



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 12, 2006

Ms. Cherry Kay Wolf
Associate General Counsel
The Texas A&M University System
200 Technology Way, Suite 2079
College Station, Texas 77845-3424

OR2006-03668

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# 246436.

Texas A&M International University (the "university") received three requests from the same requestor for various information pertaining to nineteen named individuals, the hiring process and employment of another named individual, a specified "response report" to the Southern Association of Colleges and Schools, and a 1998 compensation plan. For reference, you have numbered the three requests from 152 through 154. You indicate that some of the requested information does not exist.¹ You state that the university will make some of the requested information available to the requestor. You also state that some of the requested information is published on the Internet, and you will inform the requestor of the relevant website addresses.² You state that the university will redact certain social security

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 dism'd); Open Records Decision No. 452 at 3 (1986).

²We note that the university must make available for inspection or provide copies of this information unless the requestor agrees to accept the university's reference to the website addresses as fulfillment of his request for this particular information. See Open Records Decision 682 (2005).

numbers pursuant to section 552.147(b) of the Government Code.³ You claim that the submitted information is excepted from disclosure under sections 552.103, 552.117, 552.130, and 552.136 of the Government Code.⁴ We have considered the exceptions you claim and reviewed the submitted information, some of which consists of representative samples of information.⁵

Initially, we address your statement that you asked the requestor to narrow request number 154. *See* Gov't Code § 552.222(b) (stating that if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used). We note that a governmental body has a duty to make a good faith effort to relate a request for information to information that the governmental body holds. Open Records Decision No. 561 (1990). In this case, as you have submitted responsive information for our review and raised exceptions to disclosure for these documents, we consider the university to have made a good faith effort to identify information that is responsive to request number 154, and we will address the applicability of your claimed exceptions to that information.

Next, we note that the submitted information includes a personal financial statement which is subject to chapter 572 of the Government Code. This chapter provides for the mandatory filing of personal financial statements by state officers with the Texas Ethics Commission and designates those statements as public records. *See* Gov't Code §§ 572.021 ("a state officer . . . shall file with the [Texas Ethics] commission a verified financial statement complying with Sections 572.022 through 572.0252"), .032 ("Financial statements filed under this subchapter are public records"). Under section 572.002, "the chancellor . . . of a university system" is included in the definition of a "state officer" for the purposes of this chapter. *Id.* § 572.002(5). Information that is expressly made public by statute may not be withheld pursuant to an exception to disclosure in the Act. *See* Open Records Decision Nos. 623 (1994), 525 (1989) (as a general rule, Act's exceptions do not apply to information made public by other statutes). In this case, the personal financial statement at issue was

³Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

⁴We note that the requests include factual questions. The Act does not require a governmental body to answer factual questions, conduct legal research, or create new information in responding to a request. *See* Open Records Decision Nos. 563 at 8 (1990), 555 at 1-2 (1990).

⁵We assume that the "representative 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.

filed by the Texas A&M University System chancellor in accordance with chapter 572 of the Government Code. Consequently, we determine that the chancellor's personal financial statement is expressly public under section 572.032 of the Government Code and must be released without any redactions.

Next, we note that some of the remaining information is subject to section 552.022 of the Government Code, which provides, in pertinent part

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:

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

...

(3) 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)(1), (3). The submitted information includes a completed report, as well as travel vouchers, purchase orders, invoices, and an employment contract. This information is subject to section 552.022 and must be released unless it is expressly made confidential under other law.

You argue that this information is excepted from disclosure under sections 552.103, 552.117, 552.130, and 552.136 of the Government Code. We note that section 552.103 is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See 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 No. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). As such, section 552.103 is not other law that makes information confidential for the purposes of section 552.022, and the university may not withhold the information subject to section 552.022 under that section. However, sections 552.117, 552.130, and 552.136 do constitute other law for purposes of section 552.022, and we will address the applicability of these sections to the information at issue.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, social security number, and family member information of current or former employees of a governmental body who request that this information be kept

confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). 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). The university may only withhold information under section 552.117(a)(1) on behalf of current or former 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 in question timely elected under section 552.024 to keep their personal information confidential. Therefore, the personal information we have marked must be withheld under section 552.117 of the Government Code.

Section 552.130 of the Government Code excepts from disclosure information that "relates to . . . a motor vehicle operator's or driver's license or permit issued by an agency of this state [or] a motor vehicle title or registration issued by an agency of this state." Gov't Code § 552.130. In accordance with section 552.130 of the Government Code, the university must withhold the Texas motor vehicle record information we have marked.

Section 552.136 of the Government Code provides in relevant part:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

- (1) obtain money, goods, services, or another thing of value; or
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Id. § 552.136. Pursuant to section 552.136, the university must withhold the information we have marked on that basis. The remaining information subject to section 552.022 of the Government Code must be released to the requestor.

We note that some of the information that is subject to section 552.022 of the Government Code may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by

the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

We will now consider your arguments under section 552.103 of the Government Code for the remaining information not subject to section 552.022. Section 552.103 provides in relevant part 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.

Id. § 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 was 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).

In this instance, you provide documentation showing that the requestor has filed a complaint with the EEOC against the university for alleged discrimination and retaliation resulting from his whistle blowing activities. You also provide documentation in which the requestor states

that he is pursuing multiple courses of legal action against the university and intends to "let the courts decide" if his claims are valid. Based on your representations and our review of the information at issue, we find that the university reasonably anticipated litigation when it received these requests for information. We also find that this information relates to the anticipated litigation. We therefore conclude that the university may withhold the remaining information under section 552.103 of the Government Code.

We note, however, that 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). Further, the applicability of section 552.103(a) ends once the litigation has concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the university must release the chancellor's personal financial statement pursuant to chapter 572 of the Government Code. The university must release the information subject to section 552.022 of the Government Code, redacting the information we have marked under sections 552.117, 552.130, and 552.136 of the Government Code. However, any information protected by copyright must only be released in accordance with applicable copyright laws. The remaining information may be withheld under section 552.103 of the Government Code.

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.

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,



James A. Person III
Assistant Attorney General
Open Records Division

JAP/sdk

Ref: ID# 246436

Enc. Submitted documents

c: Mr. Richard Tansey
13838 Hollowgreen Drive
Houston, Texas 77082-1804
(w/o enclosures)