



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 13, 2004

Mr. John Peeler  
Assistant General Counsel  
University of Houston System  
311 East Cullen Building  
Houston, Texas 77204-2028

OR2004-2978

Dear Mr. Peeler:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 199424.

The University of Houston (the "university") received a request for the personnel files of six named university employees. 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 representative sample of information.<sup>1</sup>

Initially, we note that section 552.022 of the Government Code governs some of the submitted information. Section 552.022 provides that

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

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<sup>1</sup>We assume that the sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

.....

(15) information regarded as open to the public under an agency's policies[.]

Gov't Code § 552.022(a)(1), (15). The submitted information contains completed evaluations made of, for, or by the university. This information is made public by section 552.022(a)(1). The submitted information also contains job descriptions, which are usually open to the public as part of a job posting. This information is expressly public under section 552.022(a)(15). If the university regards this information as open to the public, then the university may withhold this information, which we have marked, only to the extent it is made confidential under other law. Likewise, the university may only withhold the completed evaluations, which we have marked, if they are confidential under law or excepted under section 552.108 of the Government Code.<sup>2</sup> The university claims the submitted information is excepted under section 552.103, a discretionary exception, which does not constitute other law for the purposes of section 552.022. *See* Open Records Decision Nos. 663 (1999) (governmental body may waive section 552.103), 473 (1987); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Accordingly, the university may not withhold the information subject to section 552.022 under section 552.103 of the Government Code.

We note, however, the completed evaluations contain the named employees' social security numbers. Section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the university may only withhold information under section 552.117 on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. You state that the employees whose information is at issue timely elected, pursuant to section 552.024, to keep their personal information confidential. Thus, the university must withhold the social security numbers we have marked pursuant to section 552.117.

We now turn to your argument under section 552.103 of the Government Code for the remaining information not subject to section 552.022. Section 552.103 provides in part:

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<sup>2</sup>We note that the university does not claim section 552.108 as an exception to disclosure.

(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). The governmental body has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) that the information at issue is related to that litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.–Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.–Houston [1st Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *Id.*

You inform us that the university and various officers and employees of the university are party to several pending lawsuits and that the submitted information relates to the pending cases. You indicate that these cases were pending when the university received this request for information. Based on your representations, we conclude that the remaining submitted information is excepted from disclosure at this time under section 552.103.

In reaching this conclusion, we assume that the opposing party in the pending litigation has not seen or had access to any of the submitted information. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to the litigation to obtain the information through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). If the opposing party to litigation has seen or had access to information relating to the litigation, through discovery or otherwise, then there is no interest in withholding that information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Furthermore, the applicability of section 552.103 ends once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

To summarize, we conclude that the university must release the information subject to section 552.022(a)(1) of the Government Code, which we have marked, except for the social security numbers we have marked, which must be withheld under section 552.117 of the Government Code. The university must also release the information subject to section 552.022(a)(15), which we have marked, if the university regards this information as open to the public. The remaining information may be withheld under section 552.103, to the extent it has not been seen by the opposing party to the pending litigation.

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 Dep't of Pub. 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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,

A handwritten signature in black ink, appearing to read "Sarah Swanson", with a long horizontal flourish extending to the right.

Sarah I. Swanson  
Assistant Attorney General  
Open Records Division

SIS/lmt

Ref: ID# 199424

Enc. Submitted documents

c: Mr. Wolfgang Hirczy De Mino  
c/o John Peeler  
University of Houston System  
311 East Cullen Building  
Houston, Texas 77204-2028  
(w/o enclosures)