



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 28, 2019

Mr. Ronald J. Bounds
Assistant General Counsel
Teacher Retirement System of Texas
1000 Red River Street
Austin, Texas 78701-2698

OR2019-05540

Dear Mr. Bounds:

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# 752532 (Ref. No. Swope, Cynthia 19-1).

The Teacher Retirement System of Texas (the "system") received a request for the personnel file of a named former system employee. 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.

Initially, we note some of the information at issue is 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) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108 [of the Government Code]; [and]

...

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

Gov't Code § 552.022(a)(1), (15). We note portions of the information at issue consist of completed evaluations subject to section 552.022(a)(1). Additionally, some of the information at issue consists of job descriptions, which are generally open to the public as part of job postings. If the system regards the submitted job descriptions as open to the public, then this information is subject to section 552.022(a)(15). The system must release the information subject to section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or expressly made confidential under the Act or other law. *See id.* § 552.022(a)(1). To the extent the system considers the job descriptions open to the public, the system may withhold the information subject to section 552.022(a)(15) only to the extent this information is confidential under the Act or other law. *See id.* § 552.022(a)(15). Although you raise section 552.103 for the information at issue, this section does not make information confidential under the Act. *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); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Accordingly, you may not withhold the information subject to section 552.022(a)(1) of the Government Code under section 552.103 of the Government Code. Further, if the system considers the job descriptions open to the public, then this information is subject to section 552.022(a)(15) and the system may not withhold this information under section 552.103 of the Government Code. As you raise no further exceptions for the information subject to section 552.022, the system must release the completed evaluations, which we have indicated, pursuant to section 552.022(a)(1) of the Government Code. Additionally, if the system regards the submitted job descriptions, which we have indicated, as open to the public, then the system must release this information under section 552.022(a)(15) of the Government Code. If the system does not regard the job descriptions at issue as open to the public, then we will consider your argument under section 552.103 for that information. Further, we will address your argument under section 552.103 for the remaining information.

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). A governmental body has the burden of providing relevant facts and documents to show section 552.103(a) is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was 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. *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.*); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). *See* ORD 551.

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, a governmental body must provide this office “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *Id.* This office has found a pending complaint with the Equal Opportunity Employment Commission (“EEOC”) indicates litigation is reasonably anticipated. *See* Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982), 281 at 1 (1981).

You state, and provide documentation showing, prior to the date the system received the instant request for information, the named former employee filed a discrimination claim against the system with the EEOC. Thus, we find the system reasonably anticipated litigation related to the matter at issue. You further state the information at issue is related to the anticipated litigation. Based on your representations and our review, we find the information at issue is related to litigation that was reasonably anticipated on the date the system received the request for information. Therefore, except for the information subject to section 552.022, which we have marked for release, the system may withhold the information at issue under section 552.103 of the Government Code.¹

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 pending or anticipated 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

¹The information being released contains social security numbers. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office. *See* Gov't Code § 552.147(b).

or is no longer anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

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,



Lecelle Clarke
Attorney
Open Records Division

LC/eb

Ref: ID# 752532

Enc. Submitted documents

c: Requestor
(w/o enclosures)