



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 30, 2010

Ms. Lesli R. Fitzpatrick
Public Information Officer and Staff Attorney
Texas General Land Office
P.O. Box 12873
Austin, Texas 78711-2873

OR2010-14911

Dear Ms. Fitzpatrick:

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# 395311.

The General Land Office (the "GLO") received a request for seven categories of information pertaining to specified employees during specified time periods. You state portions of the requested information did not exist on the date the GLO received the request. You also state some of the responsive information has been released, with social security numbers of individuals other than the requestor's client redacted pursuant to section 552.147 of the Government Code.¹ You claim that the submitted information is excepted from disclosure under section 552.103 of the Government Code.² You state you have notified certain individuals to whom the requested information relates of the request. *See* Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for Attorney General ruling should or should not be released). We have considered

¹Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. Gov't Code § 552.147.

²We assume 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 those records contain substantially different types of information than that submitted to this office.

your arguments and reviewed the submitted information. We have also considered comments submitted by the requestor. *See id.*

Initially, we must address the requestor's contention that the GLO did not comply with its procedural obligations under section 552.301 of the Government Code in requesting this decision. Section 552.301 prescribes procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. *See id.* § 552.301(a). Section 552.301(b) provides that a governmental body must ask for the attorney general's decision and claim its exceptions to disclosure no later than the tenth business day after the date of its receipt of the written request for information. *See id.* § 552.301(b). Section 552.301(e) requires the governmental body to submit to the attorney general, not later than the fifteenth business day after the date of the receipt of the request: (1) written comments stating why the governmental body's claimed exceptions apply to the information that it seeks to withhold; (2) a copy of the written request for information; (3) a signed statement of the date on which the governmental body received the request or evidence sufficient to establish that date; and (4) the specific information that the governmental body seeks to withhold or representative samples if the information is voluminous. *See id.* § 552.301(e)(1)(A)-(D). Section 552.301(e-1) requires a governmental body that submits written comments to the attorney general under subsection (e)(1)(A) to send a copy of those comments to the person who requested the information from the governmental body within fifteen business days of receiving the request for information. *Id.* § 552.301(e-1). If a governmental body fails to comply with section 552.301, the requested information is presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold any of the information. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ).

You inform us that the GLO received the instant request for information on July 14, 2010. You also inform us that the GLO sought a clarification of the request on July 26 and received the requestor's clarified response on July 28. *See Gov't Code* § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information). As we have no indication that the GLO acted in bad faith in seeking clarification in this instance, we consider the GLO's ten-business-day period for requesting a decision under section 552.301(b) to have begun on July 28, 2010, the date of the GLO's receipt of the requestor's response to the request for clarification. *See City of Dallas v. Abbott*, 304 S.W.3d 380, 384 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed). Thus, the GLO's ten-business-day deadline was August 11, 2010, and its fifteen-business-day deadline was August 18, 2010. Accordingly, with the exception of the brief the GLO hand delivered to this office on August 25, 2010, in which it raised third-party interests for the first time, we find the GLO's submissions to this office were postmarked within the ten- and fifteen-business-day

deadlines. *See* Gov't Code § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Although the requestor also claims the GLO missed its fifteen-business-day deadline to send him a copy of its comments, we note the requestor informs us, and has submitted the envelope showing, that he received the GLO's written arguments in an envelope postmarked August 10, 2010. Accordingly, we find this correspondence was timely under section 552.301. *See id.* § 552.301(e-1). Consequently, with the exception of the August 25, 2010 submission, we find the GLO complied with the procedural requirements of section 552.301, and its argument under section 552.103 of the Government Code is timely. However, we find the GLO failed to comply with the requirements of section 552.301 in raising third-party interests. Because a compelling reason generally exists when third-party interests are at stake, we will consider any third-party interests in the submitted information. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982).

As of the date of this letter, we have not received any correspondence from any of the notified individuals. Thus, none of these individuals has demonstrated that they have a privacy interest in any of the information at issue. Therefore, the GLO may not withhold any of the submitted information on the basis of any privacy interest these individuals may have in it.

We now turn to the GLO's argument under section 552.103 of the Government Code, which provides in part:

(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 GLO 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 GLO 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 GLO must meet both prongs of this test for information to be exempted 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 demonstrate litigation is reasonably anticipated, the governmental body must furnish concrete evidence litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Concrete evidence to support a claim litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). Furthermore, 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).

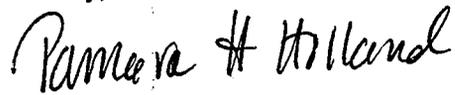
You state that the requestor's client filed a claim of discrimination with the EEOC prior to the date of the GLO's receipt of the present request for information. Thus, we agree the GLO reasonably anticipated litigation on the date it received the present request for information. You also argue that the submitted information is related to the anticipated litigation. Upon review, we agree that the submitted information is related to the anticipated litigation for purposes of section 552.103. We therefore conclude that section 552.103 is generally applicable to the submitted information.

We note, however, that the submitted information includes a complaint submitted to the GLO by the requestor's client. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* ORD 551 at 4-5. If the opposing party has seen or had access to information relating to anticipated 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). Therefore, the complaint, which we have marked, may not be withheld under section 552.103. Although the requestor's client also has seen or had access to other portions of the submitted information, he only saw or had access to that information in the usual scope of his employment. Such information is not considered to have been obtained by the opposing party to anticipated litigation and thus may be withheld under section 552.103. Therefore, with the exception of the marked complaint, the GLO may withhold the submitted information under section 552.103. We note that the applicability of this exception ends once the related litigation concludes or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). As no further exceptions to disclosure are raised, the marked complaint 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, toll free at (888) 672-6787.

Sincerely,

A handwritten signature in black ink that reads "Tamara H. Holland". The signature is written in a cursive, flowing style.

Tamara H. Holland
Assistant Attorney General
Open Records Division

THH/em

Ref: ID# 395311

Enc. Submitted documents

c: Requestor
(w/o enclosures)