



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 6, 2006

Ms. Cherry Kay Wolf
Associate General Counsel
The Texas A&M University System
200 Technology Way, Suite 2079
College Station, Texas 77845-3424

OR2006-02306

Dear Ms. Wolf:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 243466.

The Texas A&M University System (the "university") received nine requests for numerous categories of information regarding the requestor, certain university employees, and the expenditure of public funds. You state that the university does not maintain portions of the requested information.¹ The university states that it will redact social security numbers from the submitted information pursuant to section 552.147 of the Government Code. *See* Gov't Code § 552.147(b) (governmental body may redact social security number from public release without necessity of requesting decision from this office under the Act). You also state that to the extent the responsive records contained student identifying information, you will redact that information in accordance with the federal Family Education Rights and Privacy Act ("FERPA"). *See* Open Records Decision No. 634 (1995) (educational agency or institution may withhold from public disclosure information that is protected by FERPA and excepted from required public disclosure by sections 552.026 and 552.101 without the necessity of requesting an attorney general decision as to those exceptions). You further state some of the requested information has been released, but claim that the remaining information is excepted from disclosure under sections 552.103, 552.116, 552.117, 552.130,

¹The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

552.136, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

Initially, we note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides that

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

....

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;

Gov't Code § 552.022(a)(1), (3). The submitted documents include completed audit reports, as well as information contained in an account or voucher relating to the expenditure of public funds by a governmental body, subject to subsections 552.022(a)(1) and (3). The university must release this information unless it is expressly confidential under other law. Although you claim this information is excepted from disclosure under sections 552.103 and 552.116 of the Government Code, these are discretionary exceptions that protect the governmental body's interests and may be waived. *See* Gov't Code § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, sections 552.103 and 552.116 are not other laws that make information confidential for the purposes of section 552.022. Therefore, the university may not withhold any of the submitted information subject to section 552.022 under sections 552.103 and 552.116. However, we will address the applicability of sections 552.117, 552.130, 552.136, and 552.137 of the Government Code, which are other laws for purposes of section 552.022, for the information subject to section 552.022 as well as the remaining information.

²We 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) (where requested documents are numerous and repetitive, governmental body should submit representative sample; but if each record contains substantially different information, all must be submitted). 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.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, personal cellular 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. We note that an individual's work telephone number is not excepted from disclosure on this basis. Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). You inform us that the employees whose information is at issue have made timely elections for confidentiality under section 552.024. As such, the university must withhold the information we have marked pursuant to section 552.117(a)(1).

Section 552.130 of the Government Code excepts from public disclosure information that relates to a driver's license or motor vehicle title or registration issued by an agency of this state. Gov't Code § 552.130. The university must withhold the Texas driver's license and motor vehicle information we have marked under section 552.130 of the Government Code.

Section 552.136 of the Government Code provides in relevant part:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

- (1) obtain money, goods, services, or another thing of value; or
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov't Code § 552.136. The university must withhold the account numbers that we have marked pursuant to section 552.136 of the Government Code.

Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). Section 552.137 does not apply to a government employee's work e-mail address because such an address is not that of the employee as a "member of the public" but is instead the address of the individual as a government employee. The e-mail addresses we have marked are not of a

type specifically excluded by section 552.137(c). Therefore, in accordance with section 552.137, the university must withhold the marked e-mail addresses.

The remaining information subject to section 552.022 must be released to the requestor. We will now consider your arguments under sections 552.103 and 552.116 of the Government Code for the remaining information not subject to section 552.022. 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.

Gov't Code § 552.103(a), (c). 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 on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. See Open Records Decision No. 452 at 4 (1986). To establish that litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *Id.* This office has stated that a pending Equal Employment Opportunity Commission ("EEOC") complaint indicates litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982).

In this instance, you provide documentation showing that the requestor has filed a complaint with the EEOC against the university for alleged discrimination and retaliation resulting from his whistle blowing activities. You also provide documentation in which the requestor states that he is pursuing multiple courses of legal action against the university and intends

to “let the courts decide” if his claims are valid. The requestor also states that he is seeking information “to determine how my wrongful termination/placement on admin leave in spring, 2005 as a [university] faculty member and administrator was the result of my efforts to expose the fraudulent business practices” and to “remedy and expose fraudulent business practices,” especially those pertaining to the creation and operation of the International Business doctoral program. Based on your representations and our review of the submitted documents, we find that the university reasonably anticipated litigation when it received this request for information. We also find that the submitted information relates to the anticipated litigation. We therefore conclude that the university may withhold the information we have marked under section 552.103 of the Government Code.

We note, however, that 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). The requestor had access to large portions of the information and such portions are not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Section 552.116 of the Government Code provides as follows:

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, or a joint board operating under Section 22.074, Transportation Code, is excepted from [public disclosure]. If information in an audit working paper is also maintained in another record, that other record is not excepted from [public disclosure] by this section.

(b) In this section:

(1) “Audit” means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.

(2) “Audit working paper” includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116.³ We understand the university is an institution of higher education as defined by section 61.003 of the Education Code. You explain that portions of the submitted information consist of audit working papers "prepared by [university] auditors in conducting audits performed at the [university]." We understand that these audits were authorized under the Texas Internal Auditing Act, as set forth in Chapter 2102 of the Texas Government Code. *See* Gov't Code § 2102.003 (defines types of audits). Accordingly, we conclude that the information at issue constitutes audit working papers under section 552.116(b)(2) and is, thus, excepted from disclosure pursuant to section 552.116 of the Government Code.

In summary, the university must withhold the marked employee personal information under section 552.117(a)(1), the marked Texas-issued driver's license information under section 552.130, the marked account numbers under section 552.136, and the marked private e-mail addresses under section 552.137. The university may withhold the information we have marked under section 552.103 and the marked audit working papers under section 552.116 of the Government Code. The remaining information must be released to the requestor.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the

³As amended by Act of May 17, 2005, 79th Leg., R.S., ch. 202, § 1, 2005 Tex. Sess. Law Serv. (Vernon).

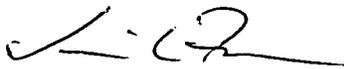
requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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 Dep't of Pub. 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 Office of the Attorney General 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. 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,



Jaime L. Flores
Assistant Attorney General
Open Records Division

JLF/er

Ref: ID# 243466

Enc. Submitted documents

c: Mr. Richard Tansey
c/o Ms. Cherry Kay Wolf
Associate General Counsel
The Texas A&M University System
200 Technology Way, Suite 2079
College Station, Texas 77845-3424
(w/o enclosures)