ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 2, 2012

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

OR2012-06370

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# 452501 (OGC No. 142183).

The University of Texas Southwestern Medical Center (the "university") received a request for ten categories of information pertaining to a named individual's employment and termination. You state the university has released some of the requested information. You state you will redact some of the requested information in accordance with section 552.024 of the Government Code and Open Records Decision No. 684 (2009).[1] You claim the submitted information is not subject to the Act or is excepted from disclosure under sections 552.101, 552.102, and 552.103 of the Government Code. We have considered your arguments and reviewed the submitted representative sample of information.[2]

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[1]*See* Gov't Code § 552.024(c)(2) (authorizing governmental bodies to redact certain personal information pertaining to employees who properly elected to keep their information confidential without the necessity of requesting a ruling from this office if proper notice is provided to requestor pursuant to section 552.024(c-2)); ORD 684 (authorizing governmental bodies to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general opinion).

[2]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 those submitted to this office.

Initially, we note you have marked some of the information as not responsive to the request. We agree the information you have marked is not responsive to the instant request because it was created after the date the request was received. This decision does not address the public availability of the non-responsive information, and the university need not release that information in response to this request.

Next, we address your contention that portions of the responsive information are not subject to the Act. The Act applies to "public information," which is defined in section 552.002 of the Government Code as "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it." Gov't Code § 552.002. Thus, virtually all of the information in a governmental body's physical possession constitutes public information and, thus, is subject to the Act. *Id.* § 552.002(a)(1); *see* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). The Act also encompasses information that a governmental body does not physically possess, if the information is collected, assembled, or maintained for the governmental body, and the governmental body owns the information or has a right of access to it. Gov't Code § 552.002(a)(2); *see* Open Records Decision No. 462 at 4 (1987).

You state the information you have marked is "a purely personal exchange" and argue it does not constitute "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business" by or for the university. *See* Gov't Code § 552.021; *see also* Open Records Decision No. 635 (1995) (statutory predecessor not applicable to personal information unrelated to official business and created or maintained by state employee involving *de minimis* use of state resources). However, upon review, we find the information at issue was collected or assembled or is maintained in connection with the transaction of official university business, namely the use of personal leave time. Accordingly, the information at issue constitutes "public information" as defined by section 552.002(a). Accordingly, this information is subject to the Act and must be released, unless the information falls within an exception to public disclosure under the Act. *See* Gov't Code § 552.305(b).

Next, you argue portions of the submitted information are not subject to the Act pursuant to section 181.006 of the Health and Safety Code. 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 other arguments for the responsive information.

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.
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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). 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.

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 litigation involving a specific matter is realistically contemplated and 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.[3] 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

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[3]In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

attorney who makes a request for information does not establish litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

In this instance, the requestor's client is the subject of the present request for information. You contend the university reasonably anticipates litigation because, the requestor, in her request for information, stated she was "representing [her client] in her claim of wrongful termination against [the university]," discussed claims of "ongoing harassment" and a "hostile work environment," requested information on the university's alternate dispute resolution procedures, and requested that documents related to the requestor's client's employment be placed on a litigation hold because of the possibility of litigation. Based on these representations and our review, we find the university reasonably anticipated litigation on the date the request was received. You also argue the information at issue is related to the anticipated litigation. Upon review, we agree the responsive information is related to the anticipated litigation. Thus, we conclude section 552.103 of the Government Code is applicable to the responsive information.

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. In this instance, some of the information at issue has been seen by the opposing party to the anticipated litigation in the course of her employment. However, other information at issue, which we have indicated, was seen outside her usual scope of employment with the university, and thus, may not be withheld under section 552.103. *Id.* Accordingly, with the exception of the information we have indicated, the university may withhold the responsive information under section 552.103 of the Government Code.[4] 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). As you raise no further exceptions, the university must release the information we have marked that was seen by the opposing party to the anticipated litigation.

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

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[4]As our ruling for this information is dispositive, we need not address your remaining arguments against its release.

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,

Jonathan Miles
Assistant Attorney General
Open Records Division

JM/em

Ref: ID# 452501

Enc. Submitted documents

c: Requestor
(w/o enclosures)