



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 5, 2007

Ms. Karen Rabon
Assistant Attorney General
Public Information Coordinator
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

OR2007-01439

Dear Ms. Rabon:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 270691.

The Office of the Attorney General (the "OAG") received a request for communications between Texas A&M University (the "university") and the OAG. You state that the OAG has released some of the responsive information but claim that the remainder is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code. We have considered your claimed exceptions to disclosure and have reviewed the submitted sample of information.¹ We have also received and considered the requestor's comments. *See Gov't Code § 552.304* (interested party may submit written comments regarding availability of information).

First, the requestor argues the OAG failed to comply with the ten-business-day deadline prescribed by section 552.301(b) of the Government Code, and that the OAG's clarification of the request does not excuse its delay in responding to the request. Pursuant to section

¹We 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.

552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply not later than the tenth business day after the date of receiving the written request. Because section 552.301 refers to “business” days, holidays, including skeleton days, are not considered to be business days. *See* Gov’t Code § 662.022 (state public office may be closed on legal holiday); http://www.oag.state.tx.us/opinopen/og_developments.php (skeleton crew day not counted as business day). Thus, holidays and skeleton crew days are not counted when calculating the deadline under section 552.301(b). Section 552.222(b) permits a governmental body to seek clarification of the request if the agency is unclear as to what information is requested. Gov’t Code § 552.222(b). This office has concluded that “the [Public Information Act] contemplates a tolling of the ten days during the interval in which a governmental body and a requestor are communicating in good faith to clarify or narrow a request.” Open Records Decision No. 663 at 5 (1999). Thus, the ten-day deadline is tolled during the clarification process and resumes upon receipt of the clarified response. *Id.*

The OAG received the request on November 2, 2006 and sought clarification on November 15. The requestor responded on November 21, 2006. Thus, the ten-business-day deadline was tolled during the clarification period until November 22, 2006. However, because the OAG observed November 22 as a skeleton crew day and November 23 and 24 were official holidays, the next business day after November 22 is November 27, 2006. The OAG submitted its request for an open records decision on November 27; therefore, the OAG complied with the deadline under section 552.301(b).

Section 552.103, the litigation exception, 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.

Gov’t Code § 552.103(a), (c). The 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 that the request for information was received,

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). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

The OAG states that prior to the receipt of the written request, the requestor filed a lawsuit against the university alleging numerous causes of action concerning his employment. The OAG is representing the university in this matter. After reviewing your arguments and the information, we conclude that litigation is pending. We also conclude the information is related to the litigation for purposes of section 552.103(a) and may, therefore, be withheld from disclosure.

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). Thus, information that has either been obtained from or provided to the opposing party in the litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, 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). Because we are able to make a determination under section 552.103, we need not address your additional arguments against disclosure.

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,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/sdk

Ref: ID# 270691

Enc: Submitted documents

c: Dr. Radoslav Dimitric
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Pittsburgh, Pennsylvania 15219
(w/o enclosures)