



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 3, 2008

Mr. Scott A. Kelly
Deputy General Counsel
Texas A&M System
200 Technology Way, Suite 2079
College Station, Texas 77845-3424

OR2008-00086

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# 298646.

Texas A&M University (the "university") received a request for information relating to the requestor, including records involving specified offices and individuals. You inform us that some of the requested information is the subject of previous open records letter rulings. You claim that other responsive information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and have reviewed the information you submitted.¹

You inform us that some of the requested information was the subject of previous requests, as a result of which this office issued Open Records Letter Nos. 2007-13393 (2007) and 2007-00557 (2007). You do not indicate that there has been any change in the law, facts, and circumstances on which the previous rulings are based. We therefore conclude that the university must dispose of the requested information that is the subject of Open Records Letter Nos. 2007-13393 and 2007-00557 in accordance with those rulings. *See Gov't Code*

¹To the extent that the submitted information is a representative sample of the requested information, this letter ruling assumes that the submitted 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).

§ 552.301(a); Open Records Decision No. 673 at 6-7 (2001) (listing elements of first type of previous determination under Gov't Code § 552.301(a)).

We next note that the submitted information includes education records. The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code, does not permit state and local educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act.² Consequently, state and local educational authorities that receive a request for education records from a member of the public under the Act must not submit education records to this office in unredacted form, that is, in a form in which "personally identifiable information" is disclosed. *See* 34 C.F.R. § 99.3 (defining "personally identifiable information"). You have submitted, among other things, redacted education records for our review. Because our office is prohibited from reviewing these education records to determine the applicability of FERPA, we will not address FERPA with respect to these records. *See* 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.3. Such determinations under FERPA must be made by the educational authority in possession of the education records.³ However, we will consider your exception to the disclosure of the submitted information.

We also note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides that "the following categories of information are public information and not excepted from required disclosure under [the Act] 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;

...

(8) a statement of the general course and method by which an agency's functions are channeled and determined, including the nature and requirements of all formal and informal policies and procedures; [and]

...

²A copy of the letter may be found on the attorney general's website, http://www.oag.state.tx.us/opinopen/og_resources.shtml.

³In the future, if the university does obtain consent to submit unredacted education records and seeks a ruling from this office on the proper redaction of those education records in compliance with FERPA, we will rule accordingly.

(13) a policy statement or interpretation that has been adopted or issued by an agency[.]

Gov't Code § 552.022(a)(1), (8), (13). The submitted documents include completed reports that must be released under section 552.022(a)(1), unless they contain information that is expressly confidential under other law or excepted from disclosure under section 552.108 of the Government Code. You do not raise section 552.108. The documents at issue also contain information that must be released under section 552.022(a)(8) and (13), unless the information is expressly confidential under other law. We have marked the information that is subject to section 552.022. Although you seek to withhold that information under section 552.103 of the Government Code, that section is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See id.* § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App. – Dallas 1999, no pet.) (Gov't Code § 552.103 may be waived); Open Records Decision No. 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 marked information that is subject to section 552.022 under section 552.103.

With respect to the remaining information, we address your claim under section 552.103. 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.

...

(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.” *See* 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 a claim of discrimination with the Equal Employment Opportunity Commission (“EEOC”) prior to the date of the university’s receipt of this request for information. You also state that the submitted information is related to the requestor’s discrimination claim. 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 this request for information. We also find that the remaining information is related to the anticipated litigation. We therefore conclude that section 552.103 is generally applicable to the remaining information.

We note, however, that the opposing party in the anticipated litigation already has seen or had access to some of the remaining 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 relating to litigation through discovery procedures. *See* ORD 551 at 4-5. Thus, if the opposing party has seen or had access to information relating to litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, to the extent that the opposing party in the anticipated litigation has seen or had access to the remaining information, any such information is not protected by section 552.103 and may not be withheld on that basis. With the exception of such information, the university may withhold the remaining information at this time under section 552.103. We 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).

In summary: (1) the university must dispose of the requested information that is the subject of Open Records Letter Nos. 2007-13393 and 2007-00557 in accordance with the previous rulings; and (2) the university may withhold the submitted information that is not subject to section 552.022 of the Government Code under section 552.103 of the Government Code, except for the information that the opposing party in the anticipated litigation has seen or to

which he has had access.⁴ The rest of the submitted information must be released.⁵ This ruling does not address the applicability of FERPA to the submitted information. Should the university determine that all or portions of the submitted information consist of “education records” that must be withheld under FERPA, the university must dispose of that information in accordance with FERPA, rather than the Act.

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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).

⁴We note that the submitted information contains a social security number. Section 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. The requestor has a right, however, to his own social security number. *See generally* Gov’t Code § 552.023(b) (governmental body may not deny access to person to whom information relates, or that person’s representative, solely on grounds that information is considered confidential by privacy principles).

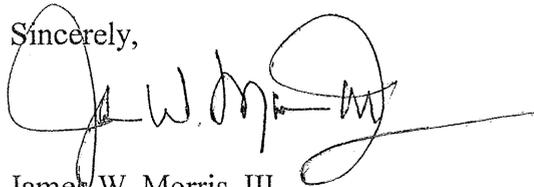
⁵We note that the university would be required to withhold some of the remaining information from the public to protect the requestor’s privacy. The requestor has a right of access, however, to his own private information. *See* Gov’t Code § 552.023(a); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself). Should the university receive another request for these same records from a person who would not have a right of access to this requestor’s private information, the university should resubmit these records and request another decision. *See* Gov’t Code §§ 552.301, .302.

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can challenge 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,

A handwritten signature in black ink, appearing to read 'James W. Morris, III', with a long horizontal flourish extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/ma

Ref: ID# 298646

Enc: Submitted documents

c: Mr. Cedric Rogers
2906 Cheshire Drive
Bryan, Texas 77803
(w/o enclosures)