



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 24, 2009

Mr. Julian W. Taylor, III
Assistant City Attorney for the City of Freeport
The Law Office of Wallace Shaw, P.C.
P.O. Box 3073
Freeport, Texas 77542-1273

OR2009-11877

Dear Mr. Taylor:

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# 354091.

The City of Freeport (the "city"), which you represent, received a request for the Equal Employment Opportunity Commission ("EEOC") complaints filed by two named individuals. You claim that the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

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.

...

(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 indicate litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982).

You state, and provide documentation showing, that prior to the city's receipt of the instant request, the named individuals filed discrimination claims with the EEOC against the city. You also state that the information at issue is related to these discrimination claims. Based on your arguments and our review of 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 the opposing party in the anticipated litigation has seen or had access to is not excepted from disclosure under section 552.103(a) and must be disclosed. In this instance, the opposing parties to the anticipated litigation have already seen or had access to most of the submitted information. Therefore, this information may not be withheld under section 552.103. However, the remaining information at issue, which we have marked, may be withheld under section 552.103 of the Government Code.

Next, we note some of the remaining information may be protected under section 552.117(a)(1) of the Government Code.¹ Section 552.117(a)(1) excepts from public disclosure the home addresses and telephone numbers, social security numbers, and family

¹The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

member information of current or former officials or employees of a governmental body who timely request that such information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). Section 552.117 also encompasses a personal cellular telephone number, provided that a governmental body does not pay for the cell phone service. *See* Open Records Decision No. 506 at 5-6 (1988) (Gov't Code § 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). The city may only withhold information under section 552.117(a)(1) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Therefore, if the city employees whose personal information we have marked timely elected to withhold their information under section 552.024, the marked information must be withheld under section 552.117(a)(1). If the employees did not timely elect confidentiality, the marked information may not be withheld under section 552.117(a)(1).

In summary, the city may withhold the information we have marked under section 552.103 of the Government Code. If the city employees whose personal information we have marked timely elected to withhold their information under section 552.024, the city must withhold the information we marked under section 552.117(a)(1) of the Government Code. The remaining information must be released to the requestor.

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,



Sarah Casterline
Assistant Attorney General
Open Records Division

SEC/eb

Ref: ID# 354091

Enc. Submitted documents

c: Requestor
(w/o enclosures)
