ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 20, 2011

Mr. R. Brooks Moore
Assistant General Counsel
The Texas A&M University System
200 Technology Way, Suite 2079
College Station, Texas 77845

OR2011-05521

Dear Mr. Moore:

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# 415248 (TAMU 11-039).

Texas A&M University (the "university") received a request for the personnel files of the requestor's client and two other named university employees, including employment-related complaints made to or by the named individuals. We understand the university has redacted information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.[1] You claim the submitted information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.[2] We have also considered comments submitted by the requestor. *See*

[1]The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office FERPA does not permit state and local educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act. The DOE has determined FERPA determinations must be made by the educational authority in possession of the education records. We have posted a copy of the letter from the DOE to this office on the Attorney General's website: http://www.oag.state.tx.us/open/20060725usdoe.pdf.

[2]We assume 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 those records contain substantially different types of information than that submitted to this office.

Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note the university appears to have redacted employee-related information that is subject to section 552.117(a)(1) of the Government Code pursuant to section 552.024 of the Government Code. Section 552.024 authorizes a governmental body to withhold information subject to section 552.117 of the Government Code without requesting a decision from this office if the employee or official or former employee or official chooses to not allow public access to this information. *See id.* §§ 552.024(c)(2), 552.117. Some of the redacted information, however, pertains to the requestor's client. Section 552.117 protects personal privacy. The requestor has a right of access to his client's private information under section 552.023 of the Government Code, and thus the university may not withhold the redacted information pertaining to the requestor's client under section 552.117(a)(1). *See id.* § 552.023(a) (person or person's authorized representative has special right of access, beyond right of general public, to information held by governmental body that relates to person and is protected from public disclosure by laws intended to protect person's privacy interests); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual asks governmental body to provide him with information concerning herself).

We next note Exhibit B-1 includes completed evaluations, reports, contracts, court-filed documents, and other information subject to section 552.022 of the Government Code, which provides in relevant part the following:

> (a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:
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> > (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;
> >
> > . . .
> >
> > (3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;
> >
> > . . .
> >
> > (17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(1), (3), (17). Although you assert this information is excepted from disclosure under section 552.103 of the Government Code, this section is a discretionary exception under the Act and does not constitute "other law" for purposes of section 552.022. *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. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived). Accordingly, the university may not withhold this information, which we have marked, under section 552.103. Section 552.117 of the Government Code, however, constitutes other law for purposes of section 552.022.[3] Therefore, we will address the applicability of this exception to the information subject to section 552.022.

Section 552.117(a)(1) of the Government Code excepts from disclosure the current and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government Code. Whether information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the university may only withhold information under section 552.117 on behalf of current or former employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Such information may not be withheld for individuals who did not make a timely election. We have marked information subject to section 552.022 that the university must withhold if section 552.117(a)(1) applies.

You assert the remaining information in Exhibit B-1 not subject to section 552.022 is excepted from disclosure under section 552.103 of the Government Code, which provides in relevant 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

[3]The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. *See* Open Records Decision Nos. 481 at 2 (1987), 480 at 5 (1987); *see, e.g.*, Open Records Decision No. 470 at 2 (1987) (because release of confidential information could impair rights of third parties and because improper release constitutes a misdemeanor, attorney general will raise predecessor statute of section 552.101 on behalf of governmental bodies).

> 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 from disclosure under section 552.103(a).

You have submitted information to this office showing that, prior to the university's receipt of the request for information, the requestor's client filed a complaint against the university with the Equal Employment Opportunity Commission (the "EEOC"). The requestor asserts the filing of a discrimination claim with the EEOC "is an administrative process, not the commencement of litigation" and, thus, argues the university's anticipated litigation claim under section 552.103 fails. However, this office has stated a pending complaint with the EEOC indicates litigation is reasonably anticipated. *E.g.*, Open Records Decision Nos. 386 at 2 (1983) ("[T]is office has frequently held that the pendency of a complaint before the [EEOC] indicates a substantial likelihood of potential litigation"), 336 at 1 (1982) ("a pending complaint before the EEOC indicates a substantial likelihood of potential litigation"). Accordingly, based on your representations and our review of the submitted documents, we find you have demonstrated litigation was reasonably anticipated when the university received the request for information. We also find you have established the information at issue is related to the anticipated litigation for purposes of section 552.103(a). Thus, section 552.103 is applicable to the information in Exhibit B-1 that is not subject to section 552.022.

We note, however, the university seeks to withhold information that the requestor's client, the opposing party in the anticipated litigation, has already seen or accessed. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information that relates to the litigation through discovery procedures. *See* ORD 551 at 4-5. Thus, if the opposing party to pending litigation has already seen or had access to information that relates to the litigation, through discovery or otherwise, there is no interest in now withholding such information under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, the submitted information that the requestor's client has already seen or had access to is not excepted from disclosure under section 552.103, and the university must release it to the requestor. The university may withhold the remaining information in Exhibit B-1 under section 552.103.

You assert Exhibit B-2 is excepted from disclosure under section 552.107 of the Government Code. Section 552.107(1) protects information coming within the attorney-client privilege.

When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.*, meaning it was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." *Id.* 503(a)(5).

Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no pet.). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You explain that Exhibit B-2 is a statement written by a university employee at the direction of an assistant general counsel for the university and made in furtherance of the rendition of professional legal services. You also assert this statement is a communication between the employee and the assistant general counsel that was intended to be confidential and that its confidentiality has been maintained. After reviewing your arguments and the submitted information, we agree Exhibit B-2 constitutes a privileged attorney-client communication that the university may withhold under section 552.107(1).

To conclude, the university must release the documents we have marked pursuant to section 552.022 of the Government Code. However, in releasing the information subject to section 552.022, the university must withhold the information we have marked within these documents under section 552.117(a)(1) of the Government Code if the employees whose

information is at issue timely elected to withhold that information under section 552.024 of the Government Code. The university must release the remaining information in Exhibit B-1 that the requestor's client has already seen or had access to. The university may withhold the remaining information in Exhibit B-1 under section 552.103. The university may withhold Exhibit B-2 under section 552.107(1) 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,

James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/tf

Ref: ID# 415248

Enc. Submitted documents

c: Requestor
(w/o enclosures)