



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 8, 2011

Ms. Ruth Shapiro
Assistant General Counsel
University of Houston System
311 E Cullen Building
Houston, Texas 77204-2028

OR2011-01915

Dear Ms. Shapiro:

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# 408578.

The University of Houston System (the "system") received a request for all information relating to the purchase of the KTRU radio transmitter and license. As permitted by section 552.024(c) of the Government Code, we understand that you will redact information subject to section 552.117 of the Government Code.¹ You state you have released some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.103, 552.104, 552.105, and 552.111 of the Government Code and privileged under rule 192.3 of the Texas Rules of Civil Procedure.² Additionally, you

¹Section 552.117 of the Government Code excepts 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).

²Although you also raised section 552.101, you have not submitted to this office written comments stating the reasons why this section would allow the information to be withheld. Thus, the system has not demonstrated that any of the submitted information is confidential for purposes of section 552.101. *See* Gov't Code §§ 552.301, .302. In addition, although you raise section 552.022 of the Government Code, we note that section 552.022 is not an exception to disclosure. Rather, section 552.022 enumerates categories of information that are not excepted from disclosure unless they are expressly confidential under other law. *See id.* § 552.022.

state release of this information may implicate the proprietary interest of third parties, whom we understand to be Rice University and Public Radio Capital ("PRC"). Accordingly, pursuant to section 552.305 of the Government Code, we understand you notified these parties of the request and of their right to submit arguments to this office as to why their information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Act in certain circumstances). PRC submitted comments to this office. We have considered the submitted arguments and reviewed the submitted representative sample of information.³

Initially, we note the requestor specifically excluded from his request e-mail addresses of members of the public and identifiable donor information. Thus, any such information is 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 system is not required to release that information in response to the request.

Next, we note most of the requested information was the subject of previous requests for information, as a result of which this office issued Open Records Letter Nos. 2010-48556 (2010), 2011-00400 (2011), and 2011-00417 (2011). In Open Records Letter No. 2010-48556 we concluded the system must withhold certain marked information pursuant to section 552.101 of the Government Code in conjunction with common-law privacy, section 552.136 of the Government Code, and section 552.137 of the Government Code, but must release the remaining information at issue. In Open Records Letter No. 2011-00400, we concluded the system must continue to rely on Open Records Letter No. 2010-48556 with respect to information encompassed by that ruling and may withhold the remaining information under section 552.105 of the Government Code. In Open Records Letter No. 2011-00417, we concluded the system may withhold the marked portions of the information under section 552.105 of the Government Code and section 552.111 of the Government Code, but must release the remaining information at issue. You now seek to withhold the information that was previously ordered released in these rulings under section 552.103 of the Government Code. Section 552.007 of the Government Code provides if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential by 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). Accordingly, pursuant to section 552.007, the system may not now withhold the

³We 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.

previously released information unless its release is expressly prohibited by law or the information is confidential by law. Section 552.103 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, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). The system does not present any law, and we are unaware of any law, that expressly prohibits the release of the submitted information, or that makes these documents confidential. Thus, we conclude the system must continue to rely on Open Records Letter Nos. 2010-48556, 2011-00400, and 2011-00417 as previous determinations and withhold or release the previously ruled upon information in accordance with those rulings. *See* Open Records Decision No. 673 (2001) (so long as law, facts, 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 prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). To the extent the requested information was not encompassed by those previous rulings, we will consider your submitted arguments.

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). 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 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). 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 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.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, 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.⁴ Open Records Decision No. 555 (1990); *see* ORD No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982).

This office has long held that for the purposes of section 552.103, "litigation" includes contested cases conducted in a quasi-judicial forum. *See, e.g.,* Open Records Decision Nos. 588 at 2 (1991); 474 at 5-6 (1987), 368 at 1-2 (1983), 336 at 1, 301 at 1-2 (1982). In determining whether an administrative proceeding is conducted in a quasi-judicial forum, this office has focused on the following factors: (1) whether the dispute is, for all practical purposes, litigated in an administrative proceeding where (a) discovery takes place, (b) evidence is heard, (c) factual questions are resolved, and (d) a record is made; and (2) whether the proceeding is an adjudicative forum of first jurisdiction, *i.e.,* whether judicial review of the proceeding in district court is an appellate review and not the forum for resolving a controversy on the basis of evidence. *See* ORD 588 at 4.

You state that the requested information relates to the system's application to the Federal Communications Commission (the "FCC") for the assignment of KTRU's radio station license to the system. You explain this application is part of the sale of KTRU to the system by Rice University. You assert that a hearing on the application constitutes litigation for purposes of section 552.103 of the Government Code. We note section 309 of title 47 of the United States Code governs the application process for the assignment of a radio station license with the FCC. 47 U.S.C. § 309. Under section 309(d) of title 47, any party in interest may file a petition to deny an application with the FCC. *Id.* § 309(d). Under section 309(d)(2), if the FCC finds that the petitioner has raised a substantial and material question of fact that the grant of the application would not be consistent with section 309(a), the FCC should formally designate the application for a hearing. *See id.* § 309(d)(2), (e). Such hearings are conducted in accordance with section 409 of title 47 of the United States Code. *Id.* § 409. In these hearings, the FCC may subpoena witnesses and require the production of evidence. 47 C.F.R. § 1.1 If, after hearing on the petition, the FCC denies the

⁴In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

application, the applicant may appeal the FCC's decision to the United States Court of Appeals for the District of Columbia. 47 U.S.C. § 402(b). Upon review, we conclude an application hearing conducted by the FCC constitutes litigation for purposes of section 552.103. You state, and have submitted documentation showing, that prior to the system's receipt of the present request for information, several organizations were formed in opposition of the sale of KTRU. These organizations sought financial support, signatures for petitions to the FCC, and support through letter-writing campaigns to oppose the sale of the station. You state that these organizations sought this support as part of their efforts to file a petition to deny the assignment of KTRU's radio station license with the FCC. We understand that filing a petition to deny an application is the procedure through which any party opposed to the granting or assignment of a license must use to oppose the application. Upon review, we conclude litigation was reasonably anticipated on the date the system received the present request for information. We further conclude the requested information is related to the anticipated litigation. Accordingly, to the extent the requested information has not been previously ruled upon, the university may withhold the requested information under 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 seeking information relating to that litigation to obtain it through discovery procedures. *See* ORD 551 at 4-5. Therefore, if the opposing parties have 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 system must continue to rely on Open Records Letter Nos. 2010-48556, 2011-00400, and 2011-00417 as previous determinations and withhold or release the previously ruled upon information in accordance with those rulings. The university may withhold any information not encompassed by those previous rulings under section 552.103 of the Government Code.⁵

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

⁵As our ruling is dispositive, we need not address the remaining arguments against disclosure.

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,



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Assistant Attorney General
Open Records Division

KH/em

Ref: ID# 408578

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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