



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

March 10, 2006

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

OR2006-02428

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# 243813.

Texas A&M International University (the "university") received seven requests for numerous categories of information regarding the university's hiring guidelines and policies, records pertaining to specified incidents involving named individuals, accounting and business audit information, personnel files of "all faculty members/ administrators" hired since 1985, budget and expenses of a specified university program, the appointment calendars of named individuals, electronic or written communication between named individuals regarding a specified topic, and information pertaining to open records requests made to the university during the past ten years. You state that you will release a portion of the requested information by providing the requestor "with the relevant website address(es)." This office has determined that a governmental body may refer a requestor to its website for requested public information if the requestor agrees to accept the information in such a manner. *See* Open Records Decision No. 682 at 7 (2005). However, if the requestor does not agree to such a provision of information, then the university must provide the requestor with paper copies of the information. *See* Gov't Code § 552.221(b)(a governmental body must provide the public information for inspection or duplication in its offices or send copies by first class United States mail to requestor). You claim that the remaining requested information is excepted from disclosure under section 552.103 of the Government Code. Alternatively, you claim that portions of the remaining requested information are excepted from disclosure

under sections 552.101, 552.117, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information, a portion of which you state is a representative sample.<sup>1</sup>

Next, we note that you have not submitted any information responsive to the requests regarding accounting and business audit information, budget and expenses for the specified university program, communications between named individuals, nor open records request information. We note that the university has made prior requests for rulings to our office regarding information sought by this same requestor. We are also aware that the university has several pending requests for rulings with this office pertaining to the same requestor, and in some instances, overlapping requests for information. To the extent any information responsive to the present requests existed on the date the university received these requests, and this information is not the subject of a prior ruling or current ruling request, we assume you have released it. If you have not released any such records, you must do so at this time. See Gov't Code §§ 552.301(a), .302; see also Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

Next, we note that section 552.022 of the Government Code governs a portion of the submitted information. 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[.]

Gov't Code § 552.022(a)(1). The submitted information contains completed evaluations of a professor employed by the university. These evaluations, which we have marked, are expressly public under subsection 552.022(a)(1). The university must release the evaluations unless they are expressly confidential under other law. Although you claim this information is excepted from disclosure under section 552.103 of the Government Code, this is a discretionary exception that protects a 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.) (section 552.103 may be waived);

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<sup>1</sup>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.

Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 542 at 4 (1990) (statutory predecessor to section subject to waiver). As such, section 552.103 is not other law that makes information confidential for purposes of section 552.022. Therefore, the university may not withhold any of the evaluations under section 552.103. As you raise no other exceptions to disclosure for the evaluations, the university must release them to the requestor.

We now turn to your arguments for the remaining submitted information. Section 552.103 of the Government Code 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.* Among other examples, this office has concluded that litigation was reasonably anticipated where an opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission ("EEOC"), see Open Records Decision No. 336 (1982); (2) 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 (3) threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981). A governmental body may also establish that litigation is reasonably anticipated by the 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).

You inform us that the requestor makes a variety of allegations in his requests. Among them, he accuses the university of fraudulent and corrupt business and employment practices, and illegal use of state funds. He also alleges that the university retaliated against him for his whistleblowing activities related to the above accusations. You have provided documentation showing that the requestor has filed a complaint with the EEOC against the university for alleged discrimination and retaliation. Based on your representations, we find that the university reasonably anticipated litigation when it received this request for information. Based on your representations, we also find that the information requested relates to the anticipated litigation for purposes of section 552.103. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 483 (Tex. App.— Austin 1997, no pet.) (“Ordinarily, the words ‘related to’ mean ‘pertaining to,’ ‘associated with’ or ‘connected with.’”). Thus, we conclude that the university may withhold the remaining submitted information at this time under section 552.103 of the Government Code.<sup>2</sup>

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). Thus, responsive information to which all of the parties in the anticipated litigation have had access is not excepted from disclosure under section 552.103(a), and it 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).

In summary, the university must release the evaluations pursuant to section 552.022 of the Government Code. The remaining submitted information may be withheld at this time under section 552.103 of the Government Code.

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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<sup>2</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure.

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 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,



Candice M. De La Garza  
Assistant Attorney General  
Open Records Division

CMD/krl

Ref: ID# 243813

Enc. Submitted documents

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