ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 7, 2011

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

OR2011-09662

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# 423026 (OGC # 136871).

The University of Texas System (the "system") received a request for all e-mails pertaining to the creation of a named task force, including correspondence amongst all current task force members and system regents from two months prior to February 25, 2011, as well as all e-mails from a named individual sent to the named task force.[1] You state the system has provided some of the requested information to the requestor. You also state the system will withhold personal e-mail addresses under section 552.137 of the Government Code pursuant to the previous determination issued to all governmental bodies in Open Records Decision No. 684 (2009).[2] You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.[3]

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[1]You inform us the requestor has withdrawn a portion of her request.

[2]The previous determination issued in Open Records Decision No. 684 authorizes all governmental bodies to withhold ten categories of information, including e-mail addresses of members of the public under section 552.137, without the necessity of requesting an attorney general decision.

[3]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.

You indicate some of the submitted information may be the subject of previous requests for information, in response to which this office issued Open Records Letter 2011-08384 (2011), 2011-09146 (2011), 2011-09195 (2011), 2011-09370 (2011), 2011-09379 (2011), 2011-09483 (2011), 2011-09543 (2011) and 2011-09566 (2011). In those decisions, we ruled, in part, some of the requested information was excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code. 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 system must rely on Open Records Letter Nos. 2011-08384, 2011-09146, 2011-09195, 2011-09370, 2011-09379, 2011-09483, 2011-09543 and 2011-09566 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:

> (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.
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> . . .
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> (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 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* Open Records Decision No. 551 at 4-5 (1990). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception applies in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the requested information is related to that litigation. *See 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 parts of this test for information to be excepted under section 552.103(a). *See* ORD 551 at 4.

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 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 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. 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 state the system reasonably anticipated litigation on the date the system received the present request for information. You inform us that prior to that date, the system received a letter from an attorney representing a former employee stating that he intended to file suit against the system and requesting the system preserve any evidence. Thus, based on your representations and our review, we find litigation was anticipated on the date the system received the request for information. 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 system may withhold the submitted information under section 552.103 of the Government Code.[4]

We note 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 previously has seen or had access to information relating to litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). In this instance, most of the submitted e-mails have been seen by the opposing party to the anticipated litigation. However, the individual's access to this information was only in the usual scope of his employment with the system. Such information is not considered to have been obtained by the opposing party to the anticipated litigation and these e-mails, as well as the remaining information at issue, may be withheld under section 552.103 of the Government Code.[5] We note the applicability

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[4]Because our ruling is dispositive, we do not address your remaining arguments against disclosure.

[5]As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

of section 552.103(a) ends once the litigation has concluded or is no longer reasonably 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, the system must rely on Open Records Letter Nos. 2011-08384, 2011-09146, 2011-09195, 2011-09370, 2011-09379, 2011-09483, 2011-09543 and 2011-09566 as previous determinations and withhold or release the identical information in accordance with those rulings. The system 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,

Vanessa Burgess
Assistant Attorney General
Open Records Division

VB/dls

Ref: ID# 423026

Enc. Submitted documents

c: Requestor
(w/o enclosures)