ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 9, 2009

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

OR2009-17435

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# 362221.

The University of Texas System (the "system") received a request for (1) audits or inspections of campus and system police departments during a specified period, and (2) copies of all complaints concerning campus and system police departments during the same time period, excluding the University of Texas at Dallas ("UTD"). The requestor subsequently clarified the second part of the request to include department employees and any UTD complaints filed since May 1, 2009. *See* Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used). You state that the responsive audits will be released to the requestor. You claim that the requested inspections and complaints are excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information, some of which consists of representative sample information.[1]

[1]We 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.

Initially, we note that some of the requested information was the subject of a previous request received by the system, as a result of which this office issued Open Records Letter No. 2009-17264 (2009). We have no indication that there has been any change in the law, facts, or circumstances on which the previous ruling was based. We therefore conclude that the system may continue to rely on Open Records Letter No. 2009-17264 as a previous determination and withhold or release the previously ruled upon information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). To the extent that the submitted information is not the precise information previously ruled upon, we will address your arguments against disclosure.

We next turn to your assertions under section 552.108 of the Government Code. Section 552.108(a)(1) excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime." Gov't Code § 552.108(a)(1). A governmental body claiming section 552.108(a)(1) must reasonably explain how and why release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). We note, however, section 552.108 is generally not applicable to information relating to an internal administrative investigation that did not result in a criminal investigation or prosecution. *See Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.—El Paso 1992, writ denied); *see also* Open Records Decision No. 350 at 3-4 (1982). The submitted complaints pertain to internal investigations of university personnel. You make no representation these complaints pertain to criminal investigations of the system. Instead, you state and provide a letter from the Director of Police for the system stating that some of the complaints in Tab 6 were sent to the Collin County District Attorney's Office (the "district attorney") for review. Where a governmental body possesses information relating to a pending case of another law enforcement agency, the governmental body may withhold the information under section 552.108 if (1) it demonstrates the information relates to the pending case and (2) this office is provided with a representation from the law enforcement agency that it wishes to withhold the information.

You have provided a representation from the district attorney that two of the complaints in Tab 6 relate to pending criminal investigations by the district attorney, and the district attorney wishes to withhold this information. Based upon the district attorney's representations and our review, we conclude release of the information at issue would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law

enforcement interests that are present in active cases). We have marked the information that is excepted from public disclosure under section 552.108(a)(1) of the Government Code. However, you have failed to show that release of the remaining information at issue in Tab 6 would interfere with the detection, investigation, or prosecution of crime. Accordingly, none of the remaining information in Tab 6 may be withheld under section 552.108(a)(1).

Section 552.108(b)(1) of the Government Code excepts from disclosure "[a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution . . . if: (1) release of the internal record or notation would interfere with law enforcement or prosecution." Section 552.108(b)(1) is intended to protect "information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State." *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.—Austin 2002, no pet.).

To prevail on its claim that section 552.108(b)(1) excepts information from disclosure, a governmental body must do more than merely make a conclusory assertion that releasing the information would interfere with law enforcement. Instead, the governmental body must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. *See* Open Records Decision No. 562 at 10 (1990) (construing statutory predecessor). In addition, generally known policies and techniques may not be withheld under section 552.108. *See, e.g.*, Open Records Decision Nos. 531 at 2-3 (1989) (Penal Code provisions, common law rules, and constitutional limitations on use of force are not protected under law enforcement exception), 252 at 3 (1980) (governmental body did not meet burden because it did not indicate why investigative procedures and techniques requested were any different from those commonly known). The determination of whether the release of particular records would interfere with law enforcement is made on a case-by-case basis. *See* Open Records Decision No. 409 at 2 (1984) (construing statutory predecessor).

You state that the requested inspections, which you have submitted in Tab 5, are maintained by the system's Office of the Director of Police ("ODOP"), a law enforcement agency. You claim that knowledge of the information contained in the inspection reports would reveal vulnerabilities of the departments to security breaches and negatively impact the system's ability to secure the campuses and protect the welfare and safety of those on the campuses. Based upon these representations and our review, we find that the release of some of the information in Tab 5 would interfere with law enforcement. Accordingly, the system may withhold the information we have marked in Tab 5 under section 552.108(b)(1) of the Government Code. However, you have failed to demonstrate that release of the remaining information in Tab 5 would interfere with law enforcement. Therefore, none of the remaining information at issue may be withheld under section 552.108(b)(1).

You seek to withhold complaint number 2008-0006 under section 552.103 of the Government Code. Section 552.103 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.
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> . . .
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> (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 is pending or reasonably anticipated on the date the governmental body receives the request for information, and (2) the information at issue is related to that litigation. *See Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex. App.—Austin 2002, no pet.); *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). This office has concluded litigation was reasonably anticipated when the potential opposing party filed a complaint with the Equal Employment Opportunity Commission (the "EEOC"). *See* Open Records Decision No. 336 (1982).

You inform this office, and provide documentation showing, that the individual named in the complaint filed a discrimination claim with the EEOC against the system before the present request for information was made. Thus, based on your representations and the submitted documentation, we find the system reasonably anticipated litigation on the date it received the present request for information. We also find that the information at issue relates to this anticipated litigation.

We note, however, that the documents you seek to withhold pursuant to section 552.103 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 system may not withhold complaint number 2008-0006 under section 552.103 of the Government Code.

You also claim section 552.101 of the Government Code, which excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information other statutes make confidential. You raise section 552.101 in conjunction with section 418.181 of the Government Code. Sections 418.176 through 418.182 were added to chapter 418 of the Government Code as part of the Texas Homeland Security Act (the "HSA"). These provisions make certain information related to terrorism confidential. Section 418.181 provides

> Those documents or portions of documents in the possession of a governmental entity are confidential if they identify the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism.

Id. § 418.181; *see also id.* § 421.001 (defining critical infrastructure to include "all public or private assets, systems, and functions vital to the security, governance, public health and safety, and functions vital to the state or the nation"). The fact that information may relate to a governmental body's security measures does not make the information *per se* confidential under the HSA. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). Furthermore, the mere recitation of a statute's key terms is not sufficient to demonstrate the applicability of the claimed provision. As with any exception to disclosure, a claim under section 418.181 must be accompanied by an adequate explanation of how the responsive records fall within the scope of the claimed provision. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

Upon review, we determine that the system has failed to establish that releasing the remaining information in Tab 5 would reveal the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism. Therefore, no portion of the remaining information in Tab 5 may be withheld under section 552.101 in conjunction with section 418.181 of the Government Code.

You seek to withhold some of the remaining information in Tab 6 under section 552.101 in conjunction with section 51.971 of the Education Code, which provides in part:

> (a) In this section:
>
> > (1) "Compliance program" means a process to assess and ensure compliance by the officers and employees of an institution of higher

education with applicable laws, rules, regulations, and policies, including matters of:

(A) ethics and standards of conduct;

(B) financial reporting;

(C) internal accounting controls; or

(D) auditing.

. . .

(c) The following are confidential:

(1) information that directly or indirectly reveals the identity of an individual who made a report to the compliance program office of an institution of higher education, sought guidance from the office, or participated in an investigation conducted under the compliance program; and

(2) information that directly or indirectly reveals the identity of an individual as a person who is alleged to have or may have planned, initiated, or participated in activities that are the subject of a report made to the compliance program office of an institution of higher education if, after completing an investigation, the office determines the report to be unsubstantiated or without merit.

(d) Subsection (c) does not apply to information related to an individual who consents to disclosure of the information.

(e) Information produced in a compliance program investigation the release of which would interfere with an ongoing compliance investigation is excepted from disclosure under Chapter 552, Government Code.

Educ. Code § 51.971. You state that in response to the submitted complaints, the system "initiated its internal process of review to assess and ultimately, ensure that its [police department] employees complied with all applicable laws, rules, regulations and policies." Thus, we agree the submitted complaints pertain to the system's compliance program for purposes of section 51.971. *See id.* § 51.971(a). We understand the individuals in these complaints who made reports to the compliance program office, participated in investigations conducted under the compliance program, or were alleged to have committed the activities

that are the subject of the complaints have not consented to release of their information. *See id.* § 51.971(d).

You have marked the information in Tab 6 that you seek to withhold under section 51.971(e). This section requires that (1) there be an ongoing compliance program investigation, and (2) release of the records at issue would interfere with such investigation. *Id.* § 51.971(e). You inform this office that some of the complaints submitted in Tab 6 pertain to unresolved compliance investigations that are ongoing by the system. We understand you to assert release of these complaints at this time will interfere with these investigations. Accordingly, we conclude the system must withhold complaints numbers 2009-0003 and 2009-0008 under section 552.101 in conjunction with section 51.971(e) of the Education Code.

You next claim that some of the remaining information in Tab 6 is confidential under subsections 51.971(c)(1) and (2) of the Education Code. Section 51.971(c)(1) makes confidential information that identifies individuals as complainants, as having sought guidance from a compliance program, or as participants in an investigation conducted under a compliance program. *Id.* § 51.971(c)(1). Section 51.971(c)(2) makes confidential information that identifies individuals alleged to have committed the activities that are the subject of a complaint made to a compliance program office if the office determines the report is unsubstantiated. *Id.* § 51.971(c)(2). You have marked information which you assert identifies individuals listed as complainants and witnesses in the complaints at issue in Tab 6. We presume the individuals listed as witnesses actually participated in the compliance program investigations resulting from those complaints. Therefore, the identifying information of individuals listed as complainants and witnesses, which you have marked, must be withheld under section 552.101 in conjunction with section 51.971(c)(1). You have also marked the identifying information of individuals alleged to have committed an activity that is the subject of a complaint which was determined to be unsubstantiated. This information must be withheld under section 552.101 in conjunction with section 51.971(c)(2) of the Education Code.

We note some of the remaining information may be subject to section 552.117 of the Government Code.[2] Section 552.117(a)(2) of the Government Code excepts from disclosure the current and former home addresses and telephone numbers, social security numbers, and family member information regarding a peace officer regardless of whether the officer elected under section 552.024 or 552.1175 of the Government Code to keep such information confidential.[3] Gov't Code § 552.117(a)(2). In this instance, the information at issue concerns an individual who is no longer employed by the system. Nevertheless, if the former

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[2]The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

[3]"Peace officer" is defined by Article 2.12 of the Texas Code of Criminal Procedure.

employee is currently a peace officer as defined by article 2.12, then the system must withhold the information we have marked pursuant to section 552.117(a)(2) of the Government Code.

If the former employee was not or is no longer a peace officer, then the system may be required to withhold the personal information at issue under section 552.117(a)(1). Section 552.117(a)(1) excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former employee of a governmental body who requests that this information be kept confidential under section 552.024. Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee who did not timely request under section 552.024 that the information be kept confidential. Therefore, the system must withhold the information we have marked under section 552.117(a)(1) to the extent that the former employee timely requested confidentiality for that information under section 552.024.

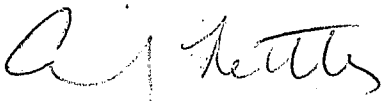
In summary, the system may continue to rely on Open Records Letter No. 2009-17264 as a previous determination and withhold or release the previously ruled upon information in accordance with that ruling. To the extent that the submitted information is not the precise information previously ruled upon, we reach the following conclusions. We have marked the information in Tab 6 that is excepted from public disclosure under section 552.108(a)(1) of the Government Code. The system may withhold the marked information in Tab 5 under section 552.108(b)(1) of the Government Code. The system must withhold the information you have marked in Tab 6 under section 552.101 of the Government Code in conjunction with section 51.971(c)(1)-(2) of the Education Code. The system must withhold the information we have marked pursuant to section 552.117(a)(2) of the Government Code, provided that the former employee was and is currently a peace officer. Otherwise, the system must withhold the information we have marked under section 552.117(a)(1) of the Government Code to the extent that the former employee timely requested confidentiality for that information under section 552.024. 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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/jb

Ref: ID# 362221

Enc. Submitted documents

c: Requestor
(w/o enclosures)