



April 1, 2002

Mr. Dennis P. Duffy
General Counsel
University of Houston System
311 East Cullen Building, Suite 212
Houston, Texas 77204-2028

OR2002-1550

Dear Mr. Duffy:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 160838.

The University of Houston System (the "university") received a request for a copy of the employment file of a named university employee, a copy of the harassment complaint file pertaining to the requestor's client, any reports generated by the university concerning the investigation of such complaints, and a copy of a settlement agreement reached at a preliminary injunction hearing on January 11, 2002 in the case of *Hirczy de Mino v. UH, et. al.* You inform us that the university is releasing a copy of the settlement agreement pursuant to sections 552.022(a)(17) and (18) of the Government Code, but claim that the remaining requested information is excepted from disclosure under sections 552.024, 552.103, 552.107, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that a portion of the information you have submitted to us for review is the identical information that was the subject of a previous ruling from this office. A portion of the information you have submitted as Exhibit 3-9 was ruled upon previously by this office in Open Records Letter No. 2002-1002 (2002). Therefore, as the four criteria for a "previous determination" established by this office in Open Records Decision No. 673 (2001) have been met, the university may withhold the information we have marked in Exhibit 3-9 in

accordance with Open Records Letter No. 2002-1002 (2002).¹ See Gov't Code § 552.301(f); Open Records Decision No. 673 (2001). We will next address your arguments for withholding the information in the remaining submitted exhibits.

Section 552.103 provides 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.

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. *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 university must meet both prongs of this test for information to be excepted under 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); see Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On

¹The four criteria for this type of "previous determination" are 1) the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D) of the Government Code; 2) the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general; 3) the attorney general's prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Act; and 4) the law, facts, and circumstances on which the prior attorney general ruling was based have not changed since the issuance of the ruling. See Open Records Decision No. 673 (2001).

the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. See Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

In this case, you have provided us with a letter from an attorney threatening to file a sexual harassment complaint against the university with the Office of Civil Rights, U.S. Department of Education, Dallas. The request for information that gave rise to this ruling was contained in this same letter. Accordingly, in view of the totality of the circumstances in this case, we conclude that the university reasonably anticipated litigation on the date of the request, and thus, it has met the first prong of the section 552.103 test. Cf. Open Records Decision No. 336 (1982) (litigation reasonably anticipated where complaint filed with the Equal Employment Opportunity Commission). We also note that you inform us that the university is involved in pending litigation in the case of *Wolfgang Hirczy de Mino v. W. Andrew Achenbaum and the University of Houston*, Cause No. H-01-4306, in the United States District Court, Southern District of Texas. Upon review of the submitted information, we conclude that this information is related to both the pending and anticipated litigations for purposes of section 552.103, and therefore it is excepted from disclosure under this section.

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, in this case, any information that has either been obtained from or provided to the opposing parties in both the anticipated litigation *and* the pending litigation may not be withheld under section 552.103(a), and it must be disclosed. Further, 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).

Finally, we note that the submitted information contains "information that is also contained in a court record" that is subject to required public disclosure under section 552.022(a)(17) of the Government Code (see green flag). Section 552.022(a) provides that this information is not excepted from required disclosure under the Act unless the information is expressly confidential under other law. Section 552.103 is a discretionary exception that does not constitute other law which makes information subject to section 552.022(a)(17) confidential. See Open Records Decision Nos. 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). However, section 552.117 excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. See Open Records Decision No. 530 at 5 (1989). Therefore, if the former

employee timely elected to keep his personal information confidential, the university must withhold the court-filed document we have marked. The university may not withhold this information under section 552.117 if the former employee did not make a timely election to keep the information confidential.

To summarize, the information we have marked in Exhibit 3-9 may be withheld in accordance with our decision in Open Records Letter No. 2002-1002 (2002). The remainder of the submitted information may be withheld under section 552.103, with the exception of any information that has been seen by the opposing parties in both the pending and reasonably anticipated litigations, and the court-filed document we have marked, which must be released pursuant to section 552.022(a)(17), unless this information is excepted under section 552.117. Given this conclusion, we need not address your other raised exceptions.

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 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).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/seg

Ref: ID# 160838

Enc. Submitted documents

c: Ms. Lorna A. Gilbert
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(w/o enclosures)