JOHN CORNYN

January 16, 2001

Mr. Edward W. Dunbar
Dunbar, Armendariz, Crowley & Hegeman, L.L.P.
4726 Transmountain Drive
El Paso, Texas 79924

OR2001-0144

Dear Mr. Dunbar:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 143224.

The El Paso Community College (the "college"), which you represent, received a request for a complete copy of the response that the college filed with the Equal Employment Opportunity Commission ("EEOC") regarding the discrimination complaint filed by the requestor's client. You claim that the requested 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.

Section 552.103(a) excepts from disclosure information relating to litigation to which a governmental body is or may be a party. The governmental body has the burden of providing relevant facts and documents to show that section 552.103(a) is applicable in a particular situation. In order to meet this burden, the governmental body must show that (1) litigation has been pending or reasonably anticipated since the date of receipt of the request for information, 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 (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); Gov't Code § 552.103. The governmental body must meet both prongs of this test for information to be excepted under section 552.103.

This office has ruled that a pending complaint before the EEOC indicates a substantial likelihood of litigation relating to the complaint. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982). You explain that the requestor's client filed a complaint against the college with the EEOC in July 2000. It appears that the complaint is still pending. Therefore, we conclude that the college has shown that litigation has been reasonably

anticipated at least since the time the college received the request for information. Furthermore, we conclude that the submitted information relates to the anticipated litigation. Accordingly, the submitted information is generally excepted under section 552.103.

However, in general, 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. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, any documents that have been obtained from or provided to the opposing party to the anticipated litigation are not excepted from disclosure under section 552.103(a) and must be disclosed. Furthermore, section 552.103 does not authorize the withholding of information which has already been made available to the public. Open Records Decision No. 436 (1986). The applicability of section 552.103(a) ends once the litigation has concluded or is no longer anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Moreover, information falling under section 552.022(a) of the Government Code may not be withheld under section 552.103.[1] The Seventy-sixth Legislature amended section 552.022 of the Government Code to make certain information expressly public, and therefore not subject to discretionary exceptions to disclosure, such as section 552.103. Gov't Code § 552.022. Section 552.022 now states in relevant part:

> (a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and are not excepted from required disclosure under this chapter unless they are expressly confidential under other law:
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> . . .
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> (10) a substantive rule of general applicability adopted or issued by an agency as authorized by law, and a statement of general policy or interpretation of general applicability formulated and adopted by an agency;
>
> . . .

[1]Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 592 at 8 (1991) (governmental body may waive section 552.104, information relating to competition or bidding), 549 at 6 (1990) (governmental body may waive informer's privilege), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions therefore do not constitute "other law" that makes information confidential.

> (13) a policy statement or interpretation that has been adopted or issued by an agency;
>
> . . .
>
> (15) information regarded as open to the public under an agency's policies.

Gov't Code § 552.022. Tab 2 of the submitted information contains a series of college policies and procedures relating to the evaluation of job applicants. We find that these policies and procedures fall under section 552.022(a) and must therefore be released. Tab 3 contains a copy of a college job posting which apparently was previously posted. Because this document was previously made available to the public, it also must be released. *See* Gov't Code § 552.022(a)(15); *see generally* Gov't Code §§ 552.007, .223; Open Records Decision No. 436 (1986).

In conclusion, the college may withhold most of the submitted information under section 552.103, however, it must release the information contained in Tabs 2 and 3.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor

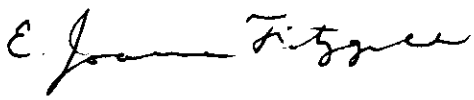
should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



E. Joanna Fitzgerald
Assistant Attorney General
Open Records Division

EJF/er

Ref: ID# 143224

Encl: Submitted documents

cc: Mr. Antonio V. Silva, P.C.
Attorney at Law
2616 Montana Avenue
El Paso, Texas 79903
(w/o enclosures)