



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 6, 2011

Mr. Brian S. Nelson  
General Counsel  
Lone Star College System  
5000 Research Forest Drive  
The Woodlands, Texas 77381

OR2011-09524

Dear Mr. Nelson:

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# 422873 (LSCS File No. PR11-0414-00067).

The Lone Star College System (the "system") received a request for the personnel file of a named system employee and for information related to the employee's termination. You state the complaint that formed the basis for the termination and the individual's personnel file have been provided to the requestor. You claim that the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

We note the submitted information contains a completed investigation, which is subject to section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) provides for the required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108." Gov't Code § 552.022(a)(1). Although you raise section 552.103 of the Government Code, section 552.103 is a discretionary exception to disclosure that protects the governmental body's interests and may be waived. *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); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 (1999) (governmental body may waive section 552.103). As such, section 552.103 is not other law that makes information confidential for the purposes of section 552.022. Therefore, the system may not withhold the completed investigation under section 552.103 of the Government Code. As you raise

no other exception to disclosure of this information, the completed investigation, which we have marked, must be released to the requestor.

We next address your section 552.103 claim for the remaining information which is not subject to section 552.022. Section 552.103 provides in relevant 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 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 was pending or reasonably anticipated on the date that the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex. App.—Austin 2002, no pet.); *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). A 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 establish 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.* Concrete evidence to support a claim 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 a potential opposing party has hired an attorney who makes a request for information does not establish litigation is reasonably anticipated. Open Records Decision No. 361 (1983). For the purposes of section 552.103(a), litigation

includes civil lawsuits and criminal prosecutions, as well as proceedings that are governed by the Administrative Procedure Act, chapter 2001 of the Government Code, or are otherwise conducted in a quasi-judicial forum. *See* Open Records Decision Nos. 588 (1991), 474 (1987), 368 (1983), 336 (1982).

In this instance, the requestor's client is the subject of the instant request for information. You assert that the system reasonably anticipates litigation because the requestor has filed a grievance on behalf of his client. You have not informed us, however, that the requestor has actually threatened litigation or otherwise taken any concrete steps toward the initiation of litigation. *See* ORD 331. Further, you have not explained how the system's grievance process constitutes litigation of a judicial or quasi-judicial nature for purposes of section 552.103. *See generally* Open Records Decision No. 301 (1982) (discussing meaning of "litigation" under predecessor to section 552.103). Consequently, you have not established that the system reasonably anticipated litigation when it received the request for information. Accordingly, the system may not withhold any of the remaining information under section 552.103 of the Government Code. As you raise no other exception to disclosure, the submitted information must be released to the requestor.<sup>1</sup>

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](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,



Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/dls

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<sup>1</sup>We note the requestor has a special right of access to some of the information being released that would otherwise be confidential with regard to the general public. *See* Gov't Code § 552.023(a). Therefore, if the system receives another request for this information from a person who does not have a special right of access to this information, the system should resubmit this same information and request another decision from this office. *See* Gov't Code §§ 552.301(a), .302; Open Records Decision No. 673 (2001).

Ref: ID# 422873

Enc. Submitted documents

c: Requestor  
(w/o enclosures)