 552.111. However, it is section 552.107(1) which protects from disclosure information that reveals client confidences to an attorney or that reveals the attorney's legal advice, opinion, and recommendation. *See* Open Records Decision No. 574 (1990). Consequently, we marked those portions of Attachment E constituting legal opinion to be withheld under this exception, but the remainder must be released.[5]

We are resolving this matter with this informal letter ruling rather than with a published open records decision.[6] This ruling is limited to the particular records at issue under the facts presented to us in this request and may 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,



Janet I. Monteros
Assistant Attorney General
Open Records Division

JJM/glg

Ref: ID#108538

Enclosures: Submitted documents

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(w/o enclosures)

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[5]To the extent that an attorney acts as an investigator and not as a legal advisor, the attorney-client privilege does not apply. Open Records Decision No. 462 (1987).

[6]As we address the issues presented under other exceptions, we need not address the issues presented by sections 552.101 and 552.102 in this instance.