



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 1, 2011

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

OR2011-09379

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# 422534.

The University of Texas System (the "university") received a request for (1) all e-mails, memos, internal documents, meeting and telephone notes, and any other items prepared or circulated between a specified time period that mention the requestor's client or a review of any of the requestor's client's work; (2) all communications between a named individual and the San Antonio Express-News; and (3) all communications requesting a review by the Vice Chancellor and General Counsel of the university. You state you have released some information to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.103, 552.107, 552.111, and 552.1235 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, we note some of the submitted information is the subject of previous requests for information, in response to which this office issued Open Records Letter Nos. 2011-09146 (2011), 2011-09195 (2011), and 2011-08384 (2011). In those decisions, we ruled, in part, some of the requested information was excepted from disclosure under sections 552.107 and 552.111 of the Government Code and some information must be released. We note that information that has been previously released to the public may not be withheld from a

¹We 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.

subsequent requestor unless the governmental body is able to demonstrate that the information is confidential by law or that release is prohibited by law. *See* Gov't Code § 552.007. You now raise section 552.103 for the submitted information we previously ordered released. 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). Thus, to the extent the information responsive to the instant request was released pursuant to any of the previous requests for information, it may not now be withheld under section 552.103. You also again raise sections 552.107(1) and 552.111 of the Government Code for the information responsive to the instant request. We note once this office has determined information is not excepted from disclosure, a governmental body may generally not seek another ruling pertaining to precisely the same information. *See* Gov't Code § 552.301(f); Open Records Decision No. 665 at 2 (2000) (governmental body not authorized to seek attorney general decision unless it in good faith believes valid legal arguments exist to support claimed exception). We have no indication there has been any change in the law, facts, or circumstances on which the previous rulings were based. Accordingly, to the extent the requested information is identical to the information previously requested and ruled upon by this office, we conclude the university must rely on Open Records Letter Nos. 2011-09146, 2011-09195, and 2011-08384 as previous determinations and withhold or release the identical information in accordance with those rulings. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and 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 responsive to the previous requests for information and is not encompassed by the prior rulings, we will consider your submitted arguments.

Section 552.103 of the Government Code provides, in relevant part, the following:

(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. Open Records Decision No. 555 (1990); *see* Open Records Decision 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). Further, 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. Open Records Decision No. 361 (1983).

You indicate the university reasonably anticipates litigation in this instance because the university received a letter from the requestor, the attorney of a terminated university employee, on the date it received the present request for information. The requestor, in his letter to the university, states his client expects litigation against the university will ensue as a result of the actions of the university and its employees. He further states his client will prosecute all remedies against the university and the individuals whose actions directly or in collaboration with others defames his client or his reputation, tortuously interferes with his existing or prospective contractual relationships, or violates his statutory and/or common-law privacy rights. Based on your representations and the totality of the circumstances, we find the university reasonably anticipated litigation on the date the request for information was received. You state the submitted information relates to the anticipated litigation as it pertains to the basis of the anticipated litigation. We find the submitted information relates to the anticipated litigation. Accordingly, the university may withhold the submitted information under section 552.103 of the Government Code.²

We note that the purpose of this exception 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. Thus, when the opposing party has seen or had access to information relating to anticipated litigation, through discovery or otherwise, there

²As this ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

is no interest in withholding that information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). In this instance, the opposing party has already seen or had access to some of the information at issue. However, we note the opposing party has only seen or had access to the information at issue in the usual scope of his employment by the university. Such information is not considered to have been obtained by the opposing party to litigation. Accordingly, any information obtained from or provided to all other parties in the anticipated litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has concluded or is no longer anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

In summary, to the extent the requested information is identical to the information previously requested and ruled upon by this office, we conclude the university must rely on Open Records Letter Nos. 2011-09146, 2011-09195, and 2011-08384 as previous determinations and withhold or release the identical information in accordance with those rulings. The university may withhold the remaining 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,



Nneka Kanu
Assistant Attorney General
Open Records Division

NK/em

Ref: ID# 422534

Enc. Submitted documents

cc: Requestor
(w/o enclosures)