



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 27, 1994

Mr. Richard Rafes
Vice Pres. for Legal Affairs & General Counsel
University of North Texas
Health Science Center at Fort Worth
P.O. Box 13426
Denton, Texas 76203-6426

OR94-273

Dear Mr. Rafes:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 24318.

The University of North Texas (the "university") has received a request for certain information relating to the former chair of the English Department, specifically a copy of the settlement between the university and the former chair and copies of the letters written by the former chair which university counsel allegedly characterized as defamatory of the requestor and others. You assert that the requested information is exempted from required public disclosure under section 552.103 of the act.

Section 552.103(a) of the act exempts from required public disclosure information relating to litigation "to which the state . . . is or may be a party." For section 552.103(a) to apply, it must relate to litigation to which the university is or may be a party. Section 552.103(a) requires concrete evidence that litigation is realistically contemplated; it must be more than mere conjecture. Open Records Decision Nos. 518 (1989) at 5; 328 (1982). You state that

It is the University's opinion that these documents were protected from disclosure under Section 552.103 of the Government Code in that it was clear from the language and tone of the letters and oral statements of the parties that litigation was eminent [*sic*] After the settlement [between the university and the former chair] was

signed, and the University believed the controversy was concluded, several of the faculty continued to make inflammatory statements that were not protected by the settlement and could once again potentially bring the University into litigation. We believe that litigation is still likely in this case despite the existence of [the] settlement agreement and that the University might be brought into the case under section 104 of the Texas [Civil Practice and] Remedies Code.

We have reviewed the settlement agreement and the statement of the former chair that you submitted for our review. We do not believe that these documents or the statements in your letter demonstrate that litigation to which the university will be a party is reasonably anticipated. The former chair has released the university, its officers, trustees, agents, attorneys, representatives and employees from causes of action he may have had "arising out of the course of his employment with the University" up to the date of the execution of the settlement agreement. Settlement Agreement, para. 11. It is apparent that the requested letters predate the settlement agreement. While the former chair has reserved the right to counter-sue any university employee who sues him, he has not reserved the right to counter-sue the university. *See id.* Moreover, there is no evidence that the former chair now intends to file an action to which the university would be a party. In addition, there is no concrete evidence that the requestor or any other person intends to file such an action. In sum, we conclude that the university has not demonstrated that litigation is contemplated. Therefore, the university may not withhold the requested information under section 552.103(a).

Finally, we note that the settlement agreement and the other requested information are not confidential under the act by virtue of paragraph 12 of the settlement agreement. Unless a governmental body has explicit statutory authority to make an enforceable promise to keep information confidential, it may not make such a promise in a settlement agreement. *See Open Records Decision No. 114 (1975) at 1.* We are aware of no explicit statutory authority which would authorize the university to keep confidential either the settlement agreement or the requested letters. Furthermore, we have reviewed the statement of the chair and do not believe that it contains information which is confidential under any other basis. Therefore, the information you submitted to this office must be released. Your letter suggests that there may be other information responsive to this request. That information must also be released.¹

¹Of course, you must not release any information which is confidential under section 552.101 of the act. If you believe that any of the remaining responsive information is confidential, you may submit it to this office for a ruling if you do so within ten days of the date of this letter.

Because case law and prior published open records decisions resolve your request, we address it with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact our office.

Yours very truly,



Mary R. Crouter
Assistant Attorney General
Open Government Section

MRC/KHG/rho

Ref: ID# 24318

Enclosures: Submitted documents

cc: Mr. James Ward Lee
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(w/o enclosures)