

January 13, 1999



OFFICE OF THE
ATTORNEY GENERAL
STATE OF TEXAS

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Mr. Dan Fontaine
Chief Legal Officer
The University of Texas
MD Anderson Cancer Center
1515 Holcombe Boulevard
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OR99-0094

Dear Mr. Fontaine:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 121021.

The University of Texas M.D. Anderson Cancer Center ("M.D. Anderson") received a request for information relating to Dr. Edward Rubenstein. You indicate that you are providing the requestor with most of the requested information. You contend that the remaining documents, which you have designated exhibits 1A through 1N and 2A through 2E, are excepted from disclosure pursuant to sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and have reviewed the documents at issue.

Section 552.101 excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. Although you have not made specific arguments under section 552.101, we will consider whether the documents at issue implicate the privacy rights of employees of M.D. Anderson. Open Records Decision No. 480 (1987) (attorney general will consider privacy issues under section 552.101 even if governmental body does not raise privacy issues). Section 552.101 encompasses the common-law right to privacy. For information to be protected from public disclosure by the common-law right of privacy under section 552.101, the information must meet the criteria set out in *Industrial Found. v. Texas Industrial Accident Board*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which

would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Id.* at 685. Having reviewed the information submitted to this office, we find that none of it is protected by the common-law right to privacy. *See* Open Records Decision Nos. 473 (1987) (public has legitimate interest in job performance of public employees), 470 (1987) (public employee's job performance does not generally constitute his private affairs). Therefore, M.D. Anderson may not withhold any information from disclosure under section 552.101.

Section 552.103(a) excepts from disclosure information:

(1) relating to litigation of a civil or criminal nature or settlement negotiations, 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; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

The governmental body 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, and (2) the information at issue is related to that litigation. *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 governmental body must meet both prongs of this test for information to be excepted under 552.103(a).

To establish that 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." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.¹ Open Records Decision No. 555 (1990); *see* Open Records

¹In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were

Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983). Having considered the totality of circumstances in this case, we conclude that you have not established that M.D. Anderson reasonably anticipates litigation. Therefore, M.D. Anderson may not withhold the documents at issue from disclosure pursuant to section 552.103(a).

You also contend that the documents at issue are excepted from disclosure under section 552.107. Section 552.107(1) excepts from disclosure information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only “privileged information,” that is, information that reflects either confidential communications from the client to the attorney or the attorney’s legal advice or opinions; it does not apply to all client information held by a governmental body’s attorney. ORD 574 at 5. Section 552.107(1) does not except purely factual information from disclosure, nor does it protect information gathered by an attorney as a fact-finder. Open Records Decision Nos. 574 (1990), 559 (1990), 462 (1987). Section 552.107(1) does not except from disclosure a factual recounting of events or the documentation of calls made, meetings attended, or memos sent. ORD 574 at 5. We have marked three documents, exhibits 1A, 1K, and 1N, that contain information that is excepted from disclosure under section 552.107(1) (see green tabs). M.D. Anderson may withhold this marked information from disclosure under section 552.107(1). The remaining information is not the type of information protected by section 552.107(1).

Finally, you contend that the documents at issue constitute attorney work product that should be protected from disclosure under section 552.111. A governmental body may withhold attorney work product from disclosure under section 552.111 if it demonstrates that the material was 1) created for trial or in anticipation of civil litigation, and 2) consists of or tends to reveal an attorney’s mental processes, conclusions and legal theories. Open Records Decision No. 647 (1996). The first prong of the work product test, which requires a governmental body to show that the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate that 1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation

not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

that there was a substantial chance that litigation would ensue, and 2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. Open Records Decision No. 647 at 4 (1996). The second prong of the work product test requires the governmental body to show that the documents at issue tend to reveal the attorney's mental processes, conclusions and legal theories. Having considered your arguments, we find that you have not established that the documents at issue were created in anticipation of litigation. Thus, we conclude that the documents are not protected attorney work product. With the exception of the information that we have marked as protected under section 552.107(1), M.D. Anderson must publicly disclose the information at issue.

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,


Karen E. Hattaway
Assistant Attorney General
Open Records Division

KEH/ch

Ref: ID# 121021

Enclosures: Submitted documents

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