



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 13, 2011

Ms. Zeena Angadicheril
Office of General Counsel
The University of Texas System
201 West Seventh Street
Austin, Texas 78701

OR2011-00661

Dear Ms. Angadicheril:

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# 405877 (OGC# 133882).

The University of Texas at Austin (the "university") received a request for all correspondence, e-mails, or other written or electronic communications, including mobile telephone messages to and from two named university employees from September 1, 2010 to October 22, 2010. You state some of the submitted information has been redacted pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.¹ You also state that, as permitted by section 552.024(c) of the Government Code, you will redact information subject to section 552.117 of the Government Code.² In addition, you state you will redact information subject to

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>.

²Section 552.117 of the Government Code exempts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body. Section 552.024 of the Government Code authorizes a governmental body to withhold information subject to section 552.117 without requesting a decision from this office if the employee or official or former employee or official chooses not to allow public access to the information. See Gov't Code §§ 552.117, .024(c).

sections 552.136 and 552.137 in accordance with Open Records Letter No. 684 (2009).³ You claim that portions of the requested information are not subject to the Act. Additionally, you claim that the requested information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.⁴

The Act is applicable to "public information." *See* Gov't Code § 552.021. Section 552.002 of the Act provides that "public information" consists of "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it." *Id.* § 552.002(a). You inform us that portions of the submitted information consist of personal e-mails that have no connection with university business and represent incidental use of university e-mail by university employees. After reviewing the information at issue, we agree that the information you have marked does not constitute "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business" by or for the university. *See id.* § 552.021; *see also* Open Records Decision No. 635 (1995) (statutory predecessor not applicable to personal information unrelated to official business and created or maintained by state employee involving *de minimis* use of state resources). Therefore, we agree the information you have marked is not subject to the Act, and the university need not release it in response to this request.⁵

Next, we note portions of the submitted information, which we have marked, are subject to two previous determinations issued by this office in Open Records Letter Nos. 2011-00356 (2010) and 2010-00418 (2010). As we have no indication that the law, facts, or circumstances on which the prior rulings were based have changed, the university must continue to rely on these rulings as previous determinations and withhold or release any previously ruled upon information in accordance with these prior rulings. *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 a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or

³Open Records Decision No. 684 serves as a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including bank account numbers under section 552.136 of the Government Code and personal e-mail addresses under section 552.137 of the Government Code without the necessity of requesting an attorney general decision. *See* ORD 684.

⁴We 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.

⁵As we are able to make this determination, we need not address your remaining arguments against the disclosure of these e-mails.

is not excepted from disclosure). However, we will consider arguments for the information not subject to the previous determinations.

We next address your claims 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). 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 of the governmental body's receipt of the request, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas 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). When the governmental body is the prospective plaintiff in litigation, the evidence of anticipated litigation must at least reflect that litigation involving a specific matter is "realistically contemplated." See Open Records Decision No. 518 at 5 (1989); see also Attorney General Opinion MW-575 (1982) (investigatory file may be withheld if governmental body's attorney determines that it should be withheld pursuant to Gov't Code § 552.103 and that litigation is "reasonably likely to result").

You state the university reasonably anticipated litigation on the date the university received the present request for information. You state the university received a notice of allegations against a university employee prior to the university's receipt of the request. You also state the individual who made the allegations hired an attorney, who has communicated with the university regarding the matter prior to the date the university received the request. You

further state a complaint related to the same matter was filed with the university's Office of Institutional Equity prior to the university's receipt of the request. Thus, based on your representations and our review, we find litigation was anticipated on the date the university received the request for information. You state the information at issue consists of "communications to or from individuals associated with the allegations made against an employee of the [u]niversity's Athletic Department" and is "therefore directly tied to the subject of the letter from the accusing party's attorney and the anticipated litigation." Upon review, we find the information we have marked pertains to the pending litigation, and it may generally be withheld under section 552.103. However, we find you have failed to demonstrate how the remaining information you seek to withhold under section 552.103, which consists of general and administrative e-mail correspondence that does not relate to the allegations made against the university employee, is related to the pending litigation. Consequently, the university may not withhold any portion of the remaining information at issue, under section 552.103 of the Government Code.

We note once the information has been obtained by all parties to the pending litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information either obtained from or provided to the opposing parties in the pending litigation is not excepted from disclosure under section 552.103(a), and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Next, we address your claims under section 552.101 in conjunction with section 51.971 of the Education Code for the remaining information at issue. 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 of the Government Code encompasses 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.

...

(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(a), (e). Section 51.971 defines a compliance program as a process to assess and ensure compliance by officers and employees of an institution of higher education. *Id.* § 51.971(a)(1). You state the remaining information pertains to a complaint and subsequent investigation pertaining to “ethical questions and standards of conduct relating to employees of the university.” You further assert that release of this information at this time would interfere with the investigation. However, as previously noted, the remaining information consists of general and administrative e-mail correspondence that does not relate to the allegations made against the university employee. Accordingly, we find you have failed to demonstrate how this information was produced in a compliance program investigation. Consequently, the university may not withhold any portion of the remaining information under section 552.101 of the Government Code in conjunction with section 51.971(e) of the Education Code.

You assert the remaining information is excepted from disclosure under common-law privacy. Section 552.101 also encompasses the common-law right of privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Common-law privacy also protects certain types of information relating to an investigation of alleged sexual harassment in the workplace. *See Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied) (public had legitimate interest in affidavit of person under investigation and conclusions of board of inquiry, but not in identities of individual witnesses and details of their personal statements beyond information contained in documents ordered released). Upon review, we find that the university has failed to demonstrate how the remaining information was used in an investigation of alleged sexual harassment. Furthermore, we find that no portion of the remaining information is highly intimate or embarrassing or not of legitimate public interest. Therefore, the university may not withhold any of the remaining information under section 552.101 on the basis of common-law privacy.

You also assert the remaining information is excepted from disclosure under constitutional privacy, which is also encompassed by section 552.101 of the Government Code. 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. ORD 455 at 4. 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 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, Texas*, 765 F.2d 490 (5th Cir. 1985)). Upon review, we find no portion of the remaining information falls within the zones of privacy or otherwise implicates an individual's privacy interests for purposes of constitutional privacy. Therefore, the university may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with constitutional privacy.

In summary, the university must continue to rely on Open Records Decision Nos. 2011-00356 and 2010-00418 as previous determinations and withhold or release the previously ruled upon information in accordance with those rulings. The university may withhold the information we have marked under section 552.103 of the Government Code. The remaining information must be released.

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,



Vanessa Burgess
Assistant Attorney General
Open Records Division

VB/dls

Ref: ID# 405877

Enc. Submitted documents

c: Requestor
(w/o enclosures)