



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 24, 2009

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

OR2009-13495

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# 356380.

The University of Texas at Tyler (the "university") received a request for documents pertaining to the requestor's employment and performance, concerns documented by university employees, and files prepared by the requestor. You state the university will release some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

You acknowledge that much of the submitted information, which we have marked, is the exact same information that was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2009-13229 (2009). In Open Records Letter No. 2009-13229, we acknowledged the university's redaction of student

¹We 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.

information in accordance with the Family Educational Rights and Privacy Act ("FERPA"), and ruled that the university must withhold the information you marked under section 552.101 of the Government Code in conjunction with common-law privacy and section 552.137 of the Government Code. We also ruled the university may withhold the information we marked under section 552.107 of the Government Code. We further ruled, to the extent the employee at issue timely elected under section 552.024 of the Government Code to keep her information confidential, the university must withhold the information you marked under section 552.117 of the Government Code. Finally, we ruled that the remaining information must be released. We have no indication that the law, facts, and circumstances on which the prior ruling was based have changed with respect to most of the submitted information that was the subject of that ruling. However, in Open Records Letter No. 2009-13229, the requestor was not the subject of any of the submitted information. In this instance, the requestor is the subject of the information that we previously held to be subject to section 552.117 of the Government Code. Pursuant to section 552.023, the requestor has a special right of access to information relating to her that would otherwise be confidential by privacy principles. Gov't Code § 552.023(b). Section 552.117 is based on privacy principles. Accordingly, the information concerning the requestor that would otherwise be excepted under section 552.117 may not be withheld from her on that basis. *See id.* We will address the availability of this personal information along with the other submitted information not subject to our prior decision. However, the university must withhold or release the remaining information we marked as subject to Open Records Letter No. 2009-13229 in accordance with that ruling.² *See* Open Records Decision No. 673 (2001) (so long as law, facts, and 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).

We next turn to your arguments against disclosure of the remaining information. 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.

²As our determination is dispositive with respect to the information we marked as subject to the previous ruling, we need not address your arguments against the disclosure of this information. Additionally, as this determination disposes of your claims under section 552.137 of the Government Code, we need not address this exception.

(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 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* Open Records Decision 551 at 4-5 (1990). 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. *Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex. App.—Austin 2002, no pet.); *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.); ORD 551 at 4. A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

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). 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.³ 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).

You assert that after the university chose not to renew the requestor’s contract, she made public remarks that lead the university to believe that litigation was imminent. You further state that given the tenor of the remarks, “the university has reason to anticipate that it will be sued by [the requestor] for alleged gender discrimination and retaliation.” However, you have not provided any information demonstrating that the requestor has taken any concrete

³Among 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) 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).

steps toward litigation. *See* ORD 331. Therefore, we find that the university has failed to meet its burden under section 552.103. Accordingly, the university may not withhold any of the remaining information under section 552.103 of the Government Code.

You assert that one of the submitted e-mails that was not the subject of Open Records Letter No. 2009-13229 is now excepted from disclosure under section 552.107 as privileged attorney-client communication. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.*, meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5).

Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state this e-mail was communicated between an identified university attorney and university administrators. You also state this communication was intended to be confidential, has been kept confidential, and was made in furtherance of the rendition of professional legal services. Accordingly, we agree that the university may withhold this e-mail under section 552.107 of the Government Code.

Some of the remaining information is subject to section 552.101. Section 552.101 of the Government Code exempts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses the doctrine of common-law privacy, which protects information that (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). This office has found some kinds of medical information or information indicating disabilities or specific illnesses to be excepted from required public disclosure under common-law privacy. *See* Open Records Decision No. 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Upon review, we marked some of the remaining information that reveals a disability or a specific illness. We conclude this is highly intimate or embarrassing information of no legitimate public interest. Accordingly, the information we marked is confidential and must be withheld under section 552.101 in conjunction with common-law privacy.

Some of the remaining information may be subject to section 552.117(a)(1) of the Government Code. This section exempts from public disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who timely request that such information be kept confidential under section 552.024. Gov't Code § 552.117(a)(1). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). The university may only withhold information under section 552.117(a)(1) on behalf of employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Accordingly, if the employee whose information we marked timely elected to keep her family member information confidential pursuant to section 552.024, the university must withhold the information we marked under section 552.117(a)(1). However, if the employee at issue did not timely elect under section 552.024, this information must be released.

In summary, the university must withhold or release the information we marked as subject to Open Records Letter No. 2009-13229 in accordance with that ruling. The university may withhold the e-mail that we marked under section 552.107 of the Government Code, and must withhold the information we marked under section 552.101 in conjunction with common-law privacy. Finally, the university must withhold the information we marked under section 552.117 if the employee whose information we marked properly elected to keep her family member information confidential. The remaining information must be released.

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, toll free, at (888) 672-6787.

Sincerely,



Bob Davis
Assistant Attorney General
Open Records Division

RSD/cc

Ref: ID# 356380

Enc. Submitted documents

cc: Requestor
(w/o enclosures)