

January 14, 1999

Ms. Jennifer Soldano  
Associate General Counsel  
Texas Department of Transportation  
125 E. 11<sup>th</sup> Street  
Austin, Texas 78701-2483

OR99-0108



OFFICE OF THE  
ATTORNEY GENERAL  
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Dear Ms. Soldano:

You have asked whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 121161.

The Department of Transportation (the "department") received a request for "e-mail messages, incoming messages (and) outgoing messages from the East Area Rural office specifically Robert L. Steeds (and) Tim Toomay's office, for the month of June 1998." You assert that the messages are protected from disclosure under section 552.103(a) of the Government Code. You submitted to this office messages that you indicate are representative samples of the responsive records.<sup>1</sup> We note that many of these messages may not be responsive to the request, as they were not created, sent, or received during June of 1998. However, we will consider your arguments concerning the submitted messages.

To show that section 552.103(a) is applicable, a governmental entity must show that (1) litigation is pending or reasonably anticipated and (2) the information at issue is related to the litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (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). The governmental entity must meet both prongs of this test for information to be excepted under section 552.103(a). You provided this office with a copy of a complaint of discrimination that has been filed with the Equal Employment Opportunity Commission ("EEOC"). This office has

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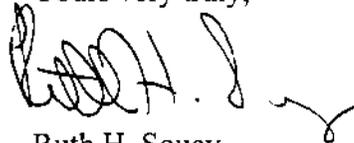
<sup>1</sup>We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision No. 499 (1988), 497 (1988). Here, we do not address any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

stated that a pending EEOC complaint indicates litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982). By showing that a complaint filed with the EEOC is pending, you have shown that litigation is reasonably anticipated.

The second prong of the section 552.103(a) test is that the records at issue must be related to the anticipated litigation. We have reviewed the sample messages and conclude that a number of the messages do not appear on their face to be related to the subject of the anticipated litigation, nor have you explained their relatedness. We have marked these messages, which if responsive to the request must be released. The remaining messages appear to have some relationship to the anticipated litigation and thus may be withheld from disclosure on the basis of section 552.103(a). In making this determination, we assume that the opposing party in the anticipated litigation has not already had access to these messages. Once information has been obtained by all parties to the litigation, no section 552.103(a) interest generally exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Also, the applicability of section 552.103(a) ends once the litigation has concluded. Attorney General Opinion MW-575 (1982), Open Records Decision No. 350 (1982).

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,



Ruth H. Soucy  
Assistant Attorney General  
Open Records Division

RHS/ch

Ref: ID# 121161

Enclosures: Submitted documents

cc: Ms. Rene Mendez  
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(w/o enclosures)