



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 27, 2012

Mr. R. Brooks Moore
Managing Counsel, Governance
The Texas A&M University System
301 Tarrow Street, Sixth Floor
College Station, Texas 77840-7896

OR2012-02952

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# 446600 (Texas A&M University Request No. 11-752, Texas AgriLife Research Request No. AR-11-010, Texas A&M University System Request No. SO-11-141).

Texas A&M University, Texas AgriLife Research, and the Texas A&M University System (collectively, the "system") each received a request for documents and communications pertaining to Camris Technologies ("Camris"), ZVI Technologies, Siemens Industry, Inc., three named individuals, zero valent iron technology, and Baker Hughes, limited to four named employees and a specified time period. You claim some of the requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹ We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Section 552.102(a) of the Government Code excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of

¹We 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 that those records contain substantially different types of information than that submitted to this office.

personal privacy.” *Id.* § 552.102(a). The Texas Supreme Court recently held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex. & The Dallas Morning News, Ltd.*, 354 S.W.3d 336, 348 (Tex. 2010). Upon review, we agree the information you have marked in Exhibit B-2 must be withheld under section 552.102(a) of the Government Code.

You raise section 552.103 of the Government Code for Exhibits B-1, B-3, and B-5. Section 552.103 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).*

To establish litigation is reasonably anticipated, a governmental body must provide this office with “concrete evidence showing the claim that litigation may ensue is more than mere conjecture.” *Open Records Decision No. 452 at 4 (1986)*. Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See 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. *See Open Records Decision No. 555 (1990); see also Open Records Decision No. 518 at 5 (1989)* (litigation must be “realistically

contemplated”). In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, or when an individual threatened to sue on several occasions and hired an attorney. *See* Open Records Decision Nos. 346 (1982), 288 (1981). 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. *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. *See* Open Records Decision No. 361 (1983).

You explain the requestor is the second attorney hired to represent his client in a dispute concerning Camris and zero valent technology. You state, and provide documentation demonstrating, that prior to the system’s receipt of the present request, the system received a letter from the requestor claiming the system violated its fiduciary and contractual duties, breached a license agreement, breached a shareholder’s agreement, and usurped a specified corporate opportunity. In the letter, the requestor claims the system caused his client significant financial damage and demands payment to settle his client’s claims. The requestor states his client “will seek to protect his rights to the fullest extent allowed by law including, but not limited to, seeking significant damages against [the system] . . . as well as attorney’s fees, costs, and all other remedies.” Based on your representations, the submitted letter, and our review of the submitted information, we determine the system has established it reasonably anticipated litigation on the date it received the request for information. We also conclude Exhibits B-1, B-3, and B-5 are related to the anticipated litigation for purposes of section 552.103. Accordingly, the system may withhold Exhibits B-1, B-3, and B-5 under section 552.103.²

We note once the information at issue has been obtained by all parties to the anticipated litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to the information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Accordingly, the system may only withhold the submitted information that the opposing party to the anticipated litigation has not seen or had access to under section 552.103 of the Government Code. We note that the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

²As our ruling on Exhibits B-1, B-3, and B-5 is dispositive, we do not address your remaining arguments against disclosure of this information.

We note some of the remaining information in Exhibit B-2 may be subject to section 552.117(a)(1) of the Government Code.³ Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, emergency contact information, 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. *See* Gov't Code § 552.117(a); Open Records Decision No. 622 (1994). Whether a particular piece of 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). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. We have marked the personal information of a system employee. If the employee whose personal information is at issue made a timely election under section 552.024, the system must withhold the information we have marked under section 552.117(a)(1). If the employee did not make a timely election under section 552.024, this information may not be withheld under section 552.117(a)(1).⁴

In summary, the system must withhold the information you have marked under section 552.102(a) of the Government Code. The system may withhold Exhibits B-1, B-3, and B-5 under section 552.103 of the Government Code. If the employee whose personal information we have marked made a timely election under section 552.024 of the Government Code, the system must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The remaining information must be released.

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

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

⁴If the employee did not make a timely confidentiality election under section 552.024, we note section 552.147(b) of the Government Code permits a governmental body to withhold a living person's social security number without the necessity of requesting a decision from this office. *See* Gov't Code § 552.147(b).

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 cursive script, appearing to read "Jennifer Luttrall", written in dark ink.

Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/dls

Ref: ID# 446600

Enc. Submitted documents

c: Requestor
(w/o enclosures)