



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 8, 2012

Ms. Barbara H. Owens
Assistant General Counsel
Texas Department of State Health Services
P.O. Box 149347
Austin, Texas 78714-9347

OR2012-02006

Dear Ms. Owens:

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# 444758 (DSHS File 19638/2012).

The Texas Department of State Health Services (the "department") received a request for e-mails by a named employee in which the requestor was named over a specified period of time. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹ We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note portions of the submitted information were the subject of a previous request for a decision, in response to which this office issued Open Records Letter No. 2012-01588 (2012). As we have no indication that the law, facts, or circumstances on which the prior ruling was based have changed, the department must continue to rely on that ruling as a previous determination and withhold or release the previously ruled upon information in accordance with this prior ruling. *See* Open Records Decision No. 673 (2001) (so long as

¹We 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 that those records contain substantially different types of information than that submitted to this office.

law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). However, we will consider your arguments for the information not subject to the prior ruling.

Next, we note portions of the remaining information, which we have marked, are not responsive to the instant request because they do not consist of e-mails sent by the named employee in which the requestor was named. The department need not release nonresponsive information in response to this request, and this ruling will not address that information.

Section 552.103 of the Government Code provides in pertinent 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). A 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 was 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). A 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 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.* This office has found that a pending complaint filed with the Equal

Employment Opportunity Commission (the “EEOC”) indicates litigation is reasonably anticipated. *See, e.g.*, Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982).

You state, and provide documentation showing, the requestor filed a discrimination claim against the department with the EEOC prior to the department’s receipt of the instant request for information. You explain the EEOC claim was still pending when the department received the request for information. You state, and the documents at issue reflect, the remaining information is related to the requestor’s claim of discrimination. Based on your representations and our review, we find the department reasonably anticipated litigation on the date this request was received, and the information at issue is related to the anticipated litigation. Therefore, we conclude the department may generally withhold the remaining information under section 552.103 of the Government Code.

However, we note the opposing party in the anticipated litigation has seen or had access to some of the information at issue, which we have marked. 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. Thus, if the opposing party has seen or had access to information relating 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). Therefore, the information we have marked is not protected by section 552.103 and may not be withheld on that basis. We note information accessed in the usual scope of employment is not considered to have been obtained by the opposing party to the litigation and may therefore be withheld under section 552.103. Accordingly, with the exception of the information we have marked, the department may withhold the remaining information under section 552.103 of the Government Code.² We also note the applicability of section 552.103 ends once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the department must continue to rely on Open Records Letter No.2012-01588 as a previous determination and withhold or release the previously ruled upon information in accordance with the prior ruling. With the exception of the information we have marked, the department may withhold the remaining information under section 552.103 of the Government Code. The information we have marked must be released.³

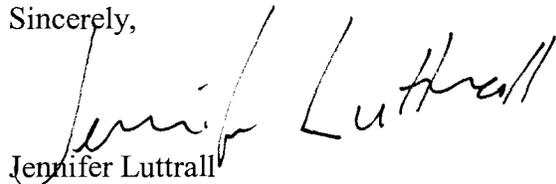
²As our ruling is dispositive, we do not address your remaining arguments against disclosure.

³We note the information being released includes the requestor’s e-mail address, to which she has a right of access. If the department receives another request for the information at issue from a different requestor, the department may withhold the requestor’s e-mail address pursuant to section 552.137 of the Government Code pursuant to Open Records Ruling No. 684 without the necessity of requesting an attorney general decision. *See* Gov’t Code § 552.137(b); Open Records Decision No. 684 (2009).

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,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JLU/dls

Ref: ID# 444758

Enc. Submitted documents

c: Requestor
(w/o enclosures)