



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 11, 1997

Ms. R. Yvette Clark
General Counsel
Stephen F. Austin State University
P.O. Box 13065, SFA Station
Nacogdoches, Texas 75962-3065

OR97-0786

Dear Ms. Clark:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 105510.

Stephen F. Austin State University (the "university") received a request for information relating to a former student, information relating to the alleged rape of the requestor's client, and all documents regarding complaints made by students arising out of alleged sexual harassment, abuse, or discrimination at the university for the past five years. You claim that the requested information is excepted from disclosure under the Family Educational Rights and Privacy Act ("FERPA"), common-law privacy, and the informer's privilege, all of which are incorporated by section 552.101 of the Government Code, as well as sections 552.103 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. The university has the burden of providing relevant facts and documents to show that 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, and (2) the information at issue is related to that litigation. *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 (1990) at 4. The university must meet both prongs of this test for information to be excepted under section 552.103(a).

Litigation cannot be regarded as "reasonably anticipated" unless there is more than a "mere chance" of it--unless, in other words, we have concrete evidence showing that the claim that litigation may ensue is more than mere conjecture. Open Records Decision Nos.

452 (1986), 331 (1982), 328 (1982). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision Nos. 452 (1986), 350 (1982). This office has concluded that litigation is reasonably anticipated when an attorney makes a written demand for disputed payments and promises further legal action if they are not forthcoming, and when a requestor hires an attorney who threatens to sue a governmental entity. Open Records Decision Nos. 555 (1990), 551 (1990).

Here, we believe that the university has established that litigation is reasonably anticipated for the purposes of chapter 552 of the Government Code. Additionally, we conclude that the documents are related to the anticipated litigation. Therefore, with the exceptions discussed below, the university may withhold the requested information under section 552.103(a) of the Government Code.

Information that typically appears on the first page of an offense report is generally not protected by section 552.103(a).¹ In Open Records Decision No. 597 (1991), this office concluded that, although 552.103(a) may except first-page offense report information in some circumstances, after the magistrate informs the suspect of the nature of the charge against him, there is no first page information that would not have been made known to him by the magistrate. Open Records Decision No. 597 (1991) at 3. Therefore, in cases where the suspect has been arrested and has appeared before a magistrate who informed him of the basic details of the alleged offense, which is the information typically found on the first page of an offense report, the university may not withhold first-page offense report information under section 552.103(a). When the opposing party in the pending litigation has seen or had access to any of the information at issue, there is no justification for now withholding that information from the requestor pursuant to section 552.103(a). Open Records Decision Nos. 349 (1982), 320 (1982). We enclose for your convenience a summary of the type of information that may not be withheld under section 552.103(a) or 552.108. Although this information is generally found on the first page of an offense report, its location is not determinative. To determine what information must be released, the type of information must be examined rather than its location. See Open Records Decision No. 127 (1976) at 5.²

However, as the subject crimes are sexual assaults, we must determine whether any front page offense report information is protected from disclosure by common-law privacy. See Open Records Decision Nos. 393 (1983), 339 (1982). We conclude that, where the first page offense report information is not protected by sections 552.103 or 552.108, any

¹Section 552.108 also does not protect from required public disclosure information typically appearing on the first page of an offense report. *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), writ ref'd n.r.e. per curiam, 536 S.W.2d 559 (Tex. 1976); Open Records Decision No. 127 (1976).

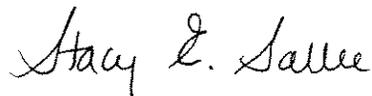
²We note that the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). Within the submitted documents, however, there appears to be information that is confidential by law or under common-law privacy that must not be released even after the conclusion of the anticipated litigation.

information that tends to identify the alleged victim must be withheld under common-law privacy, as incorporated by section 552.101 of the Government Code.³

Similarly, FERPA will not protect the remaining first page offense report information from required public disclosure. "Education records" protected by FERPA expressly do not include "records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement. 20 U.S.C. § 1232g(a)(4)(B)(ii).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Stacy E. Sallee
Assistant Attorney General
Open Records Division

SES/alg

Ref.: ID# 105510

Enclosures: Submitted documents
Summary of Open Records Decision No. 127 (1976)

cc: Mr. Steven K. DeWolf
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750 N. St. Paul Street, Suite 900
Dallas, Texas 75201
(w/summary of Open Records Decision No. 127 (1976); w/o submitted documents)

³Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

