



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 18, 2011

Ms. Neera Chatterjee
Public Information Coordinator
The University of Texas System
201 West Seventh Street
Austin, Texas 78701-2902

OR2011-03753

Dear Ms. Chatterjee:

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# 412017 (OGC# 134819).

The University of Texas at Austin (the "university") received a request for information relating to faculty members to whom "pre-emptive retention offers" were made during the last five years, including their names, departments, genders, ages, the amounts of their raises, and the details of other benefits offered as part of the retention packages. You claim 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 information you submitted.¹

We note some of the submitted information falls within the scope of section 552.022 of the Government Code. Section 552.022(a)(3) provides for required public disclosure of "information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[,]" unless the information is expressly made

¹This letter ruling assumes the submitted representative sample of information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the university to withhold any information that is substantially different from the submitted information. See Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

confidential under other law. Gov't Code § 552.022(a)(3). We have marked contracts relating to the expenditure of public funds that are subject to section 552.022(a)(3). You seek to withhold the contracts under section 552.103 of the Government Code, which is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See id.* § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (Gov't Code § 552.103 may be waived); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 is not other law that makes information confidential for purposes of section 552.022(a)(3). Therefore, the university may not withhold the marked contracts under section 552.103 of the Government Code. As you claim no other exception to disclosure of the contracts, the university must release them pursuant to section 552.022(a)(3) of the Government Code.

Next, we address your claim under section 552.103 of the Government Code for the remaining information at issue. This exception provides in 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). A governmental body that claims section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information at issue. 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 excepted from disclosure under section 552.103. *See* Open Records Decision No. 551 at 4 (1990).

You contend the remaining information at issue is related to anticipated litigation. 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 a pending Equal Employment Opportunity Commission ("EEOC") complaint indicates litigation is reasonably anticipated. *See* Open Records Decision Nos. 386 at 2 (1983), 336 at 1(1982).

You inform us the requestor filed an EEOC complaint against the university prior to its receipt of this request for information. You have provided a copy of the complaint. You state the complaint alleges violations of Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, and the Equal Pay Act. You explain the requestor claims he has received lower compensation than similarly situated female tenured faculty and male tenured faculty under age 50. You contend the remaining information at issue is related to the requestor's allegations in his EEOC complaint. Based on your representations and documentation and our review of the remaining information, we find the information at issue is related to litigation the university reasonably anticipated when it received this request for information. We therefore conclude the university may withhold the remaining information under section 552.103 of the Government Code.

In reaching this conclusion, we assume the opposing party in the anticipated litigation has not seen or had access to any of the remaining information. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* ORD 551 at 4-5. 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 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).

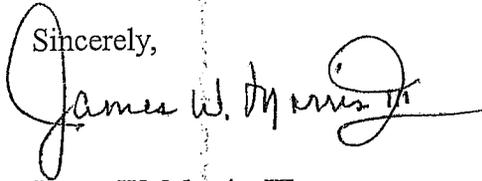
In summary, the university (1) must release the marked contracts pursuant to section 552.022(a)(3) of the Government Code and (2) may withhold the rest of the submitted information under section 552.103 of the Government Code.

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,

A handwritten signature in cursive script that reads "James W. Morris, III". The signature is written in black ink and is positioned to the right of the word "Sincerely,".

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/em

Ref: ID# 412017

Enc: Submitted documents

c: Requestor
(w/o enclosures)