



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 7, 2014

Ms. Audra Gonzalez Welter
University of Texas System
201 West Seventh Street
Austin, Texas 78701-2902

OR2014-17950

Dear Ms. Welter:

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# 538565 (OGC# 157066).

The University of Texas Medical Branch at Galveston (the "university") received a request for specified categories of information pertaining to the requestor's client and related complaints of discrimination or retaliation.¹ The university states it will withhold information under section 552.024 of the Government Code and personal e-mail addresses under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).² The university states it will release some of the requested information, but claims the submitted information is either not subject to the Act or excepted from disclosure

¹The university sought and received clarification of the information requested. *See* Gov't Code § 552.222 (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) (if governmental entity, acting in good faith, requests clarification of unclear or over-broad request, ten-day period to request attorney general ruling is measured from date request is clarified).

²Section 552.024(c)(2) of the Government Code authorizes a governmental body to redact information protected by section 552.117(a)(1) of the Government Code without the necessity of requesting a decision under the Act if the current or former employee or official to whom the information pertains timely chooses not to allow public access to the information. *See* Gov't Code § 552.024(c)(2). Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of seeking a decision from this office.

under sections 552.101, 552.102, 552.103, 552.122, and 552.136 of the Government Code. In addition, the university states, and provides documentation showing, it notified Phillips Healthcare of the university's receipt of the request for information and of Phillips Healthcare's right to submit arguments to this office as to why the requested information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 at 3 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have considered the submitted arguments and reviewed the submitted representative sample of information.³ We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

The Act is applicable only to "public information." *See id.* § 552.021. Section 552.002(a) of the Government Code defines "public information" as

information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body;
- (2) for a governmental body and the governmental body:
 - (A) owns the information;
 - (B) has a right of access to the information; or
 - (C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or
- (3) by an individual officer or employee of a governmental body in the officer's or employee's official capacity and the information pertains to official business of the governmental body.

Id. § 552.002(a). Section 552.002(a-1) also provides the following:

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.

Information is in connection with the transaction of official business if the information is created by, transmitted to, received by, or maintained by an officer or employee of the governmental body in the officer's or employee's official capacity, or a person or entity performing official business or a governmental function on behalf of a governmental body, and pertains to official business of the governmental body.

Id. § 552.002(a-1). Thus, virtually all of the information in a governmental body's physical possession constitutes public information and, thus, is subject to the Act. *Id.* § 552.002(a)(1); *see* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). You state the submitted information contains employee identification numbers of university employees. In Open Records Decision No. 581 (1990), this office determined certain computer information, such as source codes, documentation information, and other computer programming, that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property is not the kind of information made public under section 552.021 of the Government Code. You state the submitted computer identification numbers are unique, computer-generated numbers, created and assigned to university employees at the time they are hired. You also inform us that, although these numbers are not used as computer log-on information, they are used to gain access to the university's computer system. In addition, you state the numbers are used by some employees for electronic time-keeping and are tied to employee identification badges within the security system to provide some employees access to secure areas. Based on your representations and our review, we agree the submitted computer identification numbers do not constitute public information for the purposes of section 552.002. Thus, the computer identification numbers are not subject to the Act and the university is not required to release them in response to the request for information.

We next note the university has made some of the submitted information available to the public on its website. Section 552.007 of the Government Code provides if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law. *See* Gov't Code 552.007; Open Records Decision Nos. 518 at 3 (1989), 400 at 2 (1983). Although the university asserts this information is excepted from release under section 552.103 of the Government Code, this section 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 section 552.103); Open Records Decision No. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Accordingly, the university may not withhold this information, which we have marked, under section 552.103 but, instead, must release it to the requestor.

We also note section 552.022 of the Government Code is applicable to some of the remaining information. Section 552.022(a) reads, in relevant part, as follows:

Without limiting the amount or kind of information that is public information under this chapter, the 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;

...

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

...

(15) information regarded as open to the public under an agency's policies[.]

Gov't Code § 552.022(a)(1), (3), (15). The submitted information contains completed evaluations and investigations that are subject to subsection 552.022(a)(1) and information related to the expenditure of public funds that is subject to subsection 552.022(a)(3), which we have marked. We have also marked a job description that is subject to subsection 552.022(a)(15) if the university considers it to be open to the public under the university's policies. You assert this information is excepted from release under section 552.103 of the Government Code. However, section 552.103 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 section 552.103); Open Records Decision No. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the university may not withhold the information subject to section 552.022 under section 552.103. However, sections 552.101, 552.102, and 552.136 of the Government Code make information confidential under the Act. Accordingly, we will consider the applicability of these sections to the information subject to section 552.022.

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. Section 552.101 of the Government Code encompasses the Family Medical

and Leave Act (the "FMLA"). *See* 29 U.S.C. §§ 2601 *et seq.* Section 825.500 of title 29 of the Code of Federal Regulations identifies the record-keeping requirements for employers that are subject to the FMLA. Subsection (g) of section 825.500 provides the following:

[r]ecords and documents relating to medical certifications, recertifications or medical histories of employees or employees' family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files. If the Genetic Information Nondiscrimination Act of 2008 (GINA) is applicable, records and documents created for purposes of FMLA containing family medical history or genetic information as defined in GINA shall be maintained in accordance with the confidentiality requirements of Title II of GINA . . . which permit such information to be disclosed consistent with the requirements of FMLA. If the [Americans with Disabilities Act (the "ADA")], as amended, is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements . . . except that:

- (1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;
- (2) First aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatment; and
- (3) Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

29 C.F.R. § 825.500(g). You assert some of the submitted information, which you have marked, must be withheld under the FMLA. Upon review, we agree this information is confidential under section 825.500 of title 29 of the Code of Federal Regulations. The requestor asserts she has a right of access to her client's FMLA information. However, the FMLA has its own release provisions. Thus, the university may disclose the information made confidential under the FMLA only in accordance with these access provisions. *See id.* We find the requestor has failed to demonstrate, and we are not otherwise able to discern, any of the FMLA release provisions applies to the information at issue. Accordingly, the university must withhold the information you have marked under section 552.101 of the Government Code in conjunction with the FMLA.

Section 552.101 of the Government Code also encompasses section 51.971 of the Education Code, which provides in 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.

...

(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.

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

(1) in a compliance program investigation and releasing the information would interfere with an ongoing compliance investigation[.]

Educ. Code § 51.971(a), (c)-(e)(1). 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 some of the submitted information pertains to allegations of policy and standard of conduct violations reported to and investigated by the university's Office of Human Resources or the university's Legal Affairs Department, which are part of the university's compliance program. 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 state the information you have marked under section 51.971(e) relates to ongoing investigations into ethical questions and standards of conduct involving university employees. You inform us the purpose of the ongoing investigations is to assess and ensure compliance with all applicable laws, rules, regulations, and policies. You also state the release of this information during the pendency of the investigations would interfere with, and potentially compromise, those investigations. Based on these representations and our review, we agree the university must withhold the information you have marked or indicated under section 552.101 of the Government Code in conjunction with section 51.971(e) of the Education Code.

You also inform us the information you have marked or indicated under section 51.971(c) pertains to complaints that were determined to be unsubstantiated or without merit, or complaints that were determined to be substantiated in part. You argue a report in Tab 5 and two other reports in Tab 9 are confidential in their entirety under section 51.971(c) because of the targeted focus of the request or the small subset of individuals involved and, thus, merely withholding the names of the individuals involved is not sufficient to ensure the protections afforded in section 51.971(c). We note the report at issue in Tab 5 pertains to an investigation by the university's Human Resources Department involving the requestor's client that was determined to be substantiated in part. We also note the reports at issue in Tab 9 were conducted by the university's Human Resources Department or Legal Affairs Department, where one complaint was determined to be substantiated in part, while the other was determined to be unsubstantiated. Upon review, we agree release of these reports would directly or indirectly identify individuals who participated in the investigation of the complaint and the identities of the individuals who were the subjects of the substantiated and unsubstantiated complaints. *See id.* § 51.971(c)(1). Although the requestor's client is one of the individuals whose information is subject to section 51.971(c) in Tab 5 and would generally have a right of access to information pertaining solely to her pursuant to section 51.971(d), the report at issue does not pertain solely to the requestor. Thus, the requestor does not have a right of access to this report under section 51.971(d). You state none of the remaining individuals at issue have consented to release of their information. Therefore, the university must withhold these reports, which you have marked, in their entirety under section 552.101 of the Government Code in conjunction with section 51.971(c) of the Education Code.

The remaining information at issue consists of closed compliance investigations. Upon review, we agree the university must withhold the identifying information of individuals who made a report to the compliance program office, sought guidance from the compliance program office, or were the subject of the compliance program investigation that determined the claims were unsubstantiated or without merit within these reports, which you have indicated, under section 552.101 of the Government Code in conjunction with section 51.971(c) of the Education Code.

You assert the remaining information is excepted from disclosure under section 552.103 of the Government Code, which provides in part as follows:

(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). The governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request for information and (2) the information at issue is related to that litigation. *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.); 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).

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 litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, an attorney for a potential opposing party making a demand for payment and asserting an intent to sue if such payments are not made. Open Records

Decision Nos. 555 at 3 (1990), 346 (1982). In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party threatened to sue on several occasions and hired an attorney. *See* Open Records Decision No. 288 at 2 (1981). However, an individual publicly threatening to bring suit against a governmental body, but who does not actually take objective steps toward filing suit, is not concrete evidence that litigation is reasonably anticipated. *See* Open Records Decision No. 331 at 1-2 (1982).

You have submitted correspondence from the requestor in which she threatened to take legal action against the university if the university did not work with her to resolve an employment-related dispute involving her client. Based on your representations and our review of the submitted documents, we conclude, for purposes of section 552.103, you have established litigation was reasonably anticipated when the university received the request for information. We also find you have established the records at issue are related to the anticipated litigation for purposes of section 552.103(a). Therefore, we agree section 552.103 is applicable to the remaining information.

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. *See* 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). We note the requestor or the requestor's client has seen or had access to some of the remaining information. Therefore, the university may not withhold this information, which we have marked, pursuant to section 552.103. However, we agree the university may withhold the remaining information at issue under section 552.103. We note 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).

Section 552.102(a) excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). The Texas Supreme Court has held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). We agree the university must withhold the information you have marked under section 552.102(a) of the Government Code within the documents subject to section 552.022 of the Government Code.

Section 552.136(b) of the Government Code provides, "Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136(b). You have marked account numbers under section 552.136 of the Government Code in the information subject to section 552.022 of the Government Code. However, this information may pertain to the requestor's client. Section 552.023 of the

Government Code provides a governmental body may not deny access to a person or a person's representative to whom the information relates on the grounds that the information is considered confidential under privacy principles. *Id.* § 552.023(a). Thus, we must rule conditionally. The university must withhold under section 552.136 the account numbers you have marked in the documents subject to section 552.022. However, the university must release these accounts numbers pursuant to section 552.023 of the Government Code if they pertain to the requestor's client.

Finally, we note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why requested information relating to it should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, Phillips Healthcare has not submitted to this office any reasons explaining why the requested information should not be released. Thus, we have no basis for concluding any portion of the submitted information constitutes proprietary information of that third party, and the university may not withhold any portion of the submitted information on that basis. *See* 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.

To conclude, the submitted computer identification numbers are not subject to the Act and the university is not required to release them in response to the request for information. The university must release the information we have marked under section 552.007 of the Government Code. The university must withhold the information you have marked under section 552.101 of the Government Code in conjunction with the FMLA. The university must withhold the information you have marked or indicated under section 552.101 of the Government Code in conjunction with subsections 51.971(c) and 51.971(e) of the Education Code. The university must release the remaining information we have marked under subsections 552.022(a)(1) and 552.022(a)(3) of the Government Code, as well as the information we have marked under subsection 552.022(a)(15) of the Government Code if the university considers it to be open to the public under the university's policies. However, in releasing the information subject to section 552.022, the university must withhold the information you have marked under sections 552.102(a) and 552.136 of the Government Code, unless the requestor has a right of access to this information pursuant to section 552.023 of the Government Code. With the exception of the information we have marked for release, the university may withhold the remaining information under section 552.103 of the Government Code. As our ruling is dispositive, we do not address the university's other arguments to withhold the information at issue.

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 L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/cbz

Ref: ID# 538565

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. John Cumpton
Account Manager
Phillips Healthcare
P.O. Box 3003
Bothell, Washington 98041-3003
(w/o enclosures)