



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 10, 2009

Ms. Neera Chatterjee
Office of General Counsel
The University of Texas System
201 West Seventh Street
Austin, Texas 78701-2902

OR2009-04773

Dear Ms. Chatterjee:

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# 339563.

The University of Texas Southwestern Medical Center at Dallas (the "university") received a request for various pieces of information regarding the requestor's employment and discrimination complaint. You state the university has released some of the responsive information.¹ You claim the submitted information is excepted from disclosure under sections 552.103, 552.111, 552.117, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that an interested party may submit comments stating why information should or should not be released).

Initially, we address the comments submitted by the requestor. The requestor states that the university failed to timely respond to a previous request for information contained in e-mail communications between the requestor and the university. The requestor provided copies of these e-mail communications. Additionally, the requestor contends that the Act requires

¹You state that you will redact social security numbers pursuant to section 552.147 of the Government Code, which authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

a governmental body's employee to forward a misfiled request for information to the proper individuals within that agency. However, the Act requires that a request for public information sent by electronic mail be submitted to the officer for public information or that person's designee. *Id.* § 552.301(c). Upon review of the communications, we determine that the e-mails were not sent to the university's public information officer or the officer's designee. *See id.* (stating that a written request includes a request in writing that is sent to the officer for public information, or the person designated by that officer, by e-mail or facsimile). Thus, we find that the requestor's original e-mail communications were not valid requests pursuant to section 552.301(c) and the university did not violate the procedural requirements of section 552.301 of the Government Code by not responding to these e-mail communications. *See generally, id.* § 552.301 (enumerating the responsibilities a governmental body incurs upon receipt of a written request for information that it wishes to withhold). Accordingly, we will address the university's claims against disclosure of the submitted information.

Next, we note some of the information in Tab 5A is subject to section 552.022 of the Government Code, which provides in pertinent part:

(a) Without limiting the amount or kind of information that is public information under this chapter, 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;

...

(2) the name, sex, ethnicity, salary, title, and dates of employment of each employee and officer of a governmental body;

...

(15) information regarded as open to the public under an agency's policies[.]

Gov't Code § 552.022(a)(1), (2), (15). Tab 5A contains a completed investigation report which is subject to section 552.022(a)(1) and compilations of the names, genders, ethnicities, salaries, and dates of employment of university employees; which is subject to section 552.022(a)(2). Tab 5A also contains job descriptions, which are usually open to the public as part of a job posting. If the university regards the submitted job descriptions as open to the public, then the university may withhold this information, along with the

remaining information we have marked subject to sections 552.022(a)(1) and 552.022(a)(2) only to the extent it is made confidential under "other law." *See id.* § 552.022(a)(1). Although you argue these particular documents are excepted from disclosure under sections 552.103 and 552.111 of the Government Code, those sections are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See id.* § 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 Nos. 677 at 10 (2002) (attorney work product privilege under section 552.111 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 470 at 7 (1987) (statutory predecessor to section 552.111 subject to waiver). As such, sections 552.103 and 552.111 are not other law that makes information confidential for the purposes of section 552.022. Therefore, the university may not withhold any of the information subject to section 552.022 under section 552.103 or section 552.111.

However, the Texas Supreme Court has held that the Texas Rules of Civil Procedure are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Because you assert the completed investigation report in Tab 5A is also privileged under rule 192.5 of the Texas Rules of Civil Procedure, we will consider whether the university may withhold this information under rule 192.5.

Information is confidential under Texas Rule of Civil Procedure 192.5 for the purposes of section 552.022 only to the extent that the information implicates the core work product aspect of the work product privilege. *See* ORD 677 at 9-10. Rule 192.5 defines core work product as the work product of an attorney or an attorney's representative, developed in anticipation of litigation or for trial, that contains the mental impressions, opinions, conclusions, or legal theories of the attorney or the attorney's representative. *See* TEX. R. CIV. P. 192.5(a), (b)(1). Accordingly, in order to withhold attorney core work product from disclosure under rule 192.5, a governmental body must demonstrate that the material was (1) created for trial or in anticipation of litigation and (2) consists of the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative. *Id.*

The first prong of the work product test, which requires a governmental body to show that the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate that (1) 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, and (2) the party resisting discovery 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. *See Nat'l Tank v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204. The second part of the work product test requires the governmental body to show that the materials at issue contain the mental impressions, opinions, conclusions, or legal theories of an attorney's or an attorney's

representative. See TEX. R. CIV. P. 192.5(b)(1). A document containing core work product information that meets both parts of the work product test is confidential under rule 192.5, provided that the information does not fall within the scope of the exceptions to the privilege enumerated in rule 192.5(c). See *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You state that the submitted investigation report subject to section 552.022(a)(1) was created by a university employee, in consultation with the university's attorney, in response to an internal grievance filed by the requestor; which caused the university to anticipate litigation. Based on your representations and our review of the information at issue, we find the university may withhold the investigation report in Tab 5A, which we have marked, under Texas Rule of Civil Procedure 192.5.

We will now address your claim for the remaining responsive information not subject to section 552.022. Section 552.103 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 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 was pending or reasonably anticipated on the date that 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). See ORD 551.

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). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See id.* This office has found that a pending complaint filed with the Texas Workforce Commission indicates that litigation is reasonably anticipated. *See, e.g.,* Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982).

In this instance, you state, and provide documentation showing, that the requestor is a university employee who filed a claim of alleged discrimination with the Texas Workforce Commission-Civil Rights Division against the university prior to the date the university received the request for information. Upon review, we determine that the university has established that it reasonably anticipated litigation on the date that it received the request for information. Furthermore, upon review, we conclude the information in Tabs 5A, 5B, 5C, 5D, and 5E relates to the anticipated litigation. *See* ORD 551 at 5 (attorney general will determine whether governmental body has reasonably established that information at issue is related to litigation).

We note, however, that some of the documents that you seek to withhold in Tabs 5C and 5E have been seen by the potential opposing party. If a potential opposing party has seen or had access to information that is related to anticipated litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Moreover, the applicability of section 552.103(a) ends once the litigation has concluded or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982). Therefore, the university may not withhold the information that we have marked for release in Tabs 5C and 5E under section 552.103 of the Government Code. As we have no indication that the remaining information in Tabs 5A, 5B, 5C, 5D, and 5E has been seen or obtained by the opposing party, these documents may be withheld under section 552.103.²

In summary, the information we have marked as subject to 552.022(a)(2) of the Government Code must be released to the requestor. The submitted job descriptions, which we have marked, must also be released pursuant to section 552.022(a)(15) of the Government Code if the university regards this information as open to the public. The university may withhold the investigation report in Tab 5A, which we have marked, under Texas Rule of Civil Procedure 192.5. Except for the information we have marked for release, the university may withhold the remaining information under section 552.103 of the Government Code.

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

²As our ruling is dispositive, we need not address your remaining arguments against disclosure of some of the information in Tab 5A.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/sdk

Ref: ID# 339563

Enc. Submitted documents

c: Requestor
(w/o enclosures)