



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 8, 2008

Mr. William L. Fly  
University Attorney  
Texas State University  
601 University Drive  
San Marcos, Texas 78666-4616

OR2008-01897

Dear Mr. Fly:

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# 301622.

Texas State University (the "university") received a request for all documents relating to the requestor, specifically including those held by seven named university officials. You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.<sup>1</sup> We have also considered comments submitted by the requestor. Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, we note that a portion of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides in part:

(a) 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:

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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.

(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 information contains a completed evaluation. The university must release this information unless it is excepted from disclosure under section 552.108 or is expressly confidential under other law. The submitted information also includes information relating to the expenditure of public funds. The university must release this information unless it is expressly confidential under other law. You claim that the submitted information is excepted from disclosure under section 552.103 of the Government Code. We note that section 552.103 is a discretionary exception that protects the governmental body's interests and may be waived. *See 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. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived). As such, the university may not withhold the information we have marked that is subject to section 552.022 under section 552.103.

We note that some of the information subject to section 552.022 contains confidential information. Section 552.136 states in part that "[n]otwithstanding any other provision of [the Act], 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 information we have marked under section 552.136 of the Government Code.

We now address your claim under section 552.103 of the Government Code for the information that is not subject to section 552.022. Section 552.103, the litigation exception, provides in relevant part 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 that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in this particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date that the request for information is received, 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 [1<sup>st</sup> Dist.] 1984, *writ ref'd n.r.e.*); Open Records Decision No. 551 at 4 (1990). Both prongs of this test must be met in order for information to be excepted under section 552.103(a). *See* ORD 551 at 4.

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.”<sup>2</sup> This office has concluded that litigation was reasonably anticipated when the opposing party hires an attorney who makes a demand for disputed payments and threatens to sue if the payments were not made promptly. *See* Open Records Decision No. 346 (1982).

You inform us, and provide documentation showing, the university received a letter from the requestor's attorney two weeks before the request for information, which threatened litigation if an agreement was not reached. Based on your representations and our review of the submitted information, we find that you have demonstrated the university reasonably anticipated litigation on the date of its receipt of this request for information. Furthermore, we find that the information at issue is related to the anticipated litigation for purposes of section 552.103(a). We therefore conclude that section 552.103 is generally applicable to the remaining information.

We note, however, that the opposing party in the anticipated litigation has seen or had access to some of the information at issue. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* ORD 551 at 4-5. Thus, if the opposing party has seen or had access to information relating to litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure

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<sup>2</sup>Among other examples, this office has concluded that litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); (2) sent a claim letter that represents to be in compliance with the notice requirements of the Texas Tort Claims Act, chapter 101 of the Civil Practice and Remedies Code; and (3) threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, to the extent that the opposing party in the anticipated litigation has seen or had access to the remaining information, any such information is not protected by section 552.103 and may not be withheld on that basis. Furthermore, the applicability of section 552.103(a) ends when the litigation has concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

In summary, the university must withhold the information marked pursuant to section 552.136 of the Government Code. The remaining information subject to section 552.022 must be released. With the exception of information previously seen by the opposing party, the university may withhold the remainder of the requested information under section 552.103.

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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 challenge 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,

A handwritten signature in black ink, appearing to read 'Chris Schulz', with a long horizontal line extending to the right.

Chris Schulz  
Assistant Attorney General  
Open Records Division

CS/jb

Ref: ID# 301622

Enc. Submitted documents

c: Dr. Rod C. Fluker, Sr.  
Vice President for Student Affairs Office  
Texas State University- San Marcos  
Office of the University Attorney  
601 University Drive, JCK Suite 1040  
San Marcos, Texas 78666  
(w/o enclosures)