



June 15, 2001

Mr. Scott A. Kelly
Deputy General Counsel
Texas A & M University System
John B. Connally Building, 6th Floor
301 Tarrow
College Station, Texas 77840-7896

OR2001-2560

Dear Mr. Kelly:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 148481.

West Texas A&M University (the “university”) received a request for copies of two types of information,

Any statement expressing the policy or contract between [the university] and the Academic Financial Services Association [the “AFSA”] insofar as it pertains to what is referred to by [the university] as the “Emergency Student Loan Program,” and

Any statement expressing the internal policy that [the university] has respecting the Emergency Student Loan Program that expresses policy matters that are followed by the university, whether they be mandated by the contract with the [AFSA] or not.

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. We have also considered the comments submitted to this office by the requestor. *See* Gov’t Code § 552.304.

We note initially that some of the responsive information is made public by section 552.022 of the Government Code. Specifically, the contract under which AFSA provides student loan services to the university and two promissory notes that the university obtained from and which are purportedly executed by the requestor constitute “information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body.” Gov’t Code § 552.022(a)(3). Section 552.022(a)(3) of the Government Code makes information in an account, voucher, or contract relating to the

receipt or expenditure of public or other funds by a governmental body public and not excepted from required disclosure under chapter 552 of the Public Information Act unless the information is expressly confidential under other law. Gov't Code § 552.022(a)(3). Our office has previously concluded that section 552.103 is a discretionary exception. *See* Open Records Decision No. 551 (1990) (statutory predecessor to section 552.103 serves only to protect a governmental body's position in litigation, and does not itself make information confidential). We do not believe that section 552.103 makes this information expressly confidential under other law. Gov't Code § 552.022. Therefore, the submitted contract and the promissory notes may not be withheld under section 552.103 and must be released to the requestor.¹

We will consider your section 552.103 claim for the remaining information. Section 552.103 provides as follows:

(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). Section 552.103 was intended to prevent the use of the Public Information Act as a method of avoiding the rules of discovery in litigation. Attorney General Opinion JM-048 at 4 (1989). The litigation exception enables a governmental body to protect its position in litigation by requiring information related to the litigation to be obtained through discovery. Open Records Decision No. 551 at 3 (1990). The university 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

¹We note that if the opposing party in the litigation has seen or had access to any of the information in these records, there is no section 552.103(a) interest in withholding that information from the requestor. Open Records Decision Nos. 349 (1982), 320 (1982). Accordingly, even if applicable, section 552.103(a) would not except the promissory notes from disclosure. *See* Open-Records Decision Nos. 349 at 2 (1982), 320 at 1 (1982).

Decision No. 551 at 4 (1990). You provide a copy of the requestor's original pro se complaint filed in federal district court on February 27, 2001, against the Board of Regents of the Texas A&M University System and thirty-one (31) individuals, prior to the university's receipt of the present request. You also provide information showing that the requestor represented in writing on March 29, 2001, also prior to your receipt of the present request, that he would amend the complaint to include an additional cause and other university defendants. In this instance, based on the totality of the circumstances, we conclude that you have made the requisite showing that the requested information relates to litigation that was pending or reasonably anticipated on the day that the request was received and may therefore be withheld from disclosure under section 552.103(a).

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. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, you must release the contract and promissory notes under section 552.022(a)(3). You may withhold the remaining information under section 552.103(a).

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

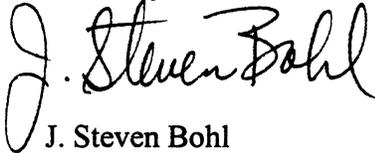
should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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,



J. Steven Bohl
Assistant Attorney General
Open Records Division

JSB/sdk

Ref: ID# 148481

Enc: Submitted documents

c: Mr. John H. Mayton
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(w/o enclosures)