



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 5, 2008

Ms. Tammye Curtis-Jones
Associate General Counsel
Texas Southern University
311 Cleburne Avenue
Houston, Texas 77004

OR2008-07705

Dear Ms. Curtis-Jones:

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# 311925.

Texas Southern University (the "university") received a request for five categories of information pertaining to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.136 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information. We have also received comments from 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 argument that the university failed to comply with the procedural requirements of the Act. The university received the request on March 14, 2008. The requestor asserts that because the requested information was not submitted to this office in the university's March 31, 2008 letter, this office should not review or consider this information. However, we note that a governmental body has fifteen business days from the date of the receipt of the request in which to submit copies of responsive information to this

¹We note that section 552.023, which provides a special right of access to confidential information in certain circumstances, is not an exception to disclosure. Accordingly, we do not address your claim that the submitted information is excepted from disclosure under this provision.

office. See Gov't Code 552.301(e)(1)(D). The university submitted the responsive information to this office on April 8, 2008, which was the fifteenth business day after the university received the request at issue. Thus, we conclude that the university complied with its obligations under the Act, and accordingly we will address its arguments pertaining to this information.

Next, we note that portions of the information submitted in Exhibit D are made expressly public under section 552.022 of the Government Code. Section 552.022 provides, in relevant part, as follows:

(a) Without limiting the amount or kind of information that is public information under this chapter, 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;

...

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

Gov't Code § 552.022(a)(1), (3), (13). Some of the submitted information consists of completed employee evaluations, paid sales invoices, policy manuals, and policy statements, — that are subject to sections 552.022(a)(1), 552.022(a)(3), and 552.022(a)(13) of the Government Code. Although you raise sections 552.103 and 552.107 of the Government Code, these sections are discretionary exceptions to disclosure that protect the 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); see also Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 (1999) (governmental body may waive section 552.103). As such, sections 552.103 and 552.107 are not other law that make information confidential for the purposes of section 552.022. Therefore, the university may

not withhold any of this information, which we have marked, under section 552.103 or section 552.107.

The Texas Supreme Court has held, however, that the Texas Rules of Evidence are "other law" within the meaning of section 552.022. *See In re. City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). The attorney-client privilege is also found at Texas Rule of Evidence 503. Accordingly, we will consider your assertion of this privilege under rule 503, which provides as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5).

Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Pittsburgh*

Corning Crop. v. Caldwell, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ). Thus, the information subject to section 552.022, which we have marked, must be released to the requestor.

You seek to withhold the information in Exhibit D under rule 503. However, you acknowledge that the university provided this information to the Equal Employment Opportunity Commission (“EEOC”). You have not demonstrated that the EEOC is a privileged party for purposes of the attorney-client privilege under rule 503. Thus, we conclude that you may not withhold any portion of Exhibit D under rule 503.

We now turn to your argument under section 552.103 of the Government Code for the information in Exhibit B and the information in Exhibit D that is not subject to section 552.022. Section 552.103 provides in 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 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). The 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 demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Concrete evidence to support a claim that litigation is reasonably anticipated

may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). This office has concluded that litigation was reasonably anticipated when the potential opposing party filed a complaint with the EEOC. *See* Open Records Decision No. 336 (1982). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982).

You inform us, and have provided documentation demonstrating, that the requestor filed a claim of discrimination with the EEOC prior to the university's receipt of the request at issue. You also indicate that the submitted information, which consists of employment documents pertaining to the requestor, information from the requestor's personnel file, and information pertaining to the university's handling of the EEOC complaint, related to the discrimination claim filed by the requestor. Based on your arguments and the submitted documentation, we find that the university reasonably anticipated litigation on the date it received the request at issue. We also find that the information not subject to section 552.022 is related to the anticipated litigation. Therefore, the university may withhold Exhibit B and the information not subject to section 552.022 in Exhibit D pursuant to section 552.103 of the Government Code.²

We also note, however, that a portion of the information appears to have been provided to or obtained from the opposing party in the discrimination claim. Once information has been obtained by all parties to 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 pertaining to the requestor's EEOC complaint against the university that has been obtained from or provided to all opposing parties in the anticipated litigation is not excepted from disclosure under section 552.103(a) and may not be withheld on that basis. In addition, section 552.103(a) is no longer applicable once the litigation has been concluded or is no longer anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Next you claim that a portion of Exhibit C is confidential under section 552.136 of the Government Code. Section 552.136 states that "[n]otwithstanding 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." Gov't Code § 552.136 (b). However, because check numbers do not constitute access device numbers, section 552.136 is not applicable to the check number that we have marked for release. You have also failed to establish that the remaining information, including payroll codes and

²Because this determination is dispositive, we need not address your remaining arguments against disclosure of this information.

purchasing codes you have highlighted under section 552.136 constitute access device numbers for the purposes of section 552.136. Thus, section 552.136 is not applicable to any of the information in Exhibit C. As you raise no other exception to disclosure of this information, it must be released to the requestor.

In summary, to the extent that information at issue has not been obtained from or provided to all opposing parties in the anticipated litigation, the university may withhold Exhibit B and the information not subject to section 552.022 in Exhibit D pursuant to section 552.103 of the Government Code. The remaining 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 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).

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 cursive script that reads "Justin D. Gordon". The signature is written in dark ink and is positioned above the typed name.

Justin D. Gordon
Assistant Attorney General
Open Records Division

JDG/eeg

Ref: ID# 311925

Enc. Submitted documents

c: Ms. Julia Mercer
5826 New Territory Boulevard, #107
Sugar Land, Texas 77479-5948
(w/o enclosures)