KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 10, 2015

Mr. Jeffrey Giles
Assistant City Attorney
City of Houston
Legal Department
P.O. Box 368
Houston, Texas 77001-0368

OR2015-16434

Dear Ms. Giles:

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# 574724 (GC No. 22366).

The City of Houston (the "city") received a request for information pertaining to the Houston Employee Assessment and Review ("HEAR") evaluation of a named employee. You state the city does not have information responsive to portions of the request.[1] You claim 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.

We note portions of the submitted information are subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

> (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:
>
> . . .

[1]The 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 dism'd); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

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

Gov't Code § 552.022(a)(15). The submitted information contains a job description. We note the city posts job descriptions on its website when advertising job openings. Accordingly, we find the city considers job descriptions to be open to the public under the city's policies, and therefore the submitted job description, which we have marked, is subject to subsection 552.022(a)(15). Information subject to section 552.022(a)(15) must be released unless it is made confidential under the Act or other law. Although the city claims section 552.103 of the Government Code for this information, that section 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 city may not withhold the information subject to section 552.022 under section 552.103. As you raise no further exceptions to disclosure of the information we have marked under section 552.022(a)(15) of the Government Code, the city must release such information at this time. However, we will address your argument under section 552.103 of the Government Code for the remaining 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).

This office has stated a pending complaint with the Equal Employment Opportunity Commission (the "EEOC") indicates litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982). The city states, and has provided documentation showing, that, prior to the city's receipt of the request for information, the requestor filed a complaint against the city with the EEOC. Based on these representations and our review of the submitted documents, we find the city has demonstrated it reasonably anticipated litigation when it received the request for information. We also find the city has established the submitted information is related to the anticipated litigation for purposes of section 552.103(a). Therefore, the city may withhold the remaining information under section 552.103(a) of the Government Code.

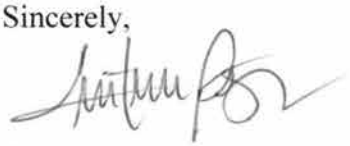
However, once the information has been obtained by all parties to the litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General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

In summary, the city must release the submitted job description pursuant to section 552.022(a)(15) of the Government Code. The city may withhold the remaining information 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,



Cristian Rosas-Grillet
Assistant Attorney General
Open Records Division

CRG/cbz

Ref: ID# 574724

Enc. Submitted documents

c: Requestor
(w/o enclosures)