



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 7, 2010

Ms. Lauri Schneidau Ruiz  
Assistant General Counsel  
University of Houston System  
311 E. Cullen Building  
Houston, Texas 77204-2028

OR2010-08294

Dear Ms. Ruiz:

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# 381788.

The University of Houston (the "university") received two requests from the same requestor for 28 categories of information pertaining to a named individual's application for a tenure position. You state that you have provided some information to the requestor. You inform us that the information requested in categories 2 and 3 of the first request does not exist.<sup>1</sup> You claim that the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information, a portion of which is a representative sample.<sup>2</sup> We have also received and considered 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, you assert that category 11 of the second request, which seeks information pertaining to a specified document, is "more of an interrogatory than a document request." Although we agree that the Act does not require a governmental body to answer general

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<sup>1</sup>We note the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision No. 452 at 3 (1986).

<sup>2</sup>We assume the representative samples of records submitted to this office are 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 those records contain substantially different types of information than that submitted to this office.

questions, perform legal research, or create new information in response to a request for information, we note the Act requires a governmental body to make a good-faith effort to relate a request to information that the governmental body holds or to which it has access. *See* Open Records Decision Nos. 563 at 8 (1990), 561 at 8-9 (1990), 555 at 1-2 (1990), 534 at 2-3 (1989). In this instance, because the submitted documents contain information from which the information requested in Category 11 can be derived, we assume the university has made a good-faith effort to locate any information responsive to category 11 of the second request. Therefore, we will address your arguments against the disclosure of the submitted information.

Next, we address the requestor's contention that the university failed to comply with the requirements of section 552.301 of the Government Code in responding to the second request. Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request: (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *Id.* § 552.301(e)(1)(A)-(D). In this instance, the university received the second request for information on April 27, 2010 and sent to this office copies of the requested information and arguments explaining why its asserted exceptions apply on May 17, 2010, which was within fifteen business days of receiving the second request. Accordingly, we find the university properly complied with the requirements of section 552.301(e) in responding to the second request. Therefore, we will address the university's arguments under sections 552.103, 552.107, and 552.111 of the Government Code.

Section 552.103 of the Government Code provides in relevant 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.

...

(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 that the department 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).

To establish that litigation is reasonably anticipated, a governmental body must provide this office “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *Id.* In Open Records Decision No. 638 (1996), this office stated that a governmental body has met its burden of showing that litigation is reasonably anticipated when it received a notice of claim letter and the governmental body represents that the notice of claim letter is in compliance with the requirements of the Texas Tort Claims Act (“TTCA”), Civ. Prac. & Rem. Code, ch. 101, or an applicable municipal ordinance. If a governmental body does not make this representation, the claim letter is a factor that this office will consider in determining whether a governmental body has established that litigation is reasonably anticipated based on the totality of the circumstances. Other evidence to support a claim that litigation is reasonably anticipated may include 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”).

You state, and provide documentation showing, that the first request was part of a demand letter alleging violation of due process on part of the university. The letter alleges the university violated the requestor’s client’s due process in its refusal to promote her to a tenure position. The letter further states that if the university refuses to promote the requestor’s client to a tenure position, then the requestor will initiate legal proceedings against the university. You do not affirmatively represent to this office that the demand letter complies with the TTCA or an applicable ordinance; therefore, we will only consider the letter as a factor in determining whether the university reasonably anticipated litigation over the incident in question. We note the letter clearly reflects the claimant is being represented by counsel in regards to the claim at issue. Based on your representations, our review of the submitted information, and the totality of the circumstances, we determine the university has established it reasonably anticipated litigation on the date it received the requests at issue. Furthermore, you state, and we agree, that the submitted information relates to the anticipated litigation for purposes of section 552.103 because it pertains to the dispute at issue. Accordingly, we agree the university may generally withhold the submitted information pursuant to section 552.103 of the Government Code.

We note that 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. 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). Thus, to the extent that the opposing party in the anticipated litigation has seen or had access to any portion of the remaining information, such information is not protected by section 552.103 and may not be withheld on that basis. In this instance, the opposing party to the anticipated litigation has seen or had access to some of the submitted information. Therefore, this information, which we have marked, may not be withheld under section 552.103. As you raise no further exceptions to disclosure for this information, it must be released to the requestor. However, the university may withhold the remaining submitted information under section 552.103.<sup>3</sup> We note that the applicability of section 552.103 ends once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

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](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,



James McGuire  
Assistant Attorney General  
Open Records Division

JM/dls

Ref: ID# 381788

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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<sup>3</sup>As our ruling is dispositive, we do not address your remaining arguments against the disclosure of this information.