



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 22, 2006

Ms. Cherry Kay Wolf
Associate General Counsel
Texas A&M University System
200 Technology Way
College Station, Texas 77845-3424

OR2006-02787

Dear Ms. Wolf:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 244558.

The Texas A&M International University (the "university") received three requests for numerous categories of information regarding the hiring decision pertaining to the requestor, records pertaining to specified incidents involving named individuals; the appointment calendars of named individuals; the job postings and job descriptions for specified university positions; the employment and termination of named individuals, including the requestor; records pertaining to the job candidates for two specified administrative positions; and accounting and business audit information and related materials. You state that the university does not maintain information responsive to portions of the requests for information.¹ You state that the university will provide the requestor "with the relevant website address(es)" for a portion of the requested information. This office has determined that a governmental body may refer a requestor to its website for requested public information if the requestor agrees to accept the information in such a manner. *See* Open Records Decision No. 682 at 7 (2005). However, if the requestor does not agree to such a

¹We note that the Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed).

provision of information, then the university must provide the requestor with paper copies of the information. *See* Gov't Code § 552.221(b) (a governmental body must provide the public information for inspection or duplication in its offices or send copies by first class United States mail to the requestor). You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.103, 552.114, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.²

As a preliminary matter, we note that some of the requested information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2006-02428 (2006). With regard to information in the current request that is identical to the information previously requested and ruled upon by this office, we conclude that, as we have no indication that the law, facts, and circumstances on which the prior ruling was based have changed, the university may continue to rely on that ruling as a previous determination and withhold or release this information in accordance with Open Records Letter No. 2006-02428. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

Next, we note that you have only submitted job postings, appointment calendars, and electronic communications for our review. We note that the university has made prior requests for rulings to our office regarding information sought by this same requestor. You inform us that the university has several pending requests for rulings with this office pertaining to the same requestor, and in some instances, overlapping requests for information. To the extent any additional responsive information existed on the date the university received this request, and this information is not the subject of a prior ruling or current ruling request, we assume you have released it. If you have not released any such records, you must do so at this time. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

Next, we note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides in pertinent part that

[w]ithout limiting the amount or kind of information that is public information under this chapter, 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:

²We note that the Act does not require a governmental body to answer questions. *See* Open Records Decision No. 555 at 1-2 (1986).

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

Gov't Code § 552.022(a)(15). The submitted documents include job vacancy announcements that are subject to section 552.022(a)(15). The university must release this information unless it is expressly confidential under other law. Although you claim this information is excepted from disclosure under section 552.103 of the Government Code, this is a discretionary exception that protects a governmental body's interests and may be waived. *Id.* § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 is not other law that makes information confidential for the purposes of section 552.022. Therefore, the university may not withhold any of the submitted information subject to section 552.022, which we have marked, under section 552.103.

We will now consider your argument under section 552.103 of the Government Code for the remaining information not subject to Open Records Letter No. 2006-02428 or section 552.022. 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). A 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 on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To establish that litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *Id.* This office has stated that a pending Equal Employment Opportunity Commission ("EEOC") complaint indicates litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982).

You inform us that the requestor makes a variety of allegations in his requests. Among them, he accuses the university of fraudulent and corrupt business and employment practices, and illegal use of state funds. He also alleges that the university retaliated against him for his whistleblowing activities related to the above accusations. You have also provided documentation showing that, prior to the university's receipt of the instant request for information, the requestor filed a complaint with the EEOC against the university alleging discrimination and retaliation. Based on your representations and our review of the submitted documents, we find you have demonstrated that litigation was reasonably anticipated when the university received the request for information. Our review of the information at issue also shows that it is related to the anticipated litigation for purposes of section 552.103(a). Thus, section 552.103 is applicable to the remaining submitted information.

We note, however, that the opposing party in the anticipated litigation may already have seen or had access to some of the remaining submitted information. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information that relates to the litigation through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). If the opposing party has seen or had access to information that relates to anticipated litigation, through discovery or otherwise, then there is no interest in withholding the information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, to the extent that the opposing party in the anticipated litigation has seen or had access to any of the remaining submitted information, the university may not withhold any such information under section 552.103. With the exception of any such information, the remaining submitted information is excepted from disclosure at this time. We note that the applicability of this exception ends when the related litigation concludes or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, we conclude the following: 1) the requestor must be given access to or copies of the information on the Internet to which the requestor was referred, unless the requestor agrees to accept information on the university's website in fulfillment of the request for information; 2) the university may continue to rely on Open Records Letter No. 2006-02428 as a previous determination; 3) the university must release the information we have marked pursuant to section 552.022 of the Government Code; and 4) except for any information that the opposing party in the anticipated litigation has seen or to which he has had access, the

university may withhold the rest of the submitted information at this time under section 552.103.³

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General at (512) 475-2497.

³As our ruling on this issue is dispositive, we do not address your remaining arguments against disclosure.

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,



Lisa V. Cubriel
Assistant Attorney General
Open Records Division

LVC/jh

Ref: ID# 244558

Enc: Submitted documents

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(w/o enclosures)