



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 13, 2019

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

OR2019-12733

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# 765070 (ORR# 19-502).

The Texas Department of Agriculture (the "department") received two requests from the same requestor for a specified employee handbook and information related to the requestor. 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 submitted information may be subject to section 552.022 of the Government Code, which provides in pertinent 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:

...

(8) a statement of the general course and method by which an agency's functions are channeled and determined, including the

nature and requirements of all formal and informal policies and procedures; [and]

...

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

Gov't Code § 552.022(a)(8), (15). The submitted information includes an organization chart that is subject to section 552.022(a)(8) of the Government Code and a job description, which is generally open to the public as part of a job posting, subject to section 552.022(a)(15). *Id.* § 552.022(a)(8), (15). The department must release the information pursuant to section 552.022(a)(8) unless it is made confidential under the Act or other law. *See id.* § 552.022(a)(8). If the department regards the submitted job description as open to the public, then this information is subject to section 552.022(a)(15). To the extent the department considers the job description open to the public, you 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). The department seeks to withhold the information subject to section 552.022 under section 552.103 of the Government Code. However, section 552.103 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 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). Accordingly, you may not withhold the information subject to section 552.022(a)(8) of the Government Code under section 552.103 of the Government Code. Further, if the department considers the job description open to the public, then this information is subject to section 552.022(a)(15) and the department may not withhold this information under section 552.103 of the Government Code. As you raise no other exceptions to disclosure for the information at issue, the department must release the information subject to section 552.022(a)(8) of the Government Code, which we marked. Additionally, if the department regards the submitted job description as open to the public, then the department must release this information under section 552.022(a)(15) of the Government Code. If the department does not regard the job description 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 not subject to section 552.022 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). A governmental body has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) litigation was pending or reasonably anticipated on the date of its receipt of 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 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

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 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).*

The department states, prior to the department's receipt of the instant request, the requestor filed a claim against the department with the EEOC. Based on the department's arguments and our review of the information at issue, we find the department reasonably anticipated litigation on the date this request was received. The department also states the information pertains to the substance of the claim. Based on the department's representations and our review, we find the information at issue is related to the anticipated litigation. Therefore, the department may withhold the remaining information under section 552.103 of the Government Code.

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

In summary, the department must release the information we marked under section 552.022(a)(8) of the Government Code. If the department considers such information to be open to the public under its policies, the department must release the marked information pursuant to section 552.022(a)(15) of the Government Code. The department 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,



Emily Buchanan
Attorney
Open Records Division

EB/mo

Ref: ID# 765070

Enc. Submitted documents

c: Requestor
(w/o enclosures)