



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 14, 2011

Ms. Tammye Curtis-Jones
Associate General Counsel
Texas Southern University
3100 Cleburne Avenue
Houston, Texas 77004

OR2011-00756

Dear Ms. Curtis-Jones:

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# 406045.

Texas Southern University (the "university") received a request for two named employees' resumes, salary information, and employment contracts.¹ You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.117, and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

Initially, we note that in his clarification of the request, the requestor specifically excluded contact information, social security numbers, and other personal identifying information of the named employees. Thus, the employees' addresses, telephone numbers, and social

¹We note the university received clarification of the request for information. *See* Gov't Code § 552.222(b) (stating that if information requested is unclear, governmental body may ask requestor to clarify request).

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.

security numbers are not responsive to the present request for information. This ruling does not address the public availability of any information that is not responsive to the request, and the university is not required to release that information in response to the request.

Next, we note a portion of the submitted information 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:

...
2) the name, sex, ethnicity, salary, title, and dates of employment of each employee and officer of a governmental body;

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(2), (3). In this instance, portions of the submitted information, which we have marked, consist of the salaries of the named university employees and are subject to section 552.022(a)(2) of the Government Code. The submitted information also includes an employment contract between the university and one of the named employees, which falls within the purview of subsection 552.022(a)(3). The university may only withhold this information if it is confidential under "other law." Although you raise section 552.103 of the Government Code for this information, this section is a discretionary exception to disclosure that protects the governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 (1999) (governmental body may waive section 552.103). As such, section 552.103 is not "other law" that makes information confidential for the purposes of section 552.022. Therefore, the university may not withhold any of the information subject to section 552.022 under section 552.103 of the Government Code.

Next, we address your claims under section 552.103 of the Government Code for the information not subject to section 552.022 of the Government Code. Section 552.103 of the Government Code provides:

(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 the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing (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.* 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 section 552.103 and that litigation is "reasonably likely to result").

You claim that the university anticipates litigation relating to comments made by the requestor regarding one of the named employees specifically as well as university employees generally in a press release e-mailed by the requestor to three people on the day the present request was made to the university. We understand the university believes these statements were defamatory and libelous. You state that the university has contacted the Attorney General's Office to discuss the filing of a legal action against the requestor based on these claims. Upon review, we conclude the university reasonably anticipated litigation on the date the university received the request. You assert the requested information is related to the anticipated litigation because it relates to potential damages. We find the information at issue is related to the anticipated litigation. Accordingly, the university may withhold the

information not subject to section 552.022 of the Government Code under section 552.103 of the Government Code.³

We note, however, that once information has been obtained by all parties to the anticipated 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). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends when the litigation has concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

Next, we turn to your arguments against the disclosure of the salary information and the employment contract, which are subject to section 552.022 of the Government Code. 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 information protected by common-law privacy. Common-law privacy protects information that (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. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *Id.* at 681-82. The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included 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. *See id.* at 683. This office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history), 523 (1989) (common-law privacy protects credit reports, financial statements, and other personal financial information). Upon review, we conclude the information we have marked constitutes personal financial information not relating to a transaction between an individual and a governmental body. Thus, the university must withhold the marked information under section 552.101 in conjunction with common-law privacy. However, a portion of the remaining responsive information you seek to withhold under common-law privacy relates to salary or other benefits paid by the university to the named employees. We conclude there is a legitimate public interest in this information. Further, upon review we find the remaining information you seek to withhold under common-law privacy is not highly

³As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

intimate or embarrassing. Accordingly, the university may not withhold any of the remaining responsive information under section 552.101 in conjunction with common-law privacy.

You claim the remaining responsive information is excepted from disclosure under section 552.102 of the Government Code. Section 552.102(a) excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). Upon review, we find none of the remaining responsive information is excepted under section 552.102(a) of the Government Code. Accordingly, none of the remaining responsive information may be withheld on that basis.

You seek to withhold the remaining responsive information under section 552.117 of the Government Code. 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 this information be kept confidential under section 552.024. *See id.* § 552.117(a)(1). 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. We have marked personal information of one of the employees named in the request. To the extent the employee timely elected to restrict access to this personal information under section 552.024, the university must withhold this information under section 552.117(a)(1) of the Government Code. However, upon review, we find none of the remaining responsive information constitutes personal information for the purposes of section 552.117 of the Government Code. Accordingly, none of the remaining responsive information may be withheld on that basis.

In summary, the university may withhold the information not subject to section 552.022 of the Government Code under section 552.103 of the Government Code. The university must withhold from the information subject to section 552.022 of the Government Code: (1) the personal financial information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy; and (2) the personal information we have marked under section 552.117(a)(1) of the Government Code, provided the employee at issue made a timely election pursuant to section 552.024 of the Government Code. The remaining information subject to section 552.022 of the Government Code 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,



Kate Hartfield
Assistant Attorney General
Open Records Division

KH/em

Ref: ID# 406045

Enc. Submitted documents

c: Requestor
(w/o enclosures)