



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 29, 2007

Mr. Jesus Toscano, Jr.
Administrative Assistant City Attorney
City of Dallas
1500 Marilla Street
Dallas, Texas 75201

OR2007-11228

Dear Mr. Toscano:

You ask 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# 290046.

The City of Dallas (the "city") received a request from the United States Department of Justice (the "department") for ten categories of information related to a particular discrimination claim against the city. You state that some of the requested information will be provided to the requestor, but claim that the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Section 552.103 of the Government Code provides in part as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature 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.

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.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body 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 on the date the governmental body received the request for information and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (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 body must meet both prongs of this test for information to be excepted under section 552.103(a).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. See Open Records Decision No. 452 at 4 (1986). To establish that litigation is reasonably anticipated, a governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *Id.* This office has stated that a pending complaint with the Equal Employment Opportunity Commission (the “EEOC”) indicates litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982).

You state, and provide documentation showing, that the former employee filed a racial discrimination and retaliation complaint with the EEOC against the city under Title VII of the Civil Rights Act of 1964. See Civil Rights Act of 1964; 42 U.S.C. § 2000e-2(a)(1). The EEOC investigated the charge, and upon conclusion of its investigation the EEOC found that there was reasonable cause to believe that the city had discriminated against the employee. The EEOC and the city then attempted to reconcile the charge through conciliation. When conciliation between the EEOC and the city failed, the EEOC, as required by statute, referred the charge to the department for enforcement. 42 U.S.C. § 2000e-5 (f)(1). Upon referral, and as part of its enforcement functions, the department sent the request at issue to the city.

We note that the department enforces Title VII against state and local government employers, but individuals who believe that they have been victims by any employer of discrimination prohibited by Title VII must first file a charge of discrimination with the EEOC in order to protect their rights. Once the EEOC investigates the charge and finds that there is reasonable cause to believe that discrimination occurred, the EEOC attempts to conciliate the charge with the respondent. After a finding of reasonable cause and attempts to conciliate fail, the EEOC must refer the charge to the department for enforcement. *Id.*; see also 28 C.F.R. § 1601.29 (2006). Thus, after referral, the complaint is no longer directly handled by the

EEOC. Upon referral from the EEOC, the department may resolve the charge by obtaining a settlement, initiating litigation on the charge or dismissing the charge and issuing a notice of right to sue to the complainant. *See* 28 C.F.R. § 42.610 (2006). After referral, the complainant in the discrimination charge maintains the same rights that he or she had while the charge was in the hands of the EEOC. The complainant maintains the right to sue the respondent if the department determines that litigation is not warranted and the right to join in any suit filed by the department. *See* 42 U.S.C. § 2000e-5 (f)(1) (if civil action is not filed by the department, then complainant must be given notification of right to sue). Therefore, we find that the mandatory referral of the discrimination charge from the EEOC to the department constitutes a continuation of the EEOC complaint process. Accordingly, litigation pertaining to the discrimination charge remains anticipated for the purposes of section 552.103 despite enforcement of the charge being referred from the EEOC to the department. We also find that the submitted information relates to the anticipated litigation.

We note, however, that the city seeks to withhold information that the former employee, who is represented by the department as opposing party to the pending litigation, has already seen or had access. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information that relates to the litigation through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). Thus, if the opposing party to pending litigation has already seen or had access to information that relates to the litigation, through discovery or otherwise, there is no interest in now withholding such information under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, the submitted information that the former employee has already seen or had access to is not excepted under section 552.103, and the city must release it to the requestor.² However, the city may withhold the remaining information under section 552.103.³

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited

²We note that the department, as the representative of the former employee at issue, has a right of access to information in the submitted documents that otherwise would be excepted from release under the Act. *See* Gov't Code § 552.023(a) ("a person or a person's authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person's privacy interests."); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning herself). Thus, the city must again seek a decision from this office if it receives a request for this information from a different requestor.

³As we are able to resolve this under section 552.103, we do not address your other arguments to withhold this information.

from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

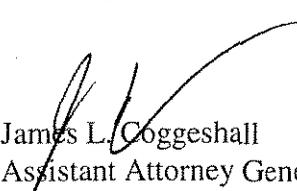
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/jh

Ref: ID# 290046

Enc. Submitted documents

c: Mr. Hector F. Ruiz, Jr.
U.S. Department of Justice
Civil Rights Division
Employment Litigation Section - PHB
950 Pennsylvania Avenue, NW
Washington, DC 20530
(w/o enclosures)