



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 18, 2015

Mr. Mack T. Harrison
Assistant General Counsel
Texas Department of State Health Services
P.O. Box 149347
Austin, Texas 78714-9347

OR2015-19584

Dear Mr. Harrison:

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# 579905 (DSHS File No. 24488/2015).

The Texas Department of State Health Services (the "department") received two requests from the same requestor for (1) information pertaining to the requestor's client, (2) information pertaining to a specified grievance, (3) weekly status reports written by named individuals during a specified time period, (4) position descriptions for named individuals for a specified time period, and (5) information pertaining to individuals employed in a specified section of the department.¹ You state the department will release some information. You claim the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.² We

¹We note the requestor clarified his request. *See* Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used).

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

have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (permitting interested third party to submit to attorney general reasons why requested information should or should not be released).

Initially, you inform us by letter dated August 24, 2015, the department withdraws its request for a ruling regarding information pertaining to individuals employed in a specified section of the department and certain information pertaining to the requestor's client. You explain, and submit documentation showing, the requestor withdrew his requests for this information. Thus, this information is no longer responsive to the requests. Therefore, this ruling does not address this non-responsive information and it need not be released in response to these requests.

Next, we address the requestor's assertion the department did not meet its procedural obligations under section 552.301 of the Government Code for the requests. Section 552.301 prescribes the procedures a governmental body must follow in asking this office to determine whether information is excepted from public disclosure under the Act. *See id.* § 552.301(a). Pursuant to section 552.301(b), within ten business days of receipt of the request the governmental body must ask for a decision from this office and state which exceptions apply to the requested information. *Id.* § 552.301(b). Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request: (1) written comments stating the reasons why the claimed exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. The department received the first request on June 29, 2015, and the second request on July 1, 2015. The department informs us it observed a skeleton crew day on July 3, 2015. However, the requestor argues the department was open for business on July 3, 2015. This office does not count any holidays, including skeleton crew days observed by a governmental body, as business days for the purpose of calculating a governmental body's deadline under the Act. Accordingly, the department's ten- and fifteen-business-day deadlines for the first request were July 14, 2015, and July 21, 2015, respectively. The department's ten- and fifteen-business-day deadlines for the second request were July 16, 2015, and July 23, 2015, respectively. The envelope in which the department requested a ruling to this office was deposited in the interagency mail on July 14, 2015, and the envelope in which the department submitted the information required by section 552.301(e) was deposited in the interagency mail on July 21, 2015. *See id.* § 552.308(a)(1) (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Therefore, we find the department complied with the requirements of section 552.301 of the Government Code.

We note the requestor also asserts he has a right of access to his client's personnel file pursuant to section 552.102(a) of the Government Code. Section 552.102(a) reads, in part,

Information is excepted from the requirements of [s]ection 552.021 [of the Government Code] if it is information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, except that all information in the personnel file of an employee of a governmental body is to be made available to that employee or the employee's designated representative as public information is made available under [the Act.]

Gov't Code § 552.102(a). The requestor states because section 552.102(a) states "information in the personnel file of an employee of a governmental body is to be made available to that employee or the employee's designated representative" he has a right of access to his client's information at issue. The requestor relies on Open Records Decision No. 200 (1978) in asserting this right of access. In Open Records Decision No. 200, this office held a memorandum pertaining to an employee's employment may not be withheld from the employee under the predecessor to section 552.103 of the Government Code because the employee had a right of access to the information pursuant to the predecessor to section 552.102. We note, however, Open Records Decision No. 200 was overruled, in part, by Open Records Decision No. 288 (1981). In Open Records Decision No. 288, this office noted the provision in the predecessor to section 552.102 that stated information must be made available to an employee or the employee's designated representative is only an exception to the general exemption covering information in personnel files. *See* ORD 288 at 5. Further, this office concluded the predecessor to section 552.102(a) "does not entitle a former employee of a governmental entity to information which the entity may withhold from the general public under [the predecessor to section 552.103.]" *Id.* at 3. Therefore, the requestor does not have a right of access to his client's personnel file pursuant to section 552.102(a). Accordingly, we will address the department's argument under section 552.103 of the Government Code.

Section 552.103 of the Government Code provides, in relevant 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 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* Open Records Decision No. 551 at 4-5 (1990). A governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception applies in a particular situation. The test for meeting this burden is a showing (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the requested information is related to that litigation. *See 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.); ORD 551 at 4. The governmental body must meet both parts of this test for information to be excepted under section 552.103(a). *See* ORD 551 at 4.

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.* This office has found a pending complaint with the Equal Employment Opportunity Commission (“EEOC”) indicates litigation is reasonably anticipated. *See* Open Records Decisions Nos. 386 at 2 (1983), 336 at 1 (1982), 281 at 1 (1981).

You state prior to the department’s receipt of the instant requests for information the requestor’s client filed claims against the department with the EEOC. Based on your representation and our review of the information at issue, we find the department reasonably anticipated litigation on the dates the requests were received. You also represent the submitted information is related to the anticipated litigation for purposes of section 552.103. Therefore, the department may withhold the submitted responsive information under section 552.103 of the Government Code.³

Generally, 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 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).

³As our ruling is dispositive, we need not address your remaining arguments against disclosure of the submitted information.

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, appearing to read "Paige Thompson". The signature is written in a cursive, flowing style.

Paige Thompson
Assistant Attorney General
Open Records Division

PT/dls

Ref: ID# 579905

Enc. Submitted documents

c: Requestor
(w/o enclosures)