



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 29, 2008

Ms. Carol Longoria
Public Information Coordinator
The University of Texas System
Office of the General Counsel
201 West Seventh Street
Austin, Texas 78701-2902

OR2008-11916

Dear Ms. Longoria:

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# 320415.

The University of Texas at Tyler (the "university") received a request for the requestor's client's personnel file. You state that the university has released some of the requested information. You also state that the university has redacted student information pursuant to FERPA.¹ You claim that the submitted information is excepted from disclosure under sections 552.103 and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We note that the submitted information contains an F-5 form. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by

¹The Department of Education has informed this office that it is the responsibility of the educational agency or institution to make determinations under FERPA. A copy of the Department of Education's letter may be found on the Office of the Attorney General's website at <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

law, either constitutional, statutory, or by judicial decision.”² Gov’t Code § 552.101. This section encompasses information made confidential by statute. The public availability of the submitted F-5 form (Report of Separation of Licensee) is governed by section 1701.454 of the Occupations Code. Under section 1701.452 of the Occupations Code, a law enforcement agency must submit a report to the Texas Commission on Law Enforcement Officer Standards and Education (“TCLEOSE”) regarding a person licensed under chapter 1701 of the Occupations Code who resigns from the employment of the law enforcement agency or whose appointment with the law enforcement agency is terminated. *See* Occ. Code § 1701.452. Section 1701.454 of the Occupations Code provides as follows:

- (a) A report or statement submitted to [TCLEOSE] under this subchapter is confidential and is not subject to disclosure under Chapter 552, Government Code, unless the person resigned or was terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses.
- (b) Except as provided by this subchapter, a [TCLEOSE] member or other person may not release the contents of a report or statement submitted under this subchapter.

Id. § 1701.454; *see* 37 T.A.C. § 217.7 (reporting appointment and termination of licensee). In this instance, the submitted F-5 form does not appear to pertain to a person who resigned or was terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses. We therefore conclude that the university must withhold the submitted F-5 form under section 552.101 in conjunction with section 1701.454 of the Occupations Code.

Section 552.103 of the Government Code provides 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

²Unlike other exceptions to disclosure, this office will raise section 552.101 on behalf of a governmental body, because the Act prescribes criminal penalties for the release of confidential information. *See* Gov’t Code §§ 552.007, .352; Open Records Decision No. 325 at 2 (1982).

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, 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). For purposes of section 552.103(a), this office considers a contested case under the Texas Administrative Procedure Act (“APA”), Government Code chapter 2001, to constitute “litigation.” Open Records Decision No. 588 (1991) at 7 (construing statutory predecessor to the APA).

You explain that the requestor's client is a former university employee whose employment was terminated, and upon his termination, the university filed a notice of separation pertaining to the requestor's client with the TCLEOSE in accordance with section 1701.452(a) of the Texas Occupations Code. You state that TCLEOSE denied the requestor's client's request to correct the record reflecting the discharge. You inform us that a terminated individual may appeal the TCLEOSE decision to the State Office of Administrative Hearings (“SOAH”) pursuant to section 1701.452 of the Occupations Code. You state that at the time of the request, the case was pending appeal to SOAH. You further explain that SOAH presides over hearings in compliance with the APA. You state, and provide supporting documentation, that the university has been implicated in the appeal. You assert that the submitted information is related to the contested case because it pertains to the requestor's client's termination from university employment. Based on our review of your arguments and the information at issue, we find that the university has established that litigation was pending on the date that it received the present request for information. Furthermore, we find that the university has demonstrated that the information at issue relates to the pending litigation. Thus, you have demonstrated the applicability of section 552.103 of the Government Code to the submitted information.

We note, however, that the opposing party in the pending litigation may have seen or had access to portions of the submitted 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 the opposing party has seen or had access to the information at issue,

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 information at issue at this time under section 552.103. We note the applicability of section 552.103 ends when the litigation has concluded. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

To the extent that the information at issue is not excepted from disclosure under section 552.103, we will address your argument against disclosure under section 552.130 of the Government Code. Section 552.130 provides that information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by a Texas agency is excepted from public release. Gov't Code § 552.130(a)(1), (2). We agree that the university must withhold the Texas motor vehicle record information you have marked under section 552.130.

In summary, the university must withhold the submitted F-5 form under section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code. To the extent that the remaining information has not been obtained from or provided to the opposing party, the university may withhold it from disclosure under section 552.103. The university must withhold the information you have marked under section 552.130. 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). If the governmental body does not file suit over 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,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/eeg

Ref: ID# 320415

Enc. Submitted documents

c: Mr. Christopher D. Livingston
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(w/o enclosures)