OFFICE OF THE ATTORNEY GENERAL · STATE OF TEXAS
JOHN CORNYN

December 17, 1999

Ms. Priscilla A. Lozano
Office of the General Counsel
The University of Texas System
201 West Seventh Street
Austin, Texas 78701-2981

OR99-3503A

Dear Ms. Lozano:

You ask this office to examine Open Records Letter No. 99-3503 (1999), issued on December 6, 1999, because you advise this office timely received your request for an opinion. Your request was assigned ID# 132117.

The University of Texas at Austin (the "university") received a request from an attorney representing Professor Gary Wise for extensive information concerning her client. You indicate you have released "voluminous documents" responsive to the request. You have provided for our review additional information that is responsive to the request, marked as attachments "4," "4A," and "5." In your request for a decision to this office you sought to withhold this information under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code.

In Open Records Letter No. 99-3503 (1999) we stated:

> [W]e conclude the request was received on September 17, 1999. Although your initial request letter is dated October 1, 1999, it is stamped as having been received by this office on October 5, 1999. The initial request letter was not postmarked, and it indicates it was sent to this office "via hand delivery." Consequently, you have not met your statutory burden. Gov't Code § 552.301. The requested information is therefore presumed public. Gov't Code § 552.302. In the absence of a demonstration that the requested information is confidential by law or that other compelling reasons exist as to why the information should not be made public, you must release the information. Open Records Decision No. 195 (1978). A compelling reason is demonstrated where information is made confidential by other law or where third party interests are involved. Open Records Decision No. 150 (1977).

> We note that sections 552.103, 552.107, and 552.111 are discretionary exceptions. A governmental body thus waives these exceptions by failing to timely invoke them. *See* Open Records Decision No. 630 (1994) (section 552.107 is a discretionary exception), 551 (1990) (statutory predecessor to section 552.103 serves only to protect a governmental body's position in litigation, and does not itself make information confidential), 470 (1987) (statutory predecessor to section 552.111 is a discretionary exception). Therefore, we find the assertion of these exceptions does not constitute a compelling reason to overcome the presumption that the requested information is public. On the other hand, section 552.101 is designed to protect confidential information. We shall consider your section 552.101 assertion with respect to all of the submitted information, because a valid section 552.101 claim overcomes the presumption that the requested information is public.

You submit to our office evidence indicating the university timely complied with the ten day requirement of section 552.301, bringing into question the accuracy of the factual determination this office made in Open Records Letter No. 99-3503 (1999). Where this office determines that a factual error is made when evaluating a governmental body's timeliness in submitting required information in the decision process under section 552.301, and that error resulted in an incorrect decision, we will correct the previously issued ruling. You represent by affidavit that you signed the October 1, 1999 request letter to this office on that day and instructed your administrative assistant to have the letter hand-delivered to this office the same day. Your administrative assistant represents by affidavit that she placed the letter in an envelope with the supporting documents and handed the package to a courier, instructing him to deliver the package to this office the same day. The courier represents by affidavit that he delivered on October 1, 1999 all of the documents that were given to him that day for delivery. Based on these representations, we find that your request letter to this office was received on October 1, 1999. Consequently, we will examine Open Records Letter No. 99-3503 (1999). We shall therefore address your sections 552.103, 552.107, and 552.111 assertions.

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. A governmental body 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. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *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 under section 552.103(a).

In the situation at hand, you state that there is a history of employment disputes between the university and the requestor's client, a tenured faculty member. You explain the faculty member has filed a grievance over the denial of his request for a summer course assignment, that the university has provided him with a termination charge letter, and that he "is taking steps to appear in front of a university hearing tribunal to refute the proposed termination." Further, the faculty member has hired an attorney.

As to the first prong of the above-stated test, the litigation must be pending or reasonably anticipated at the time of the request for information. *See* Gov't Code § 552.103(c). Contested administrative proceedings constitute pending litigation for purposes of section 552.103 if the proceeding is conducted under the Administrative Procedure Act ("APA"), Government Code, Chapter 2001. Open Records Decision No. 588 at 7 (1991). A grievance proceeding that is not conducted under the APA does not, however, constitute pending litigation for purposes of section 552.103. *See, e.g.,* Open Records Letter No. 97-1077 (1997). You have not advised this office that the pending grievances filed by the faculty member are proceedings conducted under the APA. Hence, you have not demonstrated that litigation is pending for purposes of section 552.103.

Whether litigation is reasonably anticipated must be determined on a case-by-case basis.[1] Open Records Decision Nos. 452 (1986), 350 (1982). This office has ruled that litigation is not reasonably anticipated unless there is 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). Although the faculty member has hired an attorney, and has alleged damages, we find no indication that the faculty member or his attorney have threatened litigation. We therefore conclude the university has not demonstrated under section 552.103 that litigation was reasonably anticipated at the time of the request for information. *See, e.g.,* Open Records Decision No. 361 at 2 (1983) (litigation is not reasonably anticipated where an unsuccessful employment applicant hires an attorney who makes an information request). The information at issue is thus not excepted from disclosure under section 552.103.

As to attachments "4," and "4A," which are documents from your attorney files, you also assert section 552.111. As to attachments "4," "4A," and "5," you also assert section

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[1]This office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a notice of claim in compliance with the notice provisions of the Texas Tort Claims Act, *see* Open Records Decision No. 638 (1996); 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).

552.107. You explain some of the documents in attachment "4A" consist of representative samples of drafts "which represent the advice, opinion, and recommendation of the attorney drafter."[2] You state some of the drafts "also contain notes which further reveal attorney thought processes" and that the "chronologies contained in this enclosure are prepared both by and under the direction of university attorneys." You aver "the organization of these documents and inclusion/exclusion reveal thought processes which are the heart of this legal situation."

Section 552.111 of the Government Code has two aspects. The first excepts interagency and intra-agency memoranda and letters, but only to the extent that they contain advice, opinion, or recommendation intended for use in the entity's policymaking process. Open Records Decision No. 615 (1993). The purpose of this aspect is "to protect from public disclosure advice and opinions *on policy matters* and to encourage frank and open discussion within the agency in connection with its decision-making processes." *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.--San Antonio 1982, writ ref'd n.r.e.) (emphasis added). In Open Records Decision No. 615, this office stated:

> [T]o come within the [section 552.111] exception, information must be related to the *policymaking* functions of the governmental body. An agency's policymaking functions do not encompass routine internal administrative and personnel matters . . . . [Emphasis in original.]

Open Records Decision No. 615 at 5 (1993). Except as noted below, the information in attachments "4" and "4A" concerns an internal personnel matter and does not appear to relate to the policymaking functions of the university. We therefore conclude this aspect of section 552.111 does not permit the information at issue to be withheld. *Garland v. Dallas Morning News*, 969 S.W.2d 548 , 557 (Tex. App.--Dallas 1998, pet. requested) (*citing Lett v. Klein Indep. Sch. Dist.*, 917 S.W.2d 455, 457 (Tex. App.--Houston [14th Dist.] 1996), *writ denied per curiam*, 41 Tex. Sup. Ct. J. 575 (1998) (documents relating to problems with specific employee do not relate to the making of new policy but merely implement existing policy)). Open Records Decision No. 615 at 5 (1993) (disclosure of information relating to routine personnel matters will not inhibit free discussion among agency personnel as to policy issues). Attachment "4" includes a policy memorandum dated January 23, 1974 and a document titled "1999 Summer Session Budget Instructions." While these documents contain university policy information, the information appears to consist of settled university

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[2]In reaching our conclusion here, 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.

policies that do not implicate the university's decision making process.[3] Section 552.111 does not therefore except these documents from disclosure.

The second aspect of section 552.111 is the attorney work product privilege. A governmental body may withhold attorney work product from disclosure under section 552.111 if it demonstrates that the material was 1) created for trial or in anticipation of civil litigation, and 2) consists of or tends to reveal an attorney's mental processes, conclusions and legal theories. Open Records Decision No. 647 (1996). The first prong of the work product test has two parts. First, a governmental body must demonstrate that a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue. This test is not identical to the test for whether litigation is reasonably anticipated under section 552.103. Second, the party resisting discovery or release believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. Open Records Decision No. 647 at 4 (1996). The second prong of the work product test requires the governmental body to show that the documents at issue tend to reveal the attorney's mental processes, conclusions and legal theories. In applying the above-stated test, we have considered your arguments as to the applicability of section 552.103. Having reviewed your arguments and the submitted documents, and having considered the totality of the circumstances, we conclude that the drafts as well as certain other information in attachments "4," and "4A" constitute attorney work product. This information, which we have marked, may therefore be withheld pursuant to section 552.111.

However, we believe certain other information in these attachments consist of neutral recitations of fact. This office has stated that the work product privilege does not extend to "facts an attorney may acquire." *See* Open Records Decision No. 647 at 4 (1996) (citing *Owens-Corning Fiberglass v. Caldwell*, 818 S.W.2d 749, 750 n. 2 (Tex. 1991). Nor does the privilege protect documents prepared by an attorney that contain only a "neutral recital" of facts. *See Leede Oil & Gas, Inc. v. McCorkle,* 789 S.W.2d 686 (Tex. App.--Houston [1st Dist.] 1990, no writ). Other than the information we have marked as attorney work product, the remaining information in attachments "4" and "4A" is factual and does not appear to reveal an attorney's mental processes, conclusions, strategies, or legal theories. *See Occidental Chemical Corp. v. Banales,* 907 S.W.2d 488, 490 (Tex. 1995). We thus determine this information is not excepted from disclosure under section 552.111 as work product. As discussed below, this factual information is also not excepted from disclosure by section 552.107, and must therefore be released.

Section 552.107(1) excepts information from disclosure if it is information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a

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[3]The January 23, 1974 memorandum appears to be an excerpt from a publication of university policies, and the budget instructions appear to have been obtained from an internet web site.

duty to the client under the Texas Rules of Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct. This exception does not apply to all client information held by a governmental body's attorney; rather, it excepts from public disclosure only "privileged information," *i.e.* communications made to the attorney in confidence and in furtherance of rendering professional services, or information that reveals the attorney's legal opinion or advice. Open Records Decision Nos. 589 at 1 (1991), 574 at 3 (1990), 462 at 9-11(1987). Information gathered by an attorney as a fact-finder, purely factual information, and the factual recounting of events including the documentation of calls made, meetings attended, and memos sent, are not excepted from disclosure by section 552.107(1). Open Records Decision No. 574 (1990). Section 552.107 may except from disclosure notes in an attorney's client file if they contain confidences of the client or reveal the opinions, advice, or recommendations that have been made or will be made to the client or associated attorneys. Open Records Decision No. 574 at 6 (1990). With respect to advice, opinion, and recommendations, any protection under section 552.111 will usually be no greater or less than the protection offered under section 552.107. *See* Open Records Decision No. 574 at 2 (1990). We find information in attachments "4," "4A," and "5" that we believe consists of communications made to an attorney in confidence and in furtherance of rendering professional services. These communications are therefore excepted from disclosure by section 552.107. Attachment "5" also contains some information that we believe reveals an attorney's legal opinion or advice.[4] We have marked the information in the attachments that we believe section 552.107 excepts from disclosure.

Except as otherwise noted herein, you must release the remaining responsive information to the requestor. As stated in Open Records Letter No. 99-3503 (1999), the submitted documents also contain some information that implicates the privacy interests of Professor Gary Wise. However, the requestor in the present case is an attorney representing Professor Wise, and is therefore his authorized representative. *See* Gov't Code § 552.229. Thus, the specific information in the submitted documents that implicates the privacy interests of Professor Wise is not excepted from disclosure to this requestor. *See* Gov't Code § 552.023. Open Records Letter No. 99-3503 (1999) is overruled to the extent that it conflicts with this decision.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the

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[4]While the attorney work product aspect of section 552.111 would equally apply to except such information from disclosure, you did not assert section 552.111 with respect to attachment "5."

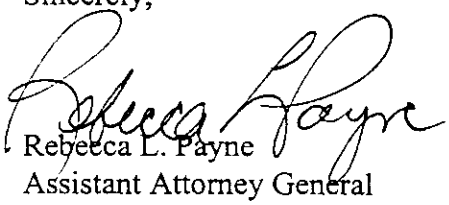
governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.–Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Rebecca L. Payne
Assistant Attorney General
Chief, Open Records Division

RLP/MG/ljp

Ref.: ID# 132117

Encl.: Submitted documents; Open Records Letter No. 99-3503 (1999)

cc: Ms. Vella M. Fink
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(w/Open Records Letter No. 99-3503 (1999))