



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 15, 2013

Ms. Zeena Angadicheril
Office of General Counsel
The University of Texas System
201 West Seventh Street
Austin, Texas 78701-2902

OR2013-12048

Ms. Zeena Angadicheril:

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# 493119 (UT OGC #149614).

The University of Texas Southwestern Medical Center (the "university") received a request for ten categories of information, including (1) list of direct reports to a named individual, including pay grade, gender, and salaries; (2) copies of all performance reviews signed by the named individual between 2005 and 2012; (3) copies of e-mails, letters, HR forms or handwritten notes relating to job descriptions that were created or re-written between 2005 and 2012, including job re-classifications and job postings; (4) copies or list of web pages used by the named individual and two other specified persons to determine the pay grade 20 Infrastructure Project Coordinator; (5) copies or list of salary studies viewed or reviewed the named individual and two other specified persons to determine the pay grade 20 Infrastructure Project Coordinator; (6) copies or list of any matrixes, spreadsheets, word documents, internal descriptions, and external descriptions for Infrastructure Project Coordinator, job number 16871; (7) list or HR reports of Infrastructure Service personnel that includes titles, gender, pay grades, overall performance ratings, and merit increases for 2005 through 2012, as well as a copy of every job description appearing on the list; (8) list of all Infrastructure Service personnel that received training for the years 2005 through 2012, documentation relating to training request and denials, and the total training expenditures for 2005 through 2012; (9) copies of specific policies or procedures relating to attendance, leave reporting, and updating calendars for the department and Infrastructure

group managed by the named individual; and (10) e-mails, spreadsheets; letters, separation documents, word documents, HR forms, internal meeting notes, ethics line reports or handwritten notes relating to conversations or internal investigations about race discrimination, gender discrimination, equal pay, or hostile working environments, including current and separated personnel, for the service years 2005 through 2012.¹ You state that you will release some information to the requestor. You claim a portion of the remaining requested information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code.² You also claim release of a portion of the requested information may implicate the proprietary interests of Towers Watson Data Services. Accordingly, you notified Towers Watson Data Services of the request and of its right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under the circumstances). We have considered the exceptions you claim and reviewed the submitted information, a portion of which consists of a representative sample.³

Initially, you state some of the requested information was the subject of previous requests for information, as a result of which this office issued Open Records Letter Nos. 2013-07473 (2013) and 2011-18254 (2011). You further state the law, facts, and circumstances upon which the prior rulings were based have not changed, thus the university must continue to rely on Open Records Letter Nos. 2013-07473 and 2011-18254 as previous determinations and withhold or release the information at issue in accordance with those rulings. *See* Open Records Decision No. 673 (2001) (so 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 information is or is not excepted from disclosure).

¹You note that the university sought and received 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).

²Although you also indicate some of this information may not be subject to the Act, you have provided no arguments in support of this claim; therefore, we do not address it. *See* Gov't Code §§ 552.301, .302.

³We assume that the "representative sample" of information 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.

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 information at issue relates to completed investigations undertaken by the university’s Offices of Equal Opportunity and Minority Affairs and Human Resources. 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 subject to section 552.022 under section 552.103 of the Government Code. However, we will consider your claim 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 section 552.103 argument for the information not subject to section 552.022 of the Government Code.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses information protected by other statutes. Section 51.971 of the Education Code provides in relevant part the following:

(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.

(2) “Institution of higher education” has the meaning assigned by Section 61.003.

...

(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 inform us the university is an institution of higher education for purposes of section 61.003 of the Education Code. *See id.* § 51.971(a)(2). As noted above, you state the information you have marked under section 552.101 in conjunction with section 51.971 of the Education Code consists of completed compliance investigations conducted by the university's Offices of Equal Opportunity and Minority Affairs and Human Resources. You further state the investigations were initiated in response to allegations involving ethical questions and standards of conduct by university employees in order to assess and ultimately ensure that the university has complied with all applicable law, rules, regulations, and policies. Based on your representations, we find this information relates to investigations conducted under the university's compliance program. *See id.* § 51.971(a)(1).

You further state the information at issue relates to closed compliance matters which resulted in final determinations that the allegations were unsubstantiated. You provided a statement from a Senior Employee Relations Representative in the Office of Human Resources, which states that withholding the names of the individuals involved in the investigations would not protect their identity, because the requestor works in the same division and has overlapping personal and professional relationships with these individuals. Accordingly, you assert release of any of the information at issue would directly or indirectly identify the individuals making the report to, seeking guidance from, or participating in the compliance program investigation, as well as the identities of individuals alleged to have planned, initiated, or participated in activities that are the subject of the investigations. You state none of the relevant individuals have consented to the disclosure of their identifying information. Upon

review, we agree release of the information at issue would directly or indirectly identify individuals as complainants or participants in the compliance program investigations, or individuals who were alleged to have participated in the activities subject to the complaints. *See id.* § 51.971(c). Therefore, the university must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 51.971 of the Education Code.⁴

We now 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.

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

⁴As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

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 state, and provide documentation showing, the requestor filed a complaint against the university with the EEOC prior to the date the university received the instant request. You explain the remaining information may be used by the requestor to bolster her claims, and also expand the scope of her allegations within her EEOC complaint. Based on your representations and our review, we agree litigation was reasonably anticipated when the university received the request for information and the information at issue is related to the anticipated litigation for the purposes of section 552.103. Therefore, the university may withhold the remaining information you have marked under section 552.103 of the Government Code.

We note, however, once information has been obtained by all parties to the anticipated litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, 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), and it must be disclosed. Further, 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).

Lastly, we note an interested third party is allowed ten business days after the date of its receipt of the governmental body’s notice to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov’t Code § 552.305(d)(2)(B). As of the date of this letter, we have not received arguments from Towers Watson Data Services. Thus, Towers Watson Data Services has not demonstrated it has a protected proprietary interest in any of the submitted information. *See id.* § 552.110(a)-(b); Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Therefore, the university may not withhold any information on the basis of any proprietary interests Towers Watson Data Services may have in the information.

In summary, the university (1) must continue to rely on Open Records Letter Nos. 2013-07473 and 2011-18254 as previous determinations and withhold or release the responsive information at issue in accordance with those rulings; (2) must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 51.971 of the Education Code; and (3) may withhold the remaining information you have marked 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



James D. Cypert
Assistant Attorney General
Open Records Division

JDC/ac

Ref: ID# 493119

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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(w/o enclosures)