



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 30, 2014

Ms. Cynthia Tynan  
Attorney and Public Information Coordinator  
The University of Texas System  
201 West Seventh Street  
Austin, Texas 78701

OR2014-17431

Dear Ms. Tynan:

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# 537893 (OGC #157000).

The University of Texas Medical Branch at Galveston (the "university") received a request for a named university police officer's personnel file and any offense reports concerning his involvement in certain investigations during a specified time period. You state you will redact some information under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).<sup>1</sup> You claim the submitted information is excepted from disclosure under sections 552.103 and 552.152 of the Government Code. You also state release of this information may implicate the interests of the Galveston Police Department (the "department"). Accordingly, you state you have notified the department of the request and of its opportunity to submit comments to this office as to why the submitted information

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<sup>1</sup>Open Records Decision No. 684 serves as a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including personal e-mail addresses under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision. See ORD 684.

should not be released to the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). As of the date of this letter, we have not received comments from the department. We have considered the submitted arguments and reviewed the submitted representative sample of information.<sup>2</sup>

Initially, you state some of the requested information was the subject of a previous request for a ruling, as a result of which this office issued Open Records Letter No. 2014-03196 (2014). In that ruling, we determined (1) the university must withhold the marked information under section 552.101 of the Government Code in conjunction with section 51.971 of the Education Code, (2) with the exception of basic information, the university may withhold the marked information pertaining to case file 201300036140 under section 552.108(a)(1) of the Government Code, and (3) the university may withhold the remaining information under section 552.103 of the Government Code. You state the law, facts, or circumstances on which the prior ruling was based have not changed. Thus, the university must continue to rely on Open Records Letter No. 2014-03196 as a previous determination and withhold or release the information at issue in accordance with that ruling. *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 a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

Next, we note some of the submitted information, which we have marked, is 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[.]

Gov't Code § 552.022(a)(1). The submitted information includes a completed evaluation that is subject to section 552.022(a)(1). The university must release the completed evaluation pursuant to section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or is made confidential under the Act or other law. You seek to withhold the information subject to section 552.022 under section 552.103 of the Government Code. However, section 552.103 is discretionary in nature and does not make

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<sup>2</sup>We 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.

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). Therefore, the information subject to section 552.022 may not be withheld under section 552.103 of the Government Code. However, you also claim the information subject to section 552.022 is excepted from disclosure under section 552.152 of the Government Code, which makes information confidential under the Act. Therefore, we will consider the applicability of section 552.152 to the information at issue. Further, we will consider your argument under section 552.103 of the Government Code for the information that is not subject to section 552.022, as well as your claim under section 552.152 for portions of this information.

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, orig. proceeding); *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).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). 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." *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>3</sup> 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 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). We also note that 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. *See* Open Records Decision No. 361 (1983).

You state, and provide documentation showing, before the university received the present request for information, the university's police department received a letter from an attorney who stated she represented a named individual regarding a case arising out of the arrest of her client by the university's police department. In the letter, the attorney directs the university's police department to preserve evidence for "the potential lawsuit." Additionally, the letter states that the university's police department should continue to preserve the evidence until "the end of litigation." Based on these representations and our review, we find the university reasonably anticipated litigation on the date it received the request. Further, you state, and we agree, the remaining information relates to the anticipated litigation because the remaining information consists of personnel information of a police officer who was involved in the arrest of the attorney's client. Thus, we find section 552.103 is applicable to the information at issue. Therefore, the university may withhold the information not subject to section 552.022 under section 552.103 of the Government Code.<sup>4</sup>

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 that 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 552.152 of the Government Code provides:

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<sup>3</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>4</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

Information in the custody of a governmental body that relates to an employee or officer of the governmental body is excepted from the requirements of Section 552.021 if, under the specific circumstances pertaining to the employee or officer, disclosure of the information would subject the employee or officer to a substantial threat of physical harm.

Gov't Code § 552.152. You seek to withhold the information subject to section 552.022(a)(1) under section 552.152. You state the information at issue relates to a special assignment. You further state release of this information would subject the officer at issue to a substantial threat of physical harm. Based on your representations and our review, we find you have demonstrated the release of the information we have marked would subject the officer at issue to a substantial threat of harm. Thus, the university must withhold the information we have marked under section 552.152 of the Government Code. However, we find you have failed to demonstrate release of the remaining information at issue would subject an employee or officer to a substantial risk of physical harm. Accordingly, the university may not withhold any of the remaining information at issue under section 552.152 of the Government Code.

In summary, 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 information we have marked under section 552.152 of the Government Code. The university must release the remaining information.

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](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,

A handwritten signature in black ink, appearing to read 'Meredith L. Coffman', with a long horizontal flourish extending to the right.

Meredith L. Coffman  
Assistant Attorney General  
Open Records Division

MLC/dls

Ref: ID# 537893

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Galveston Police Department  
c/o Ms. Cynthia Tynan  
Attorney and Public Information Coordinator  
The University of Texas System  
201 West Seventh Street  
Austin, Texas 78701  
(w/o enclosures)