



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

December 3, 1998

Mr. Dennis P. Duffy  
General Counsel  
University of Houston System  
E. Cullen Building, Suite 311  
Houston, Texas 77204-2162

OR98-2930

Dear Mr. Duffy:

You have asked whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 119884.

The University of Houston (the "university") received a request for records regarding the university's dismissal of a tenured faculty member. You assert that the records are protected from disclosure under sections 552.101, 552.103, and 552.107 of the Government Code. The records at issue were provided to this office for review. We will address your arguments against disclosure of these records.

You contend that section 552.103(a) exempts from disclosure all of the records at issue. To show that section 552.103(a) is applicable, a governmental entity must show that (1) litigation is pending or reasonably anticipated and (2) the information at issue is related to the litigation. *University of Texas Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (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 governmental entity must meet both prongs of this test for information to be excepted under section 552.103(a). You state that the former faculty member has employed an attorney and has threatened to file suit against the university for the revocation of tenure resulting in dismissal.

In Open Records Decision No. 452 at 4 (1986), this office stated:

Litigation cannot be regarded as "reasonably anticipated" unless there is more than a "mere chance" of it -- unless, in other words, we have concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.

Whether litigation is reasonably anticipated must be determined on a case-by-case basis. [Citations omitted.]

Litigation has been found to be reasonably anticipated when an individual has hired an attorney who demands damages and threatens to sue the governmental entity. Open Records Decision No. 551 at 2 (1990). This office has found that litigation was not reasonably anticipated when an applicant who was rejected for employment hired an attorney, and the attorney as part of his investigation asked for information as to why his client was rejected. Open Records Decision No. 361 (1983). We believe that in this situation the dismissed faculty member has made concrete steps toward litigation by threatening suit and employing an attorney to represent him in this matter.

We have reviewed the records at issue and agree that they are related to the anticipated litigation. However, once information has been obtained by all parties to the litigation, no section 552.103(a) interest generally exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Much of the information submitted has already been seen by the opposing party in the anticipated litigation. The information that has not already been seen by the opposing party may be withheld from disclosure under section 552.103(a).<sup>1</sup> We note, however, that some of the information that has been seen by the opposing party may not be released to the public because it is otherwise confidential under section 552.101 of the Government Code.

Section 552.101 of the Government Code protects from disclosure information that is confidential by law. The material submitted includes education records made confidential under the Family Educational Rights and Privacy Act ("FERPA"), title 20 of the United States Code, section 1232g. FERPA provides that federal funding shall not be made available to a postsecondary "educational agency or institution which has a policy or practice of permitting the release of educational records" without the consent of the student. *Id.* § 1232g(d). Education records are those records that "contain information directly related to a student and are maintained by an educational agency or institution." *Id.* § 1232g(a)(4)(A). Generally, only information which would serve to identify students is excepted from disclosure under FERPA. Open Records Decision No 332 at 3 (1982). We have marked sample documents showing the type of information which must be withheld from disclosure under FERPA.

Section 552.101 also encompasses information made confidential by common-law privacy. Information must be withheld from public disclosure under a common-law right of privacy when the information is (1) highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Industrial Found. v. Texas Indus. Accident Bd.*,

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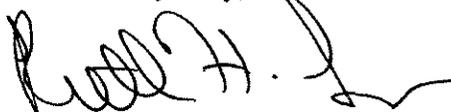
<sup>1</sup>The applicability of section 552.103(a) ends once the litigation has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977); Open Records Decision No. 611 at 1 (1992). We have marked sample documents showing the type of information that must be withheld on the basis of privacy.

The information which is not protected under section 552.103(a) but which must be withheld also includes the professor's home address, home telephone number, social security number, and information that reveals whether he has family members. Sections 552.024 and 552.117 provide that a public employee or official can opt to keep private his or her home address, home telephone number, social security number, or information that reveals that the individual has family members. You must withhold this information if, as of the time of the request for the information, the professor had elected to keep the information private. Open Records Decision Nos. 530 at 5 (1989), 482 at 4 (1987), 455 (1987). We have marked samples of this information.

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,



Ruth H. Soucy  
Assistant Attorney General  
Open Records Division

RHS/ch

Ref: ID# 119884

Enclosures: Submitted documents

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(w/o enclosures)