



June 14, 1999

Mr. John Steiner
Division Chief
Law Department
City of Austin
P.O. Box 1546
Austin, Texas 78767-1546

OR99-1949

Dear Mr. Steiner:

You have asked whether certain information is subject to required public disclosure under the Public Information Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 126124.

The City of Austin (the "city") received an open records request for "all intra-memorandum . . . I had received in the VAX-VMS system since my account was first created until last date I accessed it." In response to the request, you submit to this office for review a representative sample of the information at issue.¹ You claim that the requested records are excepted from required public disclosure pursuant to section 552.103 of the Government Code. We have considered the exception and arguments you raise, and have reviewed the information submitted.

At the outset we note that you advise our office that "[i]nformation responsive to this request could have been created at any time during the period from January 22, 1996 through June 17, 1998; in the normal course of business such information could also have been deleted from the system at any time prior to the City's receipt of" the requestor's request. We agree that the city is not required to provide information which is not in its possession. Open Records Decision No. 452 (1986). However, we assume that the city has followed the requisite records retention policies. *See generally* Local Gov. Code § 203.041 *et seq.* (local government record retention schedules). You also assert that "[s]ystem files are backed up periodically, and the backup is maintained for a limited period of time. Identification and retrieval of other information (if it exists) would require manipulation of data, at a cost to the requestor." We assume that you have notified the requestor of this fact in accordance with

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 (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.

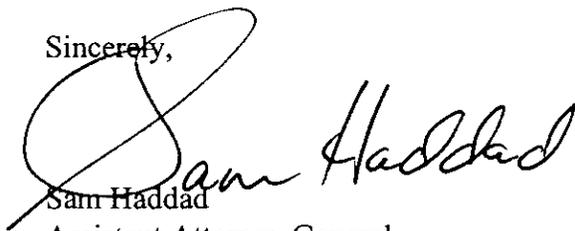
section 552.231 of the Government Code, which sets out procedures for advising the requestor of estimated costs and delays in such instances.

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). This office has stated that a pending Equal Employment Opportunity Commission ("EEOC") complaint indicates litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982). By showing that a complaint that has been filed with the EEOC and the Texas Commission on Human Rights is pending, you have shown that litigation is reasonably anticipated. Based upon the information provided and your arguments, we agree that you have shown that the requested records are related to the anticipated litigation. Thus, the city has met both prongs of section 552.103(a).

Generally, however, absent special circumstances, once information has been obtained by all parties to the litigation, either through discovery or otherwise, no section 552.103 interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Specifically, we note that the submitted records contain memorandum or electronic mail directed to or from the requestor; therefore, we advise you that such records should be released. Further, 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).

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.

Sincerely,

A handwritten signature in black ink that reads "Sam Haddad". The signature is written in a cursive, flowing style. The first letter "S" is large and loops around the first part of the name. The signature is positioned above the typed name "Sam Haddad".

Sam Haddad
Assistant Attorney General
Open Records Division

SH/nc

Ref.: ID# 126124

encl: Submitted documents

cc: Ms. Marcia Workman
5400 Cameron Road #130
Austin, Texas 78723
(w/o enclosures)