



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 17, 2013

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

OR2013-12212

Dear Ms. 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# 493537 (OGC# 149745).

The University of Texas at Austin (the "university") received a request for: (1) a named student's file; (2) a named individual's employment file; (3) information regarding a specified incident; (4) all e-mails between named individuals; (5) all documents and e-mails of a named individual; (6) all documents and e-mails of a named individual and/or the university's student emergency services concerning a named individual; (7) the student handbook in effect for the Athletic Training Education Program during a specified time period; (8) all policies in place regarding sexual harassment between faculty and students during a specified time period; (9) information regarding a named employee; (10) information regarding two specified meetings; (11) all policies and procedures regarding the standard of conduct regarding employees and students during a specified time period; (12) information from the university's handbook of operating procedures regarding relationships existing or beginning to exist during a specified time period. You state the university will redact information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g(a).¹ See Gov't Code §§ 552.026 (incorporating FERPA into the Act), .114 (excepting from disclosure "student records"); Open Records Decision

¹The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office FERPA 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. The DOE has determined FERPA determinations must be made by the educational authority in possession of the educational records. We have posted a copy of the letter from the DOE on the Attorney General's website at <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

No. 539 (1990) (determining the same analysis applies under section 552.114 of the Government Code and FERPA). You claim the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted representative sample of information.³

Initially, you state some of the responsive information was the subject of previous requests for information, as a result of which this office issued Open Records Letter Nos. 2013-03135 (2013), 2013-04074 (2013), 2013-06501 (2013), 2013-06884 (2013), and 2013-06699 (2013). As we have no indication the law, facts, or circumstances upon which the prior rulings were based have changed, the university must continue to rely on Open Records Letter Nos. 2013-03135, 2013-04074, 2013-06501, 2013-06884, and 2013-06699 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).

Section 552.103 of the Government Code 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.

²Although you assert section 552.101 of the Government Code in conjunction with section 51.971 of the Education Code, you make no arguments concerning this exception as required by section 552.301 of the Government Code. *See* Gov't Code §§ 552.301(e)(1)(A), .302. Accordingly, this ruling does not address your assertion of section 552.101 in conjunction with section 51.971 of the Education Code.

³We 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.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show section 552.103(a) applies in a particular 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). A governmental body must meet both prongs 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 found that a pending complaint filed with the Equal Employment Opportunity Commission (the “EEOC”) indicates that litigation is reasonably anticipated. *See, e.g.*, Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982).

You state, and submit documentation showing, prior to the university’s receipt of the instant request, a former university employee filed a complaint with the EEOC and the Texas Workforce Commission alleging discrimination and retaliation. You state the submitted information is directly related to the anticipated litigation. Based on your representations and our review, we find you have demonstrated the submitted information is related to litigation reasonably anticipated at the time the university received the request for information. Therefore, we find the university may withhold the submitted information under section 552.103.⁴

We note, however, 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. Thus, if the opposing party has seen or had access to information relating to the 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). We also 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).

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.

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

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,



David L. Wheelus
Assistant Attorney General
Open Records Division

DLW/dls

Ref: ID# 493537

Enc. Submitted documents

c: Requestor
(w/o enclosures)