



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 18, 1994

Ms. Melissa M. Ricard
Senior Staff Attorney
Office of the General Counsel
Texas A&M University System
State Headquarters Bldg.
301 Tarrow, 6th Floor
College Station, Texas 77843-1230

OR94-382

Dear Ms. Ricard:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 26244.

The Texas A&M University System ("A&M") has received a request for 11 categories of information relating to a dispute with a faculty member.¹ We have received a letter from you dated May 4, 1994, that asserts that some of the information requested under categories 4 and 9 is excepted from required public disclosure under sections 552.101, 552.103, and section 552.107 of the act. The information that A&M asserts is excepted from disclosure is attached thereto. We have also received a letter from you dated May 18, 1994, that reasserts that some of the information requested under categories 4 and 9 is protected from required public disclosure under sections 552.101,

¹In a letter to this office dated June 30, 1994, you state that A&M has received a second request which "seeks *inter alia*, information previously requested" above. Your letter states: "In so far as [the second] request would include documents previously submitted to you with [the first] request we ask that [the second] request be considered in conjunction [with] the request subject of Correspondence ID# 26244." Thus, we address the availability of records responsive to the second request here, but only to the extent such records have been submitted to this office in conjunction with the first request.

552.103, and section 552.107.² Your second letter also encloses exhibit 3, which you describe as protected records responsive to category 4, and exhibit 4, which you describe as containing "representative samples" of protected records responsive to category 9.

Section 552.103 of the act excepts from required public disclosure information relating to litigation "to which the state or political subdivision . . . is or may be a party." Gov't Code § 552.103(a)(1). For section 552.103 to apply, the information must relate to litigation to which A&M is or may be a party. Section 552.103 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). Thus, to secure the protection of this exception, a governmental body must demonstrate that requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision No. 551 (1990); *see also* Open Records Decision No. 588 (1991) (contested case under APTRA is litigation for purposes of former section 3(a)(3) exception).³

You state that litigation is reasonably anticipated because the faculty member has decided to present a grievance to an A&M committee and his attorney has "stated his belief that the administrative process will not afford his client a satisfactory result and that legal remedy will [be] sought" in a letter to the chairperson of the A&M board of regents dated April 20, 1994. We disagree. First, the university procedure that the faculty member has initiated does not itself constitute litigation. Second, we have reviewed the attorney's letter. In it the attorney states that if A&M attempts to sanction his client, he will recommend that the attempt "be challenged in court on due process, equal protection, restraint of trade, breach of implied contract, and perhaps other grounds." The letter also states that the faculty member's initiation of the faculty grievance procedure is not a "waiver of any other claims he may have." We do not believe that the attorney's letter demonstrates that litigation may be reasonably anticipated. The letter threatens to file suit *only if* A&M takes certain actions that the attorney believes would be actionable. Thus, it is distinguishable from a letter that threatens to file suit unless money damages are paid to redress past events. *Compare* Open Records Decision Nos. 452 (1986); 346 (1982). We also note that you have not

²Your May 18, 1994 letter states, "The records requested which are itemized as Nos. 1, 2, 3, 5, 6, 7, 8, 10 and 11 are presently being gathered and will be provided to the requestor insofar as the requested documents do, in fact, exist *and are not held subject to exception from disclosure.*" (Emphasis added.) Given that you have not asked us to rule on the availability of any of these documents, there is absolutely no reason for A&M to await for a ruling from this office to release them. Of course, A&M must not release information that is confidential under law.

³It is not relevant under section 552.103 whether information was created in anticipation of litigation. While some attorney work product may be excepted under section 552.103, that will be the case only if it relates to pending or anticipated litigation. *See* Open Records Decision No. 575 at 2, 574 at 6 (1990).

asserted that it is likely that A&M will take the actions the attorney suggests would give rise to a lawsuit, nor is this apparent from the documents on their face.⁴ Furthermore, we do not believe that a mere reservation of rights demonstrates that litigation may be reasonably anticipated.⁵

In sum, A&M's assertion that the faculty member may resort to the courts should the administrative decision not satisfy him is too conjectural to withhold documents under section 552.103. The faculty member's attorney's threat to file suit if certain events come to pass is too conditional to demonstrate that litigation may be reasonably anticipated. Thus, we conclude that A&M has not demonstrated that litigation regarding this matter is reasonably anticipated, and that the requested information may not be withheld under section 552.103.

Next, you assert that the documents in exhibits 3 and 4 are excepted from required public disclosure under the attorney-client privilege, citing sections 552.101 and 552.107 of the act. Section 552.107(1) excepts from required public disclosure "information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Rules of the State Bar of Texas." In Open Records Decision No. 574 (1990), this office held that this exception protects information that reveals client confidences to an attorney or that reveals the attorney's legal advice. Exhibits 3 and 4 contain a number of memorandums that reflect legal advice or confidential client communications. These documents, which have been marked, may be withheld from disclosure under section 552.107(1).⁶ We further note that we address only the documents submitted with your May 18, 1994 letter. We are unable to address whether section 552.107 applies to documents which have not been specifically identified to us as attorney-client communications (such as documents sent to us with your May 4, 1994 letter which are not contained in exhibit 3) or that have not been submitted to us (such items which were not sent to us as "representative samples"). No documents other than those that we have marked may be excepted under section 552.107.

⁴We have been informed by A&M that the committee will not even meet to consider this matter until August 18, 1994. Obviously, it would be premature to predict the outcome of that proceeding at this point.

⁵We have received a letter from the faculty member's attorney dated June 22, 1994. The letter could be read to admit that litigation may be reasonably anticipated in light of his April 20, 1994 letter to the chairperson. We believe, however, that this implication is merely the result of the writer's confusion between the standards for determining whether information is protected under section 552.103 of the act, on the one hand, and the attorney work product doctrine in the context of civil discovery, on the other. See *supra* note 3. We do not believe that the June 22, 1994 letter itself sheds any light on the faculty member's intentions with respect to litigation.

⁶The attorney-client privilege is waived by disclosure to a third party. Thus, any document that has been released to a third party may not be withheld from disclosure under section 552.107(1). See Open Records Decision No. 589 (1991).

If you have questions about this ruling, please contact our office.

Yours very truly,



Mary R. Crouter
Assistant Attorney General
Open Government Section

MRC/LRD/rho

Ref.: ID# 26244

Enclosures: Marked documents

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