



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 25, 2006

Mr. Scott A. Kelly
Deputy General Counsel
The Texas A&M University System
Office of the General Counsel
A&M System Building, Suite 2079
200 Technology Way
College Station, Texas 77845-3424

OR2006-12604

Dear Mr. Kelly:

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# 263935.

Texas A&M University-Galveston (the "university") received a request for "all documents contained in the [requestor's] personnel file[.]" 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 comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, we address the requestor's contention that the university failed to seek a decision from this office with the ten business day period required by section 552.301 of the Government Code. Section 552.301 prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(b) provides that the governmental body must ask for the attorney general's decision and state the exceptions to disclosure that it claims not later than the tenth business day "after the date of *receiving* the written request" for information. *See* Gov't Code § 552.301(a), (b) (emphasis added).

The requestor states that he made this request for information on August 17, 2006. Although the request is dated August 17, 2006, the university informs us that it received the request on August 22, 2006. Based on that date, ten business days following the university's receipt

of the request was September 6, 2006.¹ The university sought a decision from this office on August 31, 2006. Therefore, we conclude that the university has complied with the Act's procedural requirements in seeking an open records decision from this office.

The requestor also asserts that the university has already made the requested information available to members of the general public. The Act does not permit the selective disclosure of information to the public. *See id.* §§ 552.007(b), .021; Open Records Decision No. 463 at 1-2 (1987). If a governmental body voluntarily releases information to a member of the public, such information may not later be withheld unless its disclosure is expressly prohibited by law. *See Gov't Code* § 552.007. We also note, however, that release of information among litigants in the course of discovery does not constitute a "voluntary" release of information for purposes of the Act. *See Cornyn v. City of Garland*, 994 S.W.2d 258, 265 (Tex. App.—Austin 1999, no pet.) (alleged prior disclosure of information in course of discovery did not foreclose possibility of raising litigation exception in response to subsequent request); Open Records Decision No. 579 (1990) (exchange of information among litigants in "informal" discovery is not "voluntary" release of information for purposes of statutory predecessor of section 552.007).

In this instance, we are unable to determine based on the information provided whether the university voluntarily released to the public any of the information at issue. This situation therefore presents a fact issue that cannot be determined in the ruling process. *See Attorney General Opinions* GA-0087 at 1 (2003), GA-0003 at 1 n. 2 (2003), JC-0534 at 1 (2002) (this office does not make factual determinations in opinion process). Because we cannot determine this issue, we must address it conditionally. In this regard, if the submitted information has been voluntarily released to the public, then the university cannot now withhold the information under section 552.103 as this exception is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See Gov't Code* § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (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). However, to the extent the university has not voluntarily released the submitted information previously to the public, we will consider your claim under section 552.103. *Attorney General Opinion* MW-575 (1982); Open Records Decision No. 350 (1982).

Prior to reaching your arguments under section 552.103, however, we note that some of the submitted information is subject to section 552.022 of the Government Code. Specifically, section 552.022(a)(1) 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:

¹We note that September 5, 2006 was a holiday.

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

Gov't Code § 552.022(a)(1). The submitted information includes a completed report that was made of, for, or by the university. Completed reports must be released under section 552.022(a)(1) unless excepted from disclosure under section 552.108 of the Government Code or expressly confidential under other law. You do not raise section 552.108. As discussed above, section 552.103 of the Government Code is a discretionary exception to disclosure, and discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential), 522 at 4 (1989) (discretionary exceptions in general); *see also Dallas Area Rapid Transit*, 4 S.W.3d at 475-76. Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential for purposes of section 552.022. Accordingly, the university may not withhold the completed report that we have marked under section 552.103 of the Government Code.

We address your claim under section 552.103 of the Government Code for the remaining submitted information. This section 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 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 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 that 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.

You inform us, and provide documentation indicating, that the university and the requestor are currently involved in two civil lawsuits relating to the requestor's termination of employment with the university. Upon review of your arguments and the remaining submitted information, we find that the university has demonstrated that it was involved in pending litigation when the request was received and that the information at issue is related to that pending litigation. We note, however, that the requestor appears to have already had access to much of this information. 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, with the exception of the information to which the requestor has already had access, the university may withhold the remaining submitted records under section 552.103 of the Government Code.²

In summary, the university must release the submitted information to the extent it has been previously voluntarily released to the public. Otherwise, we conclude as follows: (1) the university must release the completed report that we have marked pursuant to section 552.022(a)(1) of the Government Code; (2) other than information to which the requestor has already had access, the university may withhold the remaining submitted records under section 552.103 of the Government Code; and (3) the remaining submitted information must be released.

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 ten 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

²We also note that 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).

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); *Tex. 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 ten calendar days of the date of this ruling.

Sincerely,



Robert B. Rapfogel
Assistant Attorney General
Open Records Division

RBR/eb

Ref: ID# 263935

Enc. Submitted documents

c: Dr. Radoslav Dimitric
P. O. Box 87
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(w/o enclosures)