



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 10, 2012

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

OR2012-19834

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# 473186 (TAMU 12-476).

Texas A&M University (the "university") received a request for the personnel file of the requestor's client and the complete investigation file of any grievance filed by the requestor's client. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the United States Department of Education Family Policy Compliance Office has informed this office the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code, does not permit state and local educational authorities to disclose to this office, without parental or an adult student's consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act.¹ Consequently, state and local educational authorities that receive a request for education records from a member of the public under the Act must not submit education records to this office in

¹A copy of this letter may be found on the Office of the Attorney General's website at <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

unredacted form, that is, in a form in which “personally identifiable information” is disclosed. *See* 34 C.F.R. § 99.3 (defining “personally identifiable information”). You have submitted unredacted education records for our review. Because our office is prohibited from reviewing these education records to determine whether appropriate redactions under FERPA have been made, we will not address the applicability of FERPA to any of the submitted records. *See* 20 U.S.C. § 1232g(a)(1)(A). Such determinations under FERPA must be made by the educational authority in possession of the education records. However, we will consider your arguments against disclosure of the submitted information.

Next, we note a portion of the submitted information, which we have marked, is not responsive to the instant request for information because it was created after the university received the request for information. This ruling does not address the public availability of any information that is not responsive to the request and the university is not required to release such information in response to this request.

We also note portions of the responsive information are subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108; [and]

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body; [and]

...

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(1), (3), (17). Some of the responsive information, which we have marked, consists of completed reports, evaluations, and investigations subject to subsection 552.022(a)(1). The university must release the completed reports, evaluations, and investigations pursuant to subsection 552.022(a)(1) unless they are excepted from disclosure under section 552.108 of the Government Code or are expressly made confidential under the Act or other law. *See id.* § 552.022(a)(1). Further, portions of the remaining information consist of information in a contract relating to the receipt or expenditure of funds by a governmental body subject to subsection 552.022(a)(3), and court-filed documents

subject to subsection 552.022(a)(17). The information subject to subsections 552.022(a)(3) and 552.022(a)(17), which we have marked, must be released unless it is made confidential under the Act or other law. *See id.* § 552.022(a)(3), (a)(17). Although you raise section 552.103 of the Government Code for the submitted information, this section is a discretionary exception to disclosure 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); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 177 at 3 (1977) (statutory predecessor to Gov't Code § 552.108 subject to waiver). As such, section 552.103 does not make information confidential for the purposes of section 552.022. Therefore, none of the information subject to subsections 552.022(a)(1), 552.022(a)(3), and 552.022(a)(17), which we have marked, may be withheld under section 552.103 of the Government Code. However, because sections 552.101 and 552.117 of the Government Code protect information made confidential under law, we will consider the applicability of these sections to the information subject to section 552.022.² We will also consider your arguments under section 552.103 of the Government Code for the information not subject to section 552.022 of the Government Code.

You claim the information not subject to section 552.022 of the Government code is excepted from disclosure under section 552.103 of the Government Code, which 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.

...

(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 has the burden of providing relevant facts and documents to show the section 552.103(a) exception applies in a particular

²The 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).

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.

Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To establish 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.” *Id.* This office has stated a pending Equal Employment Opportunity Commission (“EEOC”) complaint indicates litigation is reasonably anticipated. *See* Open Records Decision Nos. 386 at 2 (1983), 336 at 1(1982).

You have submitted information to this office showing that, prior to the university’s receipt of the instant request, the requestor’s client filed an EEOC complaint against the university. You state the submitted information is directly related to the substance of the EEOC complaint. Based on your representations and our review, we find you have demonstrated the information at issue is related to litigation that was reasonably anticipated at the time the university received the request for information. Therefore, we find section 552.103 is generally applicable to the information at issue.

We note, however, that 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 that litigation to obtain it through discovery procedures. *See* ORD 551 at 4-5. Therefore, if the opposing party has seen or had access to information relating to pending or anticipated litigation through discovery or otherwise, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). With respect to the information at issue, the opposing party in the anticipated litigation has already seen some of the information. Accordingly, the university may not withhold this information, which we have marked for release, from the requestor under section 552.103. The university may withhold the remaining information not subject to section 552.022 under section 552.103. We note the applicability of section 552.103 ends once the related litigation concludes or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

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 Exhibit B-2 concerns allegations of civil rights violations reported to and investigated by university administrators who are part of the university's compliance program. Upon review, we agree the submitted information relates to an investigation conducted under the university's compliance program. *See id.* § 51.971(a).

You seek to withhold some of the information in Exhibit B-2 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). However, subsection (c) does not apply to information related to an individual who consents to disclosure of the information. *Id.* § 51.971(d). You state the investigation at issue concluded in a determination the complaint was unsubstantiated or without merit. Upon review, we find portions of the submitted information identify individuals as participants in the compliance program investigations or individuals alleged to have committed the activities that are the subject of the unsubstantiated complaint. We understand these individuals have not consented to release of their information. We note the requestor's client is the complainant at issue. Thus, pursuant to section 51.971(d), we find the requestor has a right of access to her client's information and it may not be withheld under section 51.971(c). *Cf.* ORD 481 at 4 (privacy theories not implicated when individual requests information concerning himself). Based on your representations and our review, we find the university must withhold the information that identifies individuals as participants in the compliance program investigations, a representative sample of which we have marked, under section 552.101 in conjunction with section 51.971(c).

Section 552.101 of the Government Code also encompasses common-law privacy, which protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) of no legitimate public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both elements of the test must be established. *Id.* at 681-82. Common-law privacy encompasses the specific types of information held to be intimate or embarrassing in *Industrial Foundation*. *See id.* at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has also found some kinds of medical information or information indicating disabilities or specific illnesses are generally highly intimate or embarrassing. *See Open Records Decision No. 455* (1987) (prescription drugs, illnesses, operations, and handicaps). Upon review, we find the information we have marked in the remaining information is highly intimate or embarrassing and of no legitimate public concern. Accordingly, the university must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

Portions of the remaining information may be subject to section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee or official of a governmental body who

requests this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). We note section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former employee or official 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. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee or official who did not timely request under section 552.024 the information be kept confidential. Therefore, if the individual whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, and a governmental body does not pay for the cellular telephone service at issue, the university must withhold the cellular telephone number we have marked under section 552.117(a)(1) of the Government Code. If the individual at issue did not timely request confidentiality under section 552.024, or the cellular telephone service at issue is paid for by a governmental body, the university may not withhold the marked cellular telephone number under section 552.117(a)(1) of the Government Code.

In summary, with the exception of the information we have marked for release, 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 university must withhold the types of information we have marked in Exhibit B-2 under section 552.101 of the Government Code in conjunction with section 51.971 of the Education Code. The university must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. If the individual at issue timely elected confidentiality under section 552.024 of the Government Code, and the cellular telephone service is not paid for with government funds, the university must withhold the cellular telephone number we have marked under section 552.117(a)(1) of the Government Code. The university must release the remaining information.³

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.

³We note the information being released in this instance includes information that may be confidential with respect to the general public. Therefore, if the university receives another request for this information from a different requestor, the university must again seek a ruling from this office.

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,



Cynthia G. Tynan
Assistant Attorney General
Open Records Division

CGT/akg

Ref: ID# 473186

Enc. Submitted documents

c: Requestor
(w/o enclosures)