



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 25, 2011

Ms. Cheryl G. Cash
Office of General Counsel
Texas Southern University
310 Hannah Hall
3100 Cleburne Avenue
Houston, Texas 77004

OR2011-05644

Dear Ms. Cash:

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# 415453.

Texas Southern University (the "university") received three requests from two requestors for (1) seven exhibits to a previous request by the university for an open records letter ruling (the "First Request"); (2) licenses, certificates, transcripts, and salary information relating to ten named university faculty members (the "Second Request"); and (3) transcripts relating to five named faculty members (the "Third Request"). You state the requested salary information and one of the transcripts either have been or will be released. You claim the submitted information is excepted from disclosure under sections 552.103 and 552.117 of the Government Code. You also state some of the requested information is the subject of a previous open records letter ruling. We have considered your arguments and reviewed the

representative samples of information you submitted.¹ We also have considered the comments we received from one of the requestors.²

Initially, we address the information encompassed by the present requests that was the subject of previous requests to the university, as a result of which this office issued Open Records Letter No. 2011-01237 (2011). The information at issue in the previous ruling included three of the exhibits encompassed by the First Request, one of which was one of the transcripts encompassed by the Third Request. In Open Records Letter No. 2011-01237, we concluded the university must release a completed faculty evaluation pursuant to section 552.022(a)(1) of the Government Code and may withhold the remaining information at issue in the ruling under section 552.103 of the Government Code. You do not indicate there has been any change in the law, facts, and circumstances on which Open Records Letter No. 2011-01237 was based. We therefore conclude the university must release or withhold the three exhibits encompassed by the First Request, including the transcript encompassed by the Third Request, in accordance with Open Records Letter No. 2011-01237.³ See Open Records Decision No. 673 at 6-7 (2001) (listing elements of first type of previous determination under Gov't Code § 552.301(a)).

We note the university neither claims exceptions to the disclosure of, nor has it submitted, the remaining information encompassed by the First Request, which consists of the other four exhibits to the university's request for Open Records Letter No. 2011-01237. A governmental body that receives a request for information under the Act must either request a ruling in accordance with section 552.301 of the Government Code or release the requested information. See Gov't Code §§ 552.221, .301(a), .302; Open Records Decision No. 664 (2000). Therefore, the university must release the other four exhibits encompassed by the First Request unless it has already done so. See Open Records Decision No. 459 (1987) (attorney general treats letters requesting open records rulings as being generally available to public).

We next note you have submitted, as a representative sample of information responsive to the Second Request, a copy of your personal State Bar of Texas ("SBOT") membership card. Although section 552.301 of the Government Code permits a governmental body to submit

¹This letter ruling assumes the transcript submitted as a representative sample of information responsive to the Second and Third Requests 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).

²See Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

³As we are able to make this determination, we need not address your other arguments against disclosure of the information encompassed by Open Records Letter Ruling No. 2011-01237.

a representative sample of information in seeking a decision if the requested information is voluminous, the submitted sample must be truly representative of the information the governmental body seeks to withhold. *See* Gov't Code § 552.301(e)(1)(D); Open Records Decision Nos. 497 at 4 (1988) ("If documents are numerous and repetitive, a governmental body should submit representative samples[, but i]f . . . each document contains substantially different information, the governmental body must include copies of all of the documents or information."), 499 at 6 (1988) (same). In this instance, the second request is for "all licenses [and] certificates" of ten named university faculty members. You do not explain how or why your SBOT membership card would be representative of faculty members' licenses or certificates. Thus, we find your SBOT membership card is not a representative sample of the requested licenses and certificates of faculty members, and we do not address its public availability. We therefore conclude the university has failed to submit any information responsive to the request for the faculty members' licenses and certificates and thus has not complied with section 552.301 of the Government Code in requesting a ruling on the licenses and certificates.

When a governmental body fails to comply with section 552.301, the requested information is presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold any of the information. *See* Gov't Code § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ). This statutory presumption can generally be overcome when information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). Although the university seeks to withhold the faculty members' licenses and certificates under section 552.103 of the Government Code, that section is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See* Gov't Code § 552.007; *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 Gov't Code § 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). As such, section 552.103 does not provide a compelling reason for non-disclosure under section 552.302 of the Government Code. Therefore, the university may not withhold the licenses and certificates under section 552.103 of the Government Code. You also seek to withhold information in the licenses and certificates under section 552.117 of the Government Code.⁴ Although the applicability of this section can provide a compelling reason for non-disclosure, you have not submitted the information at issue or a representative sample of the information to this office, and we therefore have no basis to conclude any of the information in the licenses and certificates is confidential under section 552.117 of the Government Code. Thus, we have

⁴We note you claim section 552.117(a)(2) of the Government Code, which is applicable to personal information relating to a peace officer as defined by article 2.12 of the Code of Criminal Procedure. The relevant exception for personal information relating to the university's faculty members would be section 552.117(a)(1).

no choice but to order you to release the requested licenses and certificates in accordance with section 552.302 of the Government Code. If you believe the information is confidential and may not lawfully be released, you must challenge this ruling in court pursuant to section 552.324 of the Government Code.⁵

Next, we address your claim under section 552.103 of the Government Code for the remaining transcripts to which the requestors seek access. 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).*

⁵We note section 552.024(c) of the Government Code authorizes a governmental body to redact information protected by section 552.117(a)(1) of the Government Code without the necessity of requesting a decision under the Act if the current or former employee to whom the information pertains timely chooses not to allow public access to the information. *See Gov't Code § 552.024(c)(2)*. Thus, section 552.024(c) authorizes the university to withhold the faculty members' home addresses, home telephone numbers, social security numbers, and family member information to the extent they timely choose not to allow access to that information. We also note section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

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 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 state one of the requestors is a university faculty member who has filed a pending complaint of employment discrimination with the EEOC. You state the complaint was filed prior to the university's receipt of these requests for information. You have provided a copy of the complaint. You contend the rest of the requested transcripts are related to the requestor's claims of discrimination. Based on your representations, we find the information at issue is related to litigation the university reasonably anticipated on the dates of its receipt of these requests for information. We therefore conclude the university may withhold the remaining transcripts at this time under section 552.103 of the Government Code.⁶

In reaching this conclusion, we assume the requestor who is the opposing party in the anticipated litigation has not seen or had access to any of the remaining transcripts at issue. 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).

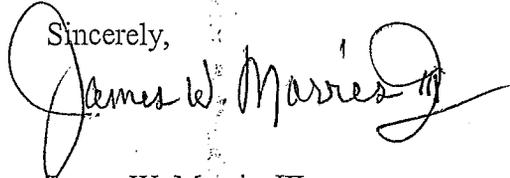
In summary: (1) the university must release or withhold the three exhibits encompassed by the First Request, including the transcript encompassed by the Third Request, that were at issue in Open Records Letter No. 2011-01237 in accordance with the previous ruling; (2) the university must release the other four exhibits to its request for Open Records Letter No. 2011-01237 unless it has already done so; (3) the university must release the requested licenses and certificates of faculty members; and (4) the university may withhold the rest of the requested transcripts 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.

⁶As we are able to make this determination, we need not address your claim for information in the transcripts under section 552.117 of the Government Code.

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 black ink that reads "James W. Morris, III". The signature is written in a cursive style with a large, looping initial "J".

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

JWM/em

Ref: ID# 415453

Enc: Submitted documents

c: Requestors
(w/o enclosures)