



August 15, 2000

Ms. Janice Marie Wilson
Assistant General Counsel
Department of Transportation
125 East 11th Street
Austin, Texas 78701

OR2000-3134

Dear Ms. Wilson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 138054.

The Department of Transportation (the “department”) received a request for a copy of the case file for case number 00HQ-N-C635, which pertains to an investigation conducted by the department’s Office of Civil Rights and involves the requestor. You have provided for our review documents that are responsive to the request, marked by you as exhibits “B” and “C.” You assert that this information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We note at the outset that this office has issued two prior decisions in response to earlier requests submitted to the department by this requestor. *See* Open Records Letter Nos. 2000-0302 (2000), 2000-0378 (2000).¹ It appears that these prior requests may have encompassed at least some of the information that is also responsive to the present request. The department at the time also represented to this office that some of the information that was

¹In both of the prior decisions, this office granted the department’s assertion of attorney-client privilege under section 552.107 of the Government Code to some of the information that was responsive to each of the prior requests. While we are unable to ascertain whether any of the information submitted with the present request was previously ruled on by this office, we advise that the department may continue to rely on the prior decisions as to the specific information that we determined may be withheld under section 552.107.

responsive to the earlier requests had been released to the requestor. In addition, the submitted documents themselves indicate that at least some of the information at issue may have been released previously by the department to the requestor, or to other members of the public. We therefore advise that, to the extent the department has voluntarily previously released any of the submitted information to any member of the public, this decision does not authorize the department to withhold that information from the requestor at this time. See Gov't Code § 552.007(b), Open Records Decision No. 400 (1983). We next address the section 552.103 assertion.

Section 552.103(a) excepts from disclosure 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.

Gov't Code § 552.103(a). Section 552.103(a) is intended to prevent the use of the Public Information Act as a method of avoiding the rules of discovery in litigation.² Attorney General Opinion JM-1048 at 4 (1989). The litigation exception enables a governmental body to protect its position in litigation by requiring information related to the litigation to be obtained through discovery. Open Records Decision No. 551 at 3 (1990).

The department 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 is pending or reasonably anticipated on the date that the governmental body received the request for information, and (2) the information at issue is related to that litigation. Gov't Code § 552.103(c); *University of Tex. Law Sch. v. Texas 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). The department must meet both prongs of this test for information to be excepted under 552.103(a).

This office has found that litigation was reasonably anticipated for purposes of section 552.103 when the potential opposing party filed a complaint with the Equal Employment Opportunity Commission ("EEOC"). Open Records Decision No. 336 at 1 (1982). You have submitted to this office a "Charge of Discrimination" form filed by the requestor on March 14, 2000 with the Texas Commission on Human Rights. The form itself indicates that the charge was simultaneously filed with the EEOC. We therefore conclude

²The Public Information Act is not a substitute for the discovery process under the Texas Rules of Civil Procedure. See Attorney General Opinion JM-1048 at 3 (1989) (the fundamental purposes of the Public Information Act and of civil discovery provisions differ); Open Records Decision No. 551 at 3-4 (1990) (discussion of relation of Public Information Act to discovery process).

that you have demonstrated that the department reasonably anticipated litigation at the time the present request for information was received by the department. See Gov't Code § 552.103(c). Our review of exhibits "B" and "C" additionally confirms your assertion that the submitted information is related to the anticipated litigation. Thus, the department has met its burden of showing that litigation is reasonably anticipated and that the information relates to the anticipated litigation. Except as otherwise noted herein, we accordingly find that the information at issue may be withheld pursuant to section 552.103.

Absent special circumstances, once information has been obtained by all parties to the litigation, *e.g.*, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, if the opposing party in the anticipated litigation has seen or had access to any of the submitted information, there is no justification for withholding that information from the requestor pursuant to section 552.103(a). In the instant case, the requestor is the opposing party in the anticipated litigation. We therefore have separated and marked as exhibit "B-2" those submitted documents which contain information to which the requestor evidently has previously had access, or which were provided to the department by the requestor. The department must release the information in these documents, as well as any other responsive information, to the extent that the requestor has seen or had access to the information. The department may not withhold such information from the requestor under section 552.103.³

We also have identified certain documents to which you have demonstrated that section 552.103 applies, but which nevertheless are not excepted from required public disclosure. In pertinent part, section 552.022 of the Government Code provides that unless "expressly confidential under other law" the following categories of information are public information and are not excepted from required public disclosure:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[;]

...

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

Gov't Code § 552.022(a)(1), (15). We have separated and marked as exhibit "B-3" documents that comprise job vacancy notices and job descriptions. The job vacancy notices describe a job opening, state the required and preferred qualifications for the job, state the criteria for an applicant to be considered for the position, and indicate a deadline by which applications must be submitted. The job descriptions describe the minimum requirements for the position and the job duties. Although your comments to this office make no reference

³We also note that the applicability of section 552.103(a) ends once the litigation concludes. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

to any policy of the department as to the public nature of this information, we believe that these documents contain information that must be regarded as open to the public under the department's policies, and that this information is therefore subject to section 552.022(a)(15). We also have marked a report of the investigation, contained in exhibit C, which we believe comprises a completed report as contemplated under section 552.022(a)(1). Because section 552.103 is a discretionary exception under the Public Information Act and does not constitute other law that makes information confidential, we conclude that these documents must be released to the requestor.⁴

Finally, although we have identified the documents in exhibit "B-2" as containing information the requestor has seen or to which he has had access and therefore find (as discussed above) that this information is not excepted under section 552.103, we note that some of these documents contain social security number information of certain named individuals, which we have marked and which the department may be required to redact.⁵ This information may be excepted from disclosure under section 552.117 or section 552.101 of the Government Code. Section 552.117(1) excepts from required public disclosure the home address, home telephone number, social security number, or personal family member information of a public employee who requests that this information be kept confidential under section 552.024 of the Government Code. *See Gov't Code §§ 552.024, .117.* However, you may not withhold this information under section 552.117 if the named individual made the request for confidentiality under section 552.024 after the present request for information was received by the department. Whether a particular piece of information is public must be determined at the time the request for it is made. *Open Records Decision No. 530 at 5 (1989).* Thus, section 552.117 requires you to withhold the social security number information we have marked only if the individual requested that this information be kept confidential under section 552.024 prior to the department's receipt of the present request. *See also Open Records Decision Nos. 622 (1994), 455 (1987).*

If the social security number information in question is not excepted under section 552.117, the information nevertheless may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See Open Records Decision No. 622 (1994).* These amendments make confidential social security numbers and related records that were obtained or are maintained by a state agency or political subdivision of the state pursuant to any provision

⁴We have marked the documents with yellow flags that are subject to release pursuant to section 552.022. We additionally note that although exhibit "B" contains copies of other reports of the investigation, we rely on your representation that these other reports constitute draft copies. As such, the drafts do not comprise completed reports that are subject to release pursuant to section 552.022(a)(1).

⁵We have marked the documents at issue with red flags, and we have marked for possible redaction the social security number information on these documents. We note that we have not marked for possible redaction the social security number information of the requestor, as the requestor has a special right of access to this information. *See Gov't Code § 552.023.*

of law enacted on or after October 1, 1990. *See* ORD 622. We have no basis for concluding that the social security number information in the records here is confidential under section 405(c)(2)(C)(viii)(I) and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Public Information Act imposes criminal penalties for the release of confidential information. *See* Gov't Code § 552.352. Thus, prior to releasing any of the social security number information we have marked, you should ensure that no such information was obtained or is maintained by the department pursuant to any provision of law enacted on or after October 1, 1990.

In summary, we agree that you have demonstrated the applicability of section 552.103 to the requested information. However, the department must nevertheless release to the requestor, pursuant to section 552.007, any of the submitted information that has been previously voluntarily released to a member of the public. Also, the documents we have marked with yellow flags must be released pursuant to section 552.022. In addition, section 552.103 does not permit the withholding of any of the submitted information which the requestor has seen or to which the requestor has been granted access, but the department may nevertheless be required to redact the social security numbers contained in the red-flagged documents, as provided above. The department may withhold the remaining information pursuant to section 552.103.

Because we are able to resolve your request under section 552.103, we do not address the section 552.107 assertion, except to note that the information that is subject to release under this decision may not be withheld pursuant to section 552.107. This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

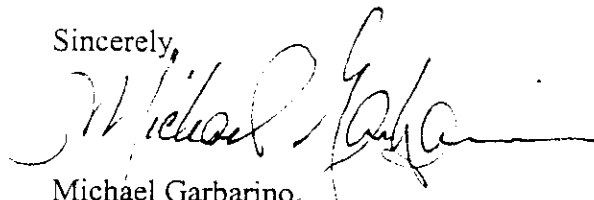
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records;

2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael Garbarino
Assistant Attorney General
Open Records Division

MG/pr

Ref: ID# 138054

Encl. Submitted documents

cc: Mr. Mohammad Farhoud, P.E.
6910 Hart Lane #403
Austin, Texas 78731
(w/o enclosures)