ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 17, 2006

Ms. Cherry Kay Wolf
Associate General Counsel
Texas A&M University System
301 Tarrow, 6th Floor
College Station, Texas 77840-7896

OR2006-03813

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# 246437.

The Texas A&M University System and Texas A&M International University (collectively the "university") received three requests from the same requestor for employment contracts, electronic and written communications, personal financial statements, and other information relating to certain individuals.[1] You 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 have submitted information that you claim is excepted from disclosure under sections 552.103 and 552.107 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted representative-sample information.[3]

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[1]You inform us that these are this requestor's 81st, 82nd, and 85th requests.

[2]We 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 No. 682 (2005).

[3]This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the university to withhold any information that is substantially different from the submitted information. *See* Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

We first note that the university does not appear to have submitted any information that is responsive to parts of these requests. We are aware, however, that this office has issued prior rulings to the university regarding information sought by this same requestor. We also are aware that the university has other requests for rulings pending with this office that involve this same requestor and that in some instances his requests for information overlap. To the extent that any other information is responsive to these requests and is the subject of a prior ruling or a pending request for a ruling, the university should follow the direction of that ruling with respect to any such information. To the extent that any other information is responsive to these requests and is not the subject of a prior ruling or a pending request for a ruling, we assume that any such information has been released, to the extent that it was in existence when the university received these requests. If the university has not already released any such information, then it must do so at this time.[4] *See* Gov't Code §§ 552.006, .301, .302; Open Records Decision No. 664 (2000).

We next address your statement that the requestor has been asked to narrow parts of these requests for information.[5] *See* Gov't Code § 552.222(b); Open Records Decision No. 663 at 2-5 (1999). We note that a governmental body must make a good-faith effort to relate a request to information that is within its possession or control. *See* Open Records Decision No. 561 at 8-9 (1990). In this instance, you have submitted responsive information for our review and have raised exceptions to the disclosure of the submitted information. Therefore, we consider the university to have made a good-faith effort to identify information that is responsive to these requests. Accordingly, we will consider your claimed exceptions to the disclosure of the submitted information.

You claim that the submitted information is excepted from disclosure under section 552.103 of the Government Code. This exception provides in part:

> (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.
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> . . . .

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[4]We note that the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

[5]You identify those parts of these requests as item numbers 1 and 2 of the request sent January 29, 2006 at 4:34 a.m. and part 3 of the request sent February 1, 2006 at 5:15 a.m.

> (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 that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated 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.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See* Open Records Decision No. 551 at 4 (1990). 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." Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *Id.*

You inform us, and have provided documentation reflecting, that the requestor filed claims of discrimination with the Equal Employment Opportunity Commission ("EEOC") prior to the date of the university's receipt of these requests for information,. You also state that the submitted information is related to the requestor's discrimination claims. This office has stated that a pending EEOC complaint indicates that litigation is reasonably anticipated. *See* Open Records Decision Nos. 386 at 2 (1983), 336 at 1(1982). Therefore, based on your representations and the submitted documentation, we find that the university reasonably anticipated litigation on the date of its receipt of these requests. We also find that the submitted information is related to the anticipated litigation. We therefore conclude that the university may withhold the submitted information at this time under 552.103 of the Government Code.[6]

In reaching this conclusion, we assume that the opposing party in the anticipated litigation has not seen or had access to any of the information in question. 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 is related to 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 is related to anticipated litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section

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[6]As we are able to make this determination, we do not address your claim under section 552.107 of the Government Code.

552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). We further note that the applicability of section 552.103 ends once the related litigation concludes or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

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).

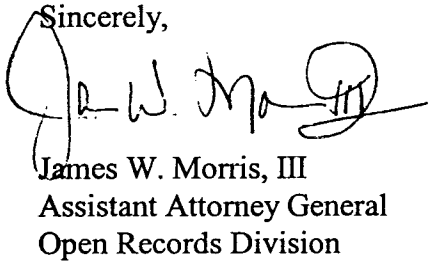
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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 W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 246437

Enc: Submitted documents

c: Mr. Richard Tansey
c/o Mr. Murray E. Malakoff
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Laredo, Texas 78041
(w/o enclosures)