



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 5, 2015

Ms. Jessica Escobar
Assistant General Counsel
Texas Department of Agriculture
P.O. Box 12847
Austin, Texas 78711

OR2015-16117

Dear Ms. Escobar:

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# 574316 (TDA-PIR-15-710).

The Texas Department of Agriculture (the "department") received a request for (1) two specified job postings and all related materials, (2) all e-mails for a named individual, the requestor, during a specified time period, and (3) phone calls and text messages from a specified phone number during a specified time period. You indicate the department does not have some information.¹ You claim the submitted information is excepted from disclosure under section 552.103 of the Government Code.² We have considered the exception you claim and reviewed the submitted representative sample of information.³

¹The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

²Although you also raise sections 552.101 and 552.107 of the Government Code, you provide no arguments explaining how these doctrines are applicable to the information at issue. Therefore, we assume you no longer assert sections 552.101 and 552.107 of the Government Code. *See Gov't Code* §§ 552.301, .302.

³We 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.

Initially, we note some of the submitted information, which we have marked, is not responsive to the instant request because it either occurred outside of the specified time period or does not concern the individual named in the request. This ruling does not address the public availability of any information that is not responsive to the request and the department is not required to release such information in response to this request.

We also note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part, the following:

(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 that are open to the public and, thus, subject to section 552.022(a)(15). The department must release this information pursuant to section 552.022(a)(15), unless it is made confidential under the Act or other law. *See id.* Although the department raises section 552.103 of the Government Code for this information, this exception is discretionary in nature 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 section 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the department may not withhold the information subject to section 552.022, which we have marked, under section 552.103. As the department raises no other exceptions to disclosure for this information, the department must release it. However, we will address the department's argument against disclosure under section 552.103 for the responsive information not subject to section 552.022.

Section 552.103 of the Government Code provides in relevant 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 governmental body has the burden of providing relevant facts and documents to show 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 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, orig. proceeding); *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 governmental body must meet both prongs of this test for information to be excepted from disclosure 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 that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* This office has found a pending complaint with the Equal Employment Opportunity Commission (the "EEOC") indicates litigation is reasonably anticipated. *See* Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982).

The department states, prior to the department's receipt of the request for information, the requestor filed a complaint with the EEOC. Upon review, we find the department has demonstrated litigation was reasonably anticipated when it received the request for information. We also find the department has established the remaining information is related to the anticipated litigation for purposes of section 552.103(a). Therefore, we agree the department may withhold the remaining responsive information under section 552.103(a) of the Government Code.

However, we note once the remaining information has been obtained by all parties to the anticipated litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

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,

A handwritten signature in black ink that reads "Cole Hutchison". The signature is written in a cursive style with a large, prominent "C" and "H".

Cole Hutchison
Assistant Attorney General
Open Records Division

CH/som

Ref: ID# 574316

Enc. Submitted documents

c: Requestor
(w/o enclosures)