



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 8, 2009

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

OR2009-14201

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# 357736 (OGC # 120759).

The University of Texas-Pan American (the "university") received a request for communications between named university administrators and a named former student and/or her parents during a specified time period and two other categories of information pertaining to the university's athletics department. You state the university has released some of the requested information to the requestor. You also state the university will redact some information, including all of the information responsive to the request for communications with the named former student and/or her parents, pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g.¹ You claim that portions of the submitted information are excepted from disclosure under

¹The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that FERPA 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. The DOE has determined that FERPA determinations must be made by the educational authority in possession of the education records. We have posted a copy of the letter from the DOE to this office on the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

sections 552.101, 552.103, 552.104, and 552.1235, of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.²

Initially, you contend that an e-mail exchange that you have marked is confidential under the doctrines of constitutional and common-law privacy. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses constitutional and common-law privacy. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently; and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy," which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected under constitutional privacy is narrower than that under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985)).

Common-law privacy protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The types of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* include information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. We note that this office has found that the public has a legitimate interest in the qualifications and work conduct of employees of governmental bodies. *See* Open Records Decision Nos. 562 at 10 (1990), 542 at 5 (1990); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow).

Upon review of the submitted information, we conclude that no part of the e-mail exchange you have marked comes within one of the constitutional zones of privacy or involves the most intimate aspects of human affairs. Therefore, the marked information may not be withheld under section 552.101 on the basis of constitutional privacy. Additionally, we find that the marked information, which consists of a discussion between university

²We 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.

administrators regarding concerns about hiring matters, is a matter of legitimate public interest. Thus, the marked information is not confidential under common-law privacy, and the university may not withhold it under section 552.101 of the Government Code on that ground. As no additional exceptions are raised for this information, it must be released to the requestor.

Next, you claim the e-mail you have marked is excepted under section 552.103 of the Government Code, which 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 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 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).

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. See Open Records Decision Nos. 555 (1990); 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined 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). Further, the fact a potential opposing party has hired an attorney who makes a request for information does not establish litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983).

You assert and provide documentation showing that prior to the receipt of the instant request for information, the university anticipated litigation regarding a former employee's claim that the university breached his employment contract. You have submitted a memorandum from an attorney with the university's general counsel's office representing that the former employee made an initial demand on the university in September 2008 and has continued to make demands. This memorandum also represents that the university is currently negotiating with the former employee "to attempt to resolve this matter short of litigation." You have also submitted two letters from the former employee, received by the university prior to this request for information, which detail his claims against the university. One of these letters states that the former employee has consulted an attorney and contains a specific threat to sue the university for wrongful termination unless the university and the former employee can settle the matter out of court. Based on your representations and our review of the submitted documentation, we agree that the university reasonably anticipated litigation on the date it received the request. We further agree that the e-mail you have marked relates to the anticipated litigation. Thus, the university may withhold the marked e-mail under section 552.103 of the Government Code.³

Generally, however, 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). Further, the applicability of section 552.103(a) ends once the litigation has been concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Next, you claim one of the remaining e-mails, which you have marked, is excepted under section 552.104 of the Government Code, which excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). The purpose of section 552.104 is to protect the purchasing interests of a governmental body in competitive bidding situations where the governmental body wishes to withhold information in order to obtain more favorable offers. *See* Open Records Decision No. 592 (1991). Section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. *See* Open Records Decision No. 541 at 4 (1990). Section 552.104 does not protect information relating to competitive bidding situations once a contract has been awarded and is in effect. *See* Open Records Decision Nos. 306 (1982), 184 (1978).

³As our ruling is dispositive, we need not address your remaining arguments against the disclosure of the e-mail you have marked under section 552.103.

You inform us that the e-mail you have marked as excepted under section 552.104 is related to ongoing contract negotiations between the university and the university's recently selected men's head basketball coach. You contend that if the marked information is released, "it would disadvantage the [u]niversity in obtaining a fair contract should initial negotiations fail." Having considered your representations, we find that the university has not established that the e-mail you have marked relates to a competitive bidding situation and therefore section 552.104 is inapplicable. *See* Open Records Decision Nos. 593 (1991) (predecessor to section 552.104 designed to protect governmental interests in commercial transactions). Thus, we conclude that the university may not withhold the e-mail you have marked pursuant to section 552.104 of the Government Code. As you raise no further exceptions against its disclosure, this e-mail must be released.

Next, you claim that the information you have marked is excepted under section 552.1235 of the Government Code, which excepts from disclosure "the name or other information that would tend to disclose the identity of a person, other than a governmental body, who makes a gift, grant, or donation of money or property to an institution of higher education[.]" Gov't Code § 552.1235(a). "Institution of higher education" is defined by section 61.003 of the Education Code. *Id.* § 552.1235(c). Section 61.003 defines an "institution of higher education" as "any public technical institute, public junior college, public senior college or university, medical or dental unit, public state college, or other agency of higher education as defined in this section." *See* Educ. Code § 61.003.

You have marked information that the university seeks to withhold under section 552.1235. We understand you to contend that the marked information either identifies or tends to identify donors to the university. You state that these donors have not granted the university permission to reveal their identity. Based upon your representations and our review, we agree that the information you have marked identifies or tends to identify persons as actual donors to the university. Accordingly, we conclude that the university must withhold the information you have marked in Tab 5 under section 552.1235.

In summary, the university may withhold the information you have marked under section 552.103 of the Government Code. The university must withhold the information you have marked under section 552.1235 of the Government Code. The remaining information must be released to the requestor.

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, 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, toll free, at (888) 672-6787.

Sincerely,



Laura Ream Lemus
Assistant Attorney General
Open Records Division

LRL/jb

Ref: ID# 357736

Enc. Submitted documents

c: Requestor
(w/o enclosures)