



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 25, 2011

Ms. Cheryl G. Cash
Office of General Counsel
Texas Southern University
3100 Cleburne Avenue
Houston, Texas 77004

OR2011-01237

Dear Ms. Cash:

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# 407187.

Texas Southern University (the "university") received four requests from the same requestor for information relating to the requestor's merit pay and all other Department of Pharmacy Practice merit pay; faculty evaluations in the Department of Pharmacy Practice of like or higher rank professors for the past five years; a copy of the source of funds used to pay any and all College of Pharmacy and Health Sciences Pharmacy faculty member's summer salaries for 2010; copies of all sick leaves attributable to any faculty members for the past five years; all e-mails regarding sick leaves between and among faculty members, chair, dean, human resources, and provost; and a copy of a named dean's PhD in pharmacology.¹ You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, and 552.117 of the Government Code. We have considered the exceptions you

¹You inform us the university sought and received clarification of this request. See Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); see also *City of Dallas v. Abbott*, 304 S.W.3d 380, 384 (Tex. 2010) (where governmental body seeks clarification or narrowing of request for information, ten-day period to request attorney general decision is measured from the date request is clarified or narrowed).

claim and reviewed the submitted information, a portion of which consists of representative samples.²

Initially, we note that you have only submitted information responsive to the requests for faculty evaluations, sick leave requests, and the dean's PhD. To the extent information responsive to the remainder of the requests existed on the date the university received the requests, we assume you have released it. If you have not released any such information, you must do so at this time. See Gov't Code §§ 552.301(a), .302; see also Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

Next, we note a portion of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a)(1) provides for the required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]" Gov't Code § 552.022(a)(1). The information in Exhibit 6 consists of a completed faculty evaluation that is subject to section 552.022(a)(1) of the Government Code. Therefore, the university may only withhold this information if it is confidential under "other law." Although you raise section 552.103 of the Government Code, 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 in Exhibit 6 under section 552.103. However, because you also raise section 552.101 of the Government Code, which is considered "other law" for purposes of section 552.022, we will address your arguments under that section for the information subject to section 552.022.

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 common-law privacy, which 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,

²We assume that the "representative samples" 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.

both prongs of this test must be satisfied. *Id.* at 681-82. You claim the information you have marked in Exhibit 6, which consists of the points awarded and the comments on the requested faculty evaluations, is confidential pursuant to common-law privacy because this information reveals that a faculty member did not qualify for a merit raise, tenure, or promotion in the department. This information pertains to the evaluation of the job performance of employees of the university. As this office has often stated, information pertaining to the work conduct and job performance of public employees is subject to a legitimate public interest and is, therefore, generally not protected from disclosure under common-law privacy. *See, e.g.*, Open Records Decision Nos. 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees), 455 (1987) (public employee's job performance or abilities generally not protected by privacy), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of governmental employees), 423 at 2 (1984) (scope of public employee privacy is narrow), 405 at 2 (1983) (manner in which public employee's job was performed cannot be said to be of minimal public interest). Thus, because the information you have marked in the requested evaluations is of legitimate public interest, it may not be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

Next, we address your argument under section 552.103 for the information not subject to section 552.022 of the Government Code, which you have labeled Exhibits 5 and 7. Section 552.103 of the Government Code provides in part 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 that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.);

Heard v. Houston Post Co., 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be exempted from disclosure under section 552.103. See Open Records Decision No. 551 at 4 (1990).

Whether litigation is reasonably anticipated must be determined on a case-by-case basis. See Open Records Decision No. 452 at 4 (1986). To establish that litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *Id.* This office has stated that a pending Equal Employment Opportunity Commission ("EEOC") complaint indicates that litigation is reasonably anticipated. See Open Records Decision Nos. 386 at 2 (1983), 336 at 1(1982).

You inform us, and have provided documentation showing, that prior to the date the university received the request, the requestor filed a complaint against the university with the Texas Workforce Commission and the EEOC alleging gender, age, and racial discrimination. Based on your representations and the submitted documentation, we find that the university reasonably anticipated litigation on the date of its receipt of this request for information. We also find that the information at issue is related to the anticipated litigation. We, therefore, conclude that the university may withhold the information in Exhibits 5 and 7 under section 552.103 of the Government Code.³

We note that the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to that litigation to obtain it through discovery procedures. See ORD 551 at 4-5. Therefore, if the opposing party has seen or had access to information relating to anticipated litigation through discovery or otherwise, there is no interest in withholding such information from public disclosure under section 552.103. See Open Records Decision Nos. 349 (1982), 320 (1982). We also note that the applicability of section 552.103 ends once the related litigation concludes or is no longer reasonably anticipated. See Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the university may withhold the information in Exhibits 5 and 7 under section 552.103 of the Government Code. The information in Exhibit 6 must be released.

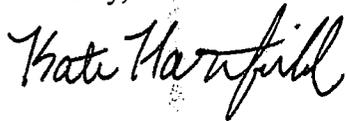
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

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

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

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,

A handwritten signature in cursive script that reads "Kate Hartfield".

Kate Hartfield
Assistant Attorney General
Open Records Division

KH/em

Ref: ID# 407187

Enc. Submitted documents

c: Requestor
(w/o enclosures)