



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

May 15, 1996

Mr. J. Robert Giddings
Attorney
The University of Texas System
Office of General Counsel
201 West Seventh Street
Austin, Texas 78701-2981

OR96-0717

Dear Mr. Giddings:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 39255.

The University of Texas-Pan American (the "university") received two open records requests for all records pertaining to the university's response to alleged NCAA rules violations in its men's basketball program. You seek to withhold pursuant to section 552.103 of the Government Code the report of the university's investigation and the response of the university to the NCAA Official Letter of Inquiry regarding the alleged rules violations.

To secure the protection of section 552.103(a), a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation to which the governmental body is a party. Open Records Decision No. 588 (1991) at 1. In this instance you have provided this office with a copy of the petition in a lawsuit in which the university is named as defendant. You have also explained how the documents at issue "relate" to the pending litigation:

[T]he lawsuit was brought by Mark Adams, the men's basketball coach at U.T. Pan American, and alleges that adverse personnel action was taken against him based upon the University's investigation of the U.T. Pan American track coach's allegations

of numerous violations of NCAA rules and an Official Letter of Inquiry issued by the NCAA. Accordingly, the documents in question . . . are a material part of the pending litigation.

We have reviewed the documents at issue and agree that they relate to the pending litigation.

This does not, however, end our discussion of the applicability of section 552.103. You do not dispute that the university has previously granted to the plaintiff in the litigation the records currently being sought by the requestors. It is well established that, absent special circumstances, once information has been obtained by all parties to the litigation, either through discovery or otherwise, no section 552.103(a) interest exists with respect to that information.¹ Open Records Decision Nos. 349 (1982), 320 (1982). In Open Records Decision No. 551 (1990) this office discussed the purpose of the statutory predecessor of section 552.103, V.T.C.S. art. 6252-17a, § 3(a)(3):

Section 3(a)(3) enables governmental entities to protect their position in litigation by forcing parties seeking information relating to that litigation to obtain it through discovery, if at all. Open Records Decision Nos. 454 (1986); 288 (1981). We do not believe that the Open Records Act was intended to provide parties involved in litigation any earlier or greater access to information than was already available directly in such litigation. Open Records Decision No. 108 (1975). *The litigation exception was intended to prevent the use of the Open Records Act as a method to avoid discovery rules.* Attorney General Opinion JM-1048 (1989).

. . . By excepting information from required public disclosure under the Open Records Act when access to such material is more appropriately sought through discovery, section 3(a)(3) protects *the discovery process* and avoids interference in matters properly resolved in court.

In striking this balance between public access to records and the litigation interests of governing bodies, the legislature may have imposed some inconvenience on persons who are not parties to

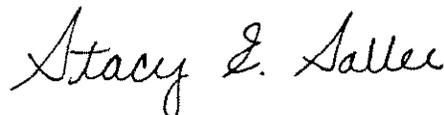
¹We agree with your contention that the release of information during the discovery process does not constitute a "voluntary" release of information to public for purposes of section 552.007 of the Government Code -- other exceptions to disclosure may continue to apply. *See, e.g.*, Open Records Decision No. 579 (1990). However, once information has been released during discovery, the protection of section 552.103 ends. *See discussion infra.*

the litigation. However, it should be noted that the litigation exception will only apply while the litigation is reasonably anticipated and during the actual pendency of the litigation. *Moreover, the litigation exception may no longer be claimed with respect to a particular lawsuit once all parties to the litigation have inspected the information pursuant to discovery.* Open Records Decision No. 454 (1986). [Emphasis added.]

Once information has been obtained by all parties to the litigation, the purpose of section 552.103 has been served. Accordingly, to the extent the plaintiff in the current lawsuit has seen or had access to the records at issue, there is no justification for now withholding such information from the requestors pursuant to section 552.103(a).² Because you have not raised any of the Open Records Act's other exceptions to required public disclosure with regard to the requested information,³ we conclude that the university may withhold pursuant to section 552.103 only those documents at issue that the university has not previously released to the plaintiff in the currently lawsuit; all remaining records must be released in their entirety.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Stacy E. Sallee
Assistant Attorney General
Open Records Division

²Your contention that this office should apply section 552.103 in a different manner because the requestors are not parties to the litigation is without merit. See Gov't Code § 552.223 (uniform treatment of requests for information). We also dismiss your contention that the release of the records at issue may interfere with possible future settlement negotiations as being entirely too speculative for our consideration here.

³We also see no conflict between this ruling and the outstanding temporary restraining order barring the university from "terminating, reassigning, demoting, or in any other way altering" the plaintiff's employment status.

SES/RWP/rho

Ref.: ID# 39255

Enclosures: Submitted documents

cc: Mr. Matt Kelly
KRGV-TV
P.O. Box 5
Weslaco, Texas 78599-0005
(w/o enclosures)

Mr. David Hinojosa
Sports Reporter
The Monitor
P.O. Box 760
McAllen, Texas 78501
(w/o enclosures)