



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 8, 2014

Mr. Carey E. Smith
General Counsel
Texas Health and Human Services Commission
Mail Code - 1070
P.O. Box 13247
Austin, Texas 78711

OR2014-07862

Dear Mr. Smith:

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# 522065.

The Health and Human Services Commission (the "commission") received a request for information related to a specified job posting, including interview dates and the applications and ethnicities of all applicants who interviewed, excluding the application of a named individual. You claim the requested information is excepted from disclosure under section 552.103 of the Government Code.¹ We have considered the exception you claim and reviewed the submitted information.

Initially, we note some of the submitted information may be subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

¹Although you also raise sections 552.107 and 552.111 of the Government Code for the submitted information, you provide no arguments explaining how these exceptions are applicable to the information at issue. Therefore, we assume you no longer assert these exceptions. See Gov't Code §§ 552.301, 302.

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

...

(15) information regarded as open to the public under an agency's policies[.]

Gov't Code § 552.022(a)(15). The submitted information includes job descriptions, which are generally open to the public as part of a job posting. If the commission regards the submitted job descriptions as open to the public, then this information is subject to subsection 552.022(a)(15), and the commission may only withhold the job descriptions if they are made confidential under the Act or other law. You seek to withhold the information at issue under section 552.103 of the Government Code. However, section 552.103 is a discretionary exception and does not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the information subject to section 552.022 of the Government Code may not be withheld under section 552.103 of the Government Code. As you claim no other exception to the disclosure of the information at issue, if the commission regards the job descriptions as open to the public, they must be released. If the commission does not regard the job descriptions as open to the public, we will consider your argument under section 552.103 for that information, as well as the remaining information.

We now turn to your argument under section 552.103 of the Government Code for the information not subject to section 552.022. Section 552.103 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). A governmental body that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information at issue. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

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 litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Concrete evidence to support a claim that 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"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *Open Records Decision No. 331 (1982).* Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. *Open Records Decision No. 361 (1983).* This office has concluded that litigation was reasonably anticipated when the potential opposing party filed a complaint with the Equal Employment Opportunity Commission (the "EEOC"). *See Open Records Decision No. 336 (1982).*

You state, and provide documentation in support of that statement, prior to the commission's receipt of this request, the requestor filed a claim of discrimination with the EEOC against the commission. You state the submitted information is directly related to the anticipated litigation. Based on your representations and our review, we find you have demonstrated the submitted information is related to litigation reasonably anticipated at the time the commission received the request for information. Therefore, we conclude the commission may withhold the submitted information under section 552.103.

However, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See Open Records Decision Nos. 349 (1982), 320 (1982).* Thus, information that has either been obtained from or provided to all parties to the pending litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of

section 552.103(a) ends once the litigation has been concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

In summary, if the commission regards the job descriptions as open to the public, the commission must release them pursuant to subsection 552.022(a)(15) of the Government Code and may withhold the remaining information under section 552.103 of the Government Code. If the commission does not regard the job descriptions as open to the public, the commission may also withhold the job descriptions under section 552.103 of the Government Code.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/dls

Ref: ID# 522065

Enc. Submitted documents

c: Requestor
(w/o enclosures)