



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 24, 2011

Ms. Zeena Angadicheril
Office of General Counsel
The University of Texas System
201 West Seventh Street
Austin, Texas 78701-2902

OR2011-04074

Dear Ms. Angadicheril:

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# 412162.

The University of Texas-Pan American (the "university") received a request for twenty-two categories of information pertaining to the requestor's client, two named individuals, and the university's Facilities Operations and Maintenance department.¹ You state the university will release some of the requested information to the requestor. You also state the university does not have information responsive to seven categories of the request.² You inform us that, as permitted by section 552.024(c) of the Government Code, you will redact information subject to section 552.117 of the Government Code.³ You also inform us you will redact

¹You indicate the university sought and received clarification from the requestor regarding the request. *See Gov't Code* § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used).

²The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

³Section 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(b).

certain information pursuant to Open Records Decision No. 684 (2009).⁴ You claim a portion of the submitted information is not subject to the Act. You also claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.107, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.⁵

Initially, we address your argument that portions of the submitted information are not subject to the Act. You contend that pursuant to section 181.006 of the Health and Safety Code, the information you have marked is not subject to the Act. Section 181.006 states that “[f]or a covered entity that is a governmental unit, an individual’s protected health information . . . is not public information and is not subject to disclosure under [the Act].” Health & Safety Code § 181.006. We will assume, without deciding, the university is a covered entity. Subsection 181.006(2) does not remove protected health information from the Act’s application, but rather states this information is “not public information and is not subject to disclosure under [the Act].” We interpret this to mean a covered entity’s protected health information is subject to the Act’s application. Furthermore, this statute, when demonstrated to be applicable, makes confidential the information it covers. Thus, we will consider your arguments for the submitted information.

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.

...

⁴This office issued Open Records Decision No. 684, a previous determination to all governmental bodies, which authorizes the withholding of ten categories of information, including: a direct deposit authorization form under section 552.101 of the Government Code in conjunction with the common-law right to privacy; a Form I-9 under section 552.101 in conjunction with section 1324a of title 8 of the United States Code; a W-2 and a W-4 form under section 552.101 in conjunction with section 6103(a) of title 26 of the United States Code; a Texas driver’s license number under section 552.130 of the Government Code; and a bank account number and bank routing number under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

⁵We assume the “representative sample” of information 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 those records contain substantially different types of information than those submitted to this office.

(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 that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request, 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). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. We note contested cases conducted under the Administrative Procedure Act (the "APA"), chapter 2001 of the Government Code, are considered litigation for purposes of section 552.103. See Open Records Decision No. 588 at 7 (1991).

In order to demonstrate that litigation is reasonably anticipated, the governmental body must provide this office "concrete evidence showing that the claim that litigation might ensue is more than a mere conjecture." Open Records Decision No. 452 at 4 (1986). 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. Open Records Decision No. 555 (1990); see also Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that 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). We also note the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. See Open Records Decision No. 361 (1983). The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. See ORD 452 at 4. Furthermore, this office has stated that a pending Equal Employment Opportunity Commission complaint indicates litigation is reasonably anticipated. Open Records Decision No. 386 at 2 (1983), 336 at 1 (1982).

You inform us that on the date the instant request was received, the requestor's client was engaged in a worker's compensation claim that was pending before the Texas Department of Insurance Division of Workers' Compensation (the "department") regarding alleged injuries sustained while working for the university. We note contested cases before the department are generally governed by the APA. Labor Code § 410.153. Additionally, you inform us that after the university received the request, but prior to the university's receipt

of clarification regarding portions of the request, the requestor's client's worker's compensation claim was, in part, denied. You assert the university anticipates the denied claim will lead to litigation. You also state the information at issue is related to the alleged injuries and the worker's compensation claim. Based on your representations and our review, we find the university has established that litigation was reasonably anticipated on the date that it received the instant request for information, and also on the date it received clarification regarding portions of the request. Furthermore, we find the information at issue relates to the anticipated litigation. Accordingly, we conclude that the university may withhold the information at issue under section 552.103 of the Government Code.⁶

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. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

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,



Sean Nottingham
Assistant Attorney General
Open Records Division

SN/eeg

⁶As our ruling is dispositive, we need not address your remaining arguments against disclosure.

Ref: ID# 412162

Enc. Submitted documents

c: Requestor
(w/o enclosures)