



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

July 27, 2009

Ms. Neera Chatterjee
Public Information Coordinator
The University of Texas System
201 West Seventh Street
Austin, Texas 78701-2902

OR2009-10325

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# 350211.

The University of Texas of the Permian Basin (the "university") received a request for information pertaining to evaluations of the School of Business faculty from 2003 to 2008, including (1) copies of the annual evaluation materials submitted by the faculty, (2) written evaluations from the dean of the annual evaluation materials submitted by the faculty, and (3) percent merit raise for each faculty member based on the annual evaluation. You state you have released information pertaining to the percent merit raise for each faculty member of the School of Business from 2003 to 2008. You also state you will provide the requestor any information requested that pertains to him. You claim the remaining 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.¹

Initially, we note the requested information may have been the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2009-07860 (2009). In that ruling, this office held the university may withhold the submitted information under section 552.103 of the Government Code, with the exception of the information we marked under section 552.022(a)(1). To the extent any portion of the submitted information was ruled upon in Open Records Letter No. 2009-07860, as we have no indication that the law, facts, and circumstances on which the prior ruling was based have changed, the

¹This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the university to withhold any information that is substantially different from the submitted information. *See* Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

university must continue to rely on Open Records Letter No. 2009-07860 as a previous determination and withhold or release the identical information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). To the extent the submitted information is not encompassed by the previous ruling, we will address the submitted arguments.

Next, we note some of the submitted information is subject to section 552.022 of the Government Code, which provides in relevant part:

the following categories of information are public information and not excepted from required disclosure under [the Act] 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 subject to section 552.022(a)(1). The information that is subject to section 552.022(a)(1) must be released, unless the information is expressly confidential under other law or excepted under section 552.108. You do not claim section 552.108. Although you raise section 552.103 of the Government Code for this information, section 552.103 is a discretionary exception to public disclosure that protects 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 No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 is not "other law" that makes information confidential for the purposes of section 552.022. Therefore, the information subject to section 552.022 that we have marked may not be withheld under section 552.103 and must be released. However, we will consider the university's claim under section 552.103 with respect to the remaining information that is not subject to section 552.022.

Section 552.103 of the Government Code provides:

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

To establish 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. *Id.* 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 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 instance, you inform us the underlying matter involves a dispute concerning the university's decision not to promote the requestor. You state that, prior to the university's receipt of the request, the requestor hired an attorney and met with a law firm concerning his promotion. You also state in a March 12, 2009 e-mail, the requestor requested the "contact information of the individual established to accept service on behalf of [the university]." Additionally, you state the requestor threatened to sue the university on March 24, 2009 and in an e-mail dated March 25, 2009, the requestor stated he intended to file suit against the university and planned on issuing subpoenas in regards to the matter at issue. Based upon your representations and a review of the information at issue, we conclude the university reasonably anticipated litigation on the date that it received this request for information. Further, you explain the information at issue is related to the anticipated litigation because it pertains to the university's promotion of other faculty members. Accordingly, the university may withhold the remaining submitted information under section 552.103 of the Government Code.

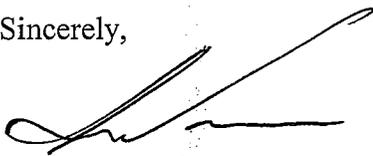
However, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is 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 been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, to the extent any portion of the submitted information was ruled upon in Open Records Letter No. 2009-07860, the university must continue to rely on that ruling as a previous determination and withhold or release the identical information in accordance with that ruling. If the submitted information was not previously ruled upon, the university may withhold the submitted information under section 552.103 of the Government Code, with the exception of the information we have marked for release pursuant to section 552.022 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.

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/eeg

Ref: ID# 350211

Enc. Submitted documents

c: Requestor
(w/o enclosures)