



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 23, 2014

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

OR2014-10751

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# 526707 (TAMU 14-248).

Texas A&M University (the "university") received a request for the requestor's client's complete personnel file, all documents relating to investigations of the requestor's client, and a specified investigation and report. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

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

(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

¹We assume that 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 that those records contain substantially different types of information than that submitted to this office.

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.

...

(e) Information is excepted from disclosure under [the Act] if it is collected or produced:

...

(2) by a systemwide compliance office for the purpose of reviewing compliance processes at a component institution of higher education of a university system.

Educ. Code § 51.971(a), (e)(2). We understand the university is an institution of higher education for purposes of section 61.003 of the Education Code. *See id.* § 51.971(a)(2). You state the information you have marked pertains to allegations of a breach of standards of conduct and ethics. In response to the allegations, you state the System Internal Audit Department (the "department") initiated an internal review to assess and ensure employees' compliance with applicable laws, rules, regulations, and policies. You explain the department collected and produced portions of the submitted information for the purpose of reviewing compliance processes at the university, a component of the Texas A&M University System. Based on your representations and our review, we conclude the university must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 51.971(e)(2) of the Education Code.²

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

²As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

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.). The governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a). *See Open Records Decision No. 551 at 4 (1990).*

To demonstrate that litigation is reasonably anticipated, the governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *Open Records Decision No. 452 at 4 (1986)*. 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.³ *Open Records Decision No. 555 (1990)*; *see also 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)*. This office has concluded that litigation was reasonably anticipated when the potential opposing party filed a complaint with the Equal Employment Opportunity Commission (the "EEOC"). *See Open Records Decision No. 336 (1982)*.

³In 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)*.

You state, and submit supporting documentation demonstrating, the requestor's client filed an EEOC Notice of Charge of Discrimination against the university before the date the university received the present request for information. Based on your representations and our review, we determine the university reasonably anticipated litigation on the date the university received the present request for information. You state, and we agree, the remaining information you have marked relates to the anticipated litigation. Accordingly, we conclude the university may withhold the remaining information you have marked under section 552.103 of the Government Code.

We note once the 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 No. 349 at 2 (1982). We also note the applicability of section 552.103(a) ends when the litigation is concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. *See* TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *See In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *See* TEX. R. EVID. 503(b)(1). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.*, meaning it was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." *Id.* 503(a)(5). Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain the confidentiality of a

communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You claim the remaining information is protected by section 552.107(1) of the Government Code. You state the information at issue consists of communications involving Texas A&M University System attorneys and administrators and university employees. Further, you state the communications were made for the purpose of facilitating the rendition of professional legal services to the university and these communications have remained confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the remaining information. Thus, the university may withhold the remaining information under section 552.107(1) of the Government Code.

In summary, the university must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 51.971(e)(2) of the Education Code. The university may withhold the information you have marked under section 552.103 of the Government Code. The university may withhold the remaining information under section 552.107(1) of the Government Code.

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,



Cristian Rosas-Grillet
Assistant Attorney General
Open Records Division

CRG/dls

Ref: ID# 526707

Enc. Submitted documents

c: Requestor
(w/o enclosures)