



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 1, 2012

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

OR2012-12006

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# 460694 (TAMU 12-209).

Texas A&M University (the "university") received a request for seven categories of information regarding the termination of employment of a named individual. You claim that the submitted information is excepted from disclosure under sections 552.103, 552.104, and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup>

Initially, you state some of the requested information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2011-19083 (2011). In Open Records Letter No. 2011-19083, we concluded, the university may withhold certain specified communications under section 552.107(1) of the Government Code. Accordingly, to the extent the requested information is identical to the information previously requested and ruled upon by this office, we conclude the university may rely on Open Records Letter No. 2011-19083 as a previous determination and withhold the identical information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so

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<sup>1</sup>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.

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 is not encompassed by the previous ruling, we will address your arguments under sections 552.103, 552.104, and 552.107 of the Government Code.

Next, we note some of the submitted information is subject to section 552.022 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,” unless it is excepted by section 552.108 of the Government Code or “made confidential under [the Act] or other law[.]” Gov’t Code § 552.022(a)(1). The completed report in Exhibit B-1 is subject to section 552.022(a)(1) and must be released unless it is either excepted under section 552.108 of the Government Code or is confidential under the Act or other law. You do not claim section 552.108. Although you assert this information is excepted from disclosure under section 552.103, this is a discretionary section 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 section 552.103); Open Records Decision No. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the university may not withhold the information subject to section 552.022 under section 552.103. However, you also claim an exception under section 552.104 of the Government Code. Information encompassed by section 552.022(a)(1) may be withheld under section 552.104. *See* Gov’t Code § 552.104(b) (information protected by section 552.104 not subject to required public disclosure under section 552.022(a)). We will, therefore, consider your argument under section 552.104 for the completed report in Exhibit B-1. We will also consider your arguments under sections 552.103, 552.104, and 552.107 for the information not subject to section 552.022.

You claim Exhibits B-1 and B-2 are excepted from disclosure under section 552.104 of the Government Code, which excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” *Id.* § 552.104(a). The purpose of section 552.104 is to protect a governmental body’s interests in competitive bidding situations. *See* Open Records Decision No. 592 at 8 (1991). Moreover, section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. Open Records Decision No. 541 at 4 (1990).

You contend the university is negotiating a dispute with the requestor’s client, a former employee and release of the information at issue would give the requestor’s client a competitive advantage in negotiations with the university. However, upon review, we find

that the university has not established that the information relates to a competitive bidding situation as contemplated by section 552.104. Thus, we conclude that the university may not withhold any of the submitted information pursuant to section 552.104 of the Government Code.

We now address your claims under section 552.103 of the Government Code for the information not subject to section 552.022 of the Government Code. Section 552.103 of the Government Code provides:

(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). The 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 is pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *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 under section 552.103(a).

To establish that 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." See 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 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.<sup>2</sup> 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. *See* 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 university reasonably anticipates litigation with the requestor’s client regarding the termination of his client’s employment. You explain the requestor has threatened litigation and sent a demand letter to the university prior to the date of this request. You state the responsive information directly relates to the anticipated litigation. Based on your representations and our review, we find the information at issue is related to litigation the university anticipated on the date of its receipt of the request for information. Therefore, we conclude the university may generally withhold the information at issue under section 552.103 of the Government Code.<sup>3</sup>

We note, however, a portion of the submitted information was sent to the university by the potential opposing party to the anticipated litigation. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to the litigation to obtain such information through discovery procedures. *See* ORD 551 at 4-5 (1990). Thus, once an opposing party has seen or had access to information that is related to the litigation, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Accordingly, we have marked the information at issue that was seen by the potential opposing party to the anticipated litigation and that the university, therefore, may not withhold under section 552.103. However, information that has not been seen by the potential opposing party may be withheld under section 552.103 of the Government Code. We note the applicability of section 552.103 ends once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

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<sup>2</sup>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).

<sup>3</sup>As our ruling is dispositive for the information at issue, we do not address your remaining arguments against its disclosure.

In summary, the university must release the information we have marked in Exhibit B-1 pursuant to section 552.022(a)(1) of the Government Code. The university may withhold the remaining information that has not been seen by the potential opposing party under section 552.103 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](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,



Jeffrey W. Giles  
Assistant Attorney General  
Open Records Division

JWG/dls

Ref: ID# 460694

Enc. Submitted documents

c: Requestor  
(w/o enclosures)