ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 28, 2009

Ms. Amy L. Sims
Assistant City Attorney
City of Lubbock
P.O. Box 2000
Lubbock, Texas 79457

OR2009-10406

Dear Ms. Sims:

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# 350945.

The City of Lubbock (the "city") received three requests for the Equal Employment Opportunity Commission ("EEOC") complaint filed by a named individual. The first request also seeks all EEOC complaints filed with the city's Human Resources Department for the month preceding the request, and the third request additionally seeks the complaint filed by the named individual with the Texas Workforce Commission-Civil Rights Division. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that you have only submitted the complaints filed by the named individual. Thus, to the extent any additional information responsive to the first request for information existed when the first request was received, we assume it has been released. If such information has not been released, then it must be released at this time. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

Next, we address your claim under section 552.103 of the Government Code, as it is potentially the most encompassing of your claimed exceptions to disclosure. Section 552.103 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.
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> . . .
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> (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 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 on the date the governmental body received the request, 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). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See id.*

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See id.* This office has found that a pending EEOC complaint and a pending complaint filed with the Texas Workforce Commission's Civil Rights Division (the "TWC") indicate litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982).

You state, and provide documentation showing, that the named individual filed a retaliation claim with the EEOC and the TWC prior to the city's receipt of this request. You also state that the information at issue is related to this discrimination claim. Based on your arguments, and the submitted information, we find that the city reasonably anticipated litigation on the date of its receipt of this request. We also find that the submitted information is related to the anticipated litigation. Therefore, we find that section 552.103 is generally applicable to the submitted information.

We note, however, that once the opposing party in the pending litigation has seen or had access to information that is related to litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103 *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, the 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 must be disclosed. In this instance, the opposing party to the anticipated litigation has already had access to the submitted information. Therefore, the submitted information may not be withheld under section 552.103.

You raise section 552.101 of the Government Code in conjunction with section 1611.10 of title 9 of the Code of Federal Regulations for the submitted information. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. A federal regulation enacted pursuant to statutory authority can provide statutory confidentiality for purposes of section 552.101. *See* Open Records Decision Nos. 599 (1992), 373 (1983). Section 1611.10 of title 9 of the Code of Federal Regulations provides:

> The [EEOC] shall not disclose any record which is contained in a system of records it maintains, by any means of communication to any person or to another agency, except pursuant to a written request by, or with the prior written consent of the individual to whom the record pertains, unless the disclosure is authorized by one or more provisions of 5 U.S.C. 552a(b).

29 C.F.R § 1611.10. Section 1611.10 applies to records maintained by the EEOC. You have failed to demonstrate that this section applies to the city as a party to the complaints at issue. Therefore, the submitted information may not be withheld under section 552.101 in conjunction with section 1611.10 of title 29 of the Code of Federal Regulations.

You also raise section 552.101 of the Government Code in conjunction with section 21.304 of the Labor Code. Section 21.304 of the Labor Code, which relates to public release of information obtained by the TWC, provides as follows:

> An officer or employee of the [TWC] may not disclose to the public information obtained by the [TWC] under Section 21.204 except as necessary to the conduct of a proceeding under this chapter.

Labor Code § 21.304. You contend the submitted information is confidential pursuant to section 21.304 of the Labor Code. However, we note that this section, by its own terms, only applies to officers and employees of the TWC. *See* Open Records Decision Nos. 478 at 2 (1987) (language of confidentiality statute controls scope of protection), 465 at 4-5 (1987) (statute explicitly required confidentiality). Therefore, section 21.304 does not apply to the city and the submitted information may not be withheld under this statute.

You also assert the submitted information is excepted from disclosure under section 552.102 of the Government Code. Section 552.102(a) excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102(a) is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Government Code. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976). Information is protected from disclosure under the common-law right to privacy if (1) it contains highly intimate or embarrassing facts, the release of which would be highly objectionable to a reasonable person, and (2) it is not of legitimate concern to the public. *See id.* at 685. The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. However, information pertaining to the work conduct and job performance of public employees is subject to a legitimate public interest and therefore generally not protected from disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute employee's private affairs), 455 (1987) (public employee's job performance or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employee), 423 at 2 (1984) (scope of public employee privacy is narrow). Upon review, we find none of the submitted information constitutes highly intimate or embarrassing information that is of no legitimate concern to the public. Therefore, the city may not withhold any of the submitted information under section 552.102 of the Government Code on that basis.

You also raise section 552.117 of the Government Code for a portion of the submitted information. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). Whether a particular piece of information is public must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Pursuant to section 552.117(a)(1), the city must withhold personal information that pertains to a current or former employee who elected, prior to the city's receipt of the request for information, to keep such information confidential. You state, and provide documentation showing, that the employee at issue has timely elected to keep her information confidential. Accordingly, we have marked the information that must be withheld under section 552.117(a)(1).

In summary, the city must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The remaining information must be released.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,

Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/eeg

Ref: ID# 350945

Enc. Submitted documents

c: Requestor (3)
(w/o enclosures)