



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 28, 2012

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

OR2012-03026

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# 446678 (OGC # 141344).

The University of Texas Southwestern Medical Center (the “university”) received a request for the requestor’s employment records, including all evaluations of the requestor from 1996 through 2011 and all reviews and attendance records for the requestor from 1996 through 2011.<sup>1</sup> You state you have released some of the requested information to the requestor. You claim a portion of the submitted information is not subject to the Act. Additionally and alternatively, you claim that the submitted information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered your submitted arguments and reviewed the submitted representative sample of information.<sup>2</sup>

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<sup>1</sup>You note that the university received a clarification of the information requested. *See* Gov’t Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

<sup>2</sup>We 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.

Initially, you argue the information you have marked under section 181.006 of the Health and Safety Code is not subject to the Act. Section 181.006 states “[f]or a covered entity that is a governmental unit, an individual’s protected health information . . . is not public information and is not subject to disclosure under [the Act].” Health & Safety Code § 181.006(2). Section 181.006(2) does not remove protected health information from the Act’s application, but rather states this information is “not public information and is not subject to disclosure under [the Act].” We interpret this to mean a covered entity’s protected health information is subject to the Act’s application. Furthermore, this statute, when demonstrated to be applicable, makes confidential the information it covers. Thus, we will consider your arguments for this information, as well as the other submitted information.

Section 552.022(a)(1) of the Government Code provides for required public disclosure of “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body,” unless the information is excepted from disclosure under section 552.108 of the Government Code or made confidential under the Act or other law. *See Gov’t Code § 552.022(a)(1)*. You state a portion of the submitted information, which you have marked, relates to a completed compliance investigation. Thus, the information at issue is subject to disclosure under section 552.022(a)(1). Although you assert the information at issue is excepted from disclosure under section 552.103 of the Government Code, that exception is discretionary and does not make information confidential under the Act. *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 Gov’t Code § 552.103); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 is not a confidentiality provision for purposes of section 552.022(a)(1) of the Government Code. Therefore, the university may not withhold any of the information at issue under section 552.103 of the Government Code. However, we will consider your claims under section 552.101 of the Government Code, which is a confidentiality provision for purposes of section 552.022 of the Government Code. We will also address your arguments under sections 552.101 and 552.103 of the Government Code for the information not subject to section 552.022 of the Government Code.

Section 552.101 of the Government Code excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses section 51.971 of the Education Code, which provides:

(a) In this section:

(1) “Compliance program” means a process to assess and ensure compliance by the officers and employees of an institution of higher education with applicable laws, rules, regulations, and policies, including matters of:

- (A) ethics and standards of conduct;
- (B) financial reporting;
- (C) internal accounting controls; or
- (D) auditing.

...

(c) The following are confidential:

(1) information that directly or indirectly reveals the identity of an individual who made a report to the compliance program office of an institution of higher education, sought guidance from the office, or participated in an investigation conducted under the compliance program; and

(2) information that directly or indirectly reveals the identity of an individual as a person who is alleged to have or may have planned, initiated, or participated in activities that are the subject of a report made to the compliance program office of an institution of higher education if, after completing an investigation, the office determines the report to be unsubstantiated or without merit.

(d) Subsection (c) does not apply to information related to an individual who consents to disclosure of the information.

Educ. Code § 51.971(a), (c)-(d). You state information subject to section 552.022 pertains to a completed investigation undertaken by the university's Human Resources Department. You state the investigation was in response to allegations against a university employee and was initiated in order to assess and ensure compliance with all applicable laws, rules, regulations, and policies. Upon review, we agree the information at issue relates to an investigation conducted under the university's compliance program. *See id.* § 51.971(a). You state none of the individuals who made the complaints, participated in the investigation, or were alleged to have participated in the activities subject to the complaints have consented to the disclosure of their identifying information. *See id.* § 51.971(d).

You seek to withhold the information subject to section 552.022 of the Government Code under section 51.971(c). Section 51.971(c)(1) makes confidential information that identifies individuals as complainants, as having sought guidance from a compliance program, or as participants in an investigation conducted under a compliance program. *Id.* § 51.971(c)(1). Section 51.971(c)(2) makes confidential information that identifies individuals alleged to

have committed the activities that are the subject of a complaint made to a compliance program office if the office determines the report is unsubstantiated. *Id.* § 51.971(c)(2). You state releasing the information at issue would directly or indirectly reveal the identity of those individuals making a report to, seeking guidance from, or participating in a compliance program investigation. Based on your representations and our review, we agree release of some of the information at issue, which we have marked, would directly or indirectly reveal the identity of the individuals who made complaints or participated in the investigation at issue and did not consent to disclosure of their information. Thus, the university must withhold this marked information under section 552.101 of the Government Code in conjunction with section 51.971(c)(1) of the Education Code.

You also state releasing the remaining information subject to section 552.022 would directly or indirectly reveal the identity of the individuals alleged to have committed the activities that are the subject of the investigation. You inform us the investigation concluded in a determination the complaints were “generally unsubstantiated.” However, we note the requestor is the individual whose information is subject to section 51.971(c). Thus, pursuant to section 51.971(d), we find the requestor has a right of access to her information and it may not be withheld under section 51.971(c). *Cf.* Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself). Furthermore, we find you have failed to demonstrate how the remaining information at issue identifies a complainant, an individual who sought guidance, a participant, or an individual alleged to have committed the activity which is the subject of the complaints for purposes of section 51.971(c). Consequently, no portion of the remaining information subject to section 552.022 may be withheld on that basis.

Next, we address your arguments for the information not subject to section 552.022 of the Government Code. Section 552.103 of the Government Code 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 an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date the governmental body received 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, 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 from disclosure under section 552.103(a). *See* ORD 551 at 4.

In order to demonstrate that litigation is reasonably anticipated, the governmental body must provide this office “concrete evidence showing that the claim that litigation might ensue is more than a mere conjecture.” Open Records Decision No. 452 at 4 (1986). This office has concluded that litigation was reasonably anticipated when the potential opposing party filed a complaint with the Equal Employment Opportunity Commission (the “EEOC”). *See* Open Records Decision No. 336 (1982).

You state, and provide documentation showing, the requestor filed a complaint against the university with the EEOC before the date the university received both the initial request for information and clarification. Based on your representation and our review, we agree the university reasonably anticipated litigation on the date the university received the present request for information. We also agree the information not subject to section 552.022 is related to the anticipated litigation. Thus, we conclude section 552.103 of the Government Code is generally applicable to the information not subject to section 552.022.

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103 of the Government Code interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, any information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a). However, information accessed by the opposing party in the usual scope of employment is not considered to have been obtained by the opposing party to the anticipated litigation and thus, may be withheld under section 552.103. Upon review, we find the university may withhold the information not subject to section 552.022 of the Government Code under section 552.103 of the Government Code.<sup>3</sup> We note the applicability of section 552.103(a) ends once the litigation has been concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

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<sup>3</sup>As our ruling for this information is dispositive, we need not address your remaining arguments against its release.

In summary, the university must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 51.971 of the Education Code. The university may withhold the information not subject to section 552.022 of the Government Code under section 552.103 of the Government Code. The remaining information must be released to this requestor.<sup>4</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,



Vanessa Burgess  
Assistant Attorney General  
Open Records Division

VB/dls

Ref: ID# 446678

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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<sup>4</sup>We note that the requestor has a special right of access to some of the information being released in this instance. Because such information is confidential with respect to the general public, if the university receives another request for this information from a different requestor, the university must again seek a ruling from this office.