



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 7, 2011

Mr. William L. Fly
University Attorney
Texas State University-San Marcos
601 University Drive
San Marcos, Texas 78666

OR2011-01864

Dear Mr. Fly:

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# 408496.

Texas State University (the "university") received three requests from the same requestor for e-mails sent between and among three named individuals from May 2010 to the date of the request. You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we note some of the requested information was the subject of a previous ruling issued by this office, Open Records Letter No. 2011-00167 (2011). In that ruling, this office concluded that the university must release certain information. You now argue this information is excepted from disclosure under section 552.103 of the Government Code. Section 552.007 of the Government Code, however, provides that if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from disclosure unless its public release is expressly prohibited by law or the information is confidential under law. *See* Gov't Code § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure

under the Act, but it may not disclose information made confidential by law). Thus, pursuant to section 552.007, the university may not now withhold the previously released information unless its release is expressly prohibited by law or the information is confidential under law. Although you now raise section 552.103 for the previously released information, this section is a general exception to disclosure that does not prohibit the release of information or make information confidential. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, with regard to the portion of the submitted information that was previously ruled upon and released by this office, the university may not now withhold such information under section 552.103 of the Government Code. However, with respect to the remaining submitted information that was not previously released pursuant to Open Records Letter No. 2011-00167, we will address your arguments against disclosure of this information.

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 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 university 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).

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 litigation is reasonably anticipated, the governmental body must furnish concrete evidence

litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* This office has stated a pending Equal Employment Opportunity Commission ("EEOC") complaint indicates litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982).

You state a former university employee, one of the individuals named in the instant requests, filed a claim of discrimination with the EEOC prior to the date of the university's receipt of the present requests for information. Thus, we agree the university reasonably anticipated litigation on the date it received the present request for information. You also assert the submitted information is related to the anticipated litigation. Upon review, we agree the submitted information is related to the anticipated litigation for purposes of section 552.103. We therefore conclude the university may generally withhold the information at issue under section 552.103 of the Government Code.

We note 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* Open Records Decision No. 551 at 4-5 (1990). 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). In this instance, the former employee has already seen or had access to some of the information at issue. However, the individual's access to this information was only in the usual scope of his employment with the university. Such information is not considered to have been obtained by the opposing party to the litigation and, thus, may be withheld under section 552.103. We also note 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).

Accordingly, with regard to the portion of the submitted information that was released pursuant to Open Records Letter No. 2011-00167, the university may not now withhold such information under section 552.103 of the Government Code. The university may withhold the remaining submitted information under section 552.103 of the Government Code.

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/em

Ref: ID# 408496

Enc. Submitted documents

c: Requestor
(w/o enclosures)