



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 6, 2009

Ms. Neera Chatterjee
The University of Texas System
Office of General Counsel
201 West Seventh Street
Austin, Texas 78701-2902

OR2009-02969

Dear Ms. Chatterjee:

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# 336823.

The University of Texas at San Antonio (the "university") received a request for the following: 1) all correspondence between the university and the U.S. Department of Education related to the "May 2008 TRIO Site Review" from May 2008 to the present; 2) all information regarding two specified job positions from two specified time periods; 3) information regarding a specified complaint made by the requestor; and 4) all information regarding complaints made by a named individual. You claim the requested information is excepted from disclosure under sections 552.103, 552.107, 552.111, 552.117, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the submitted documents include information that is subject to section 552.022 of the Government Code, which provides in pertinent part:

(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;

(15) information regarded as open to the public under an agency's policies[.]

Gov't Code § 552.022(a)(1), (3), (15). The submitted documents contain completed reports which are subject to section 552.022(a)(1) and information contained in accounts, vouchers, and contracts relating the receipt or expenditure of public funds, which is subject to section 552.022(a)(3). The submitted information also contains information published on the university's website and a job description, which is usually open to the public as part of a job posting. If the university regards the information published on the university's website and the submitted job description as open to the public, then the university may withhold this information, along with the remaining information we have marked subject to sections 552.022(a)(1), 552.022(a)(3), and 552.022(a)(15), only to the extent it is made confidential under "other law." Although you argue this information is excepted from disclosure under section 552.103 of the Government Code, this section is a discretionary exception and, as such, is not "other law" for purposes of section 552.022. *See* Open Records Decision Nos. 665 at 2 n.5 (discretionary exceptions generally), 542 at 4 (1990) (statutory predecessor to section 552.103 subject to waiver). Therefore, the information we have marked as subject to sections 552.022(a)(1) and 552.022(a)(3) may not be withheld under section 552.103 and must be released to the requestor. The information published on the university's website and the submitted job description, which we have marked, must also be released pursuant to section 552.022(a)(15) if it is regarded by the university as open to the public.

We next address your argument under section 552.103 of the Government Code with regards to the remaining information. Section 552.103 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). A 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 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(a). *See* ORD 551.

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 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." *Id.* This office has found that a pending Equal Employment Opportunity Commission ("EEOC") complaint indicates litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982), 281 at 1 (1981).

In this instance, you state, and provide documentation showing, that the requestor is a former university employee who filed a claim of alleged discrimination with the EEOC against the university prior to the date the university received the request for information. Upon review, we determine that the university has established that it reasonably anticipated litigation on the date that it received the request for information. Furthermore, upon review, we conclude the remaining information that you seek to withhold under section 552.103 is related to the anticipated litigation. *See* ORD 551 at 5 (attorney general will determine whether governmental body has reasonably established that information at issue is related to litigation).

We note, however, that some of the documents you seek to withhold have been seen by the potential opposing party. If a potential opposing party has seen or had access to information that is related to anticipated 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, the university may not withhold the information that we have marked for release under section 552.103 of the Government Code. However, because we have no indication that the remaining information at issue has been seen or obtained by the opposing party, these documents may be withheld under section 552.103.¹

Finally, we note that some of the submitted information is protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are protected by copyright. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of materials protected by copyright, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, the information we have marked as subject to sections 552.022(a)(1) and 552.022(a)(3) of the Government Code must be released to the requestor. The information published on the university's website and the submitted job description, which we have marked, must also be released pursuant to section 552.022(a)(15) of the Government Code if the university regards this information as open to the public. Except for the information we have marked for release, the university may withhold the remaining information under section 552.103 of the Government Code. The remaining information must be released, but any copyrighted information may only be released in accordance with copyright law.² As our ruling is dispositive, we do not address your remaining arguments against disclosure.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php,

¹We note that the applicability of section 552.103(a) ends once the litigation has concluded or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

²We note the requestor has a special right of access to some of the information being released in this instance. *See* Gov't Code § 552.023(a). Because such information may be confidential with respect to the general public, if the university receives another request for this information from a different requestor, the university must again seek a ruling from this office.

or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Amy L.S. Shipp
Assistant Attorney General
Open Records Division

ALS/cc

Ref: ID# 336823

Enc. Submitted documents

cc: Requestor
(w/o enclosures)