ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 7, 2011

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

OR2011-00418

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# 405305 (OGC# 133879).

The University of Texas at Austin (the "university") received a request for e-mails sent between six named individuals during a specified time period that concern one of the named individuals. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.[1]

Initially, we note a portion of the submitted information, which we have marked, is not responsive to the instant request for information because it was created after the date the university received the instant request for information. This ruling does not address the

[1]We assume 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 those records contain substantially different types of information than that submitted to this office.

public availability of any information that is not responsive to the request and the university is not required to release such information in response to this request.

Section 552.103 of the Government Code 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 section 552.103(a) 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 the governmental body received the request for information, and (2) the information at issue is related to that litigation. *See 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 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." *See* Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim 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. *See* Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, or when an individual threatened to sue on several occasions and hired an attorney. *See* Open Records Decision Nos. 346 (1982), 288 (1981). On the other hand, this office has determined 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 litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983).

You state the university reasonably anticipated litigation on the date the university received the present requests for information. You state the university received a notice of allegations against a university employee prior to the university's receipt of the requests. You also state, prior to the date the university received the present requests for information, the individual who made the allegations hired an attorney, who states she is "prepared to move forward and seek all legal remedies" on her client's behalf. You also state the information at issue is related to these allegations. Based on your arguments, and the submitted information, we find the university reasonably anticipated litigation on the date of its receipt of these requests. We also find the information at issue is related to the anticipated litigation. Therefore, we find section 552.103 is generally applicable to the information at issue.

We note, the opposing party has seen or had access to portions 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 seeking information relating to the litigation to obtain such information through discovery procedures. *See* ORD 551 at 4-5 (1990). Thus, once the opposing party in anticipated litigation has seen or had access to information that is related to the anticipated litigation, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Accordingly, with the exception of the information the opposing party has seen or had access to, which we have marked, the university may withhold the submitted information under section 552.103 of the Government Code.[2] We note the applicability of section 552.103 ends once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

You claim section 552.101 of the Government Code in conjunction with section 51.971 of the Education Code for the remaining information. Section 552.101 excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that other statutes make confidential. Section 51.971 of the Education Code provides in part:

> (a) In this section:
>
> > (1) "Compliance program" means a process to assess and ensure compliance by the officers and employees of an institution of higher education with applicable laws, rules, regulations, and policies, including matters of:

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[2]As our ruling is dispositive with respect to this information, we need not address your remaining arguments against its disclosure.

(A) ethics and standards of conduct;

(B) financial reporting;

(C) internal accounting controls; or

(D) auditing.

. . .

(e) Information produced in a compliance program investigation the release of which would interfere with an ongoing compliance investigation is excepted from disclosure under [the Act].

Educ. Code § 51.971(a), (e). Section 51.971 defines a compliance program as a process to assess and ensure compliance by officers and employees of an institution of higher education. *Id.* § 51.971(a)(1). You state the remaining information pertains to a complaint and subsequent investigation pertaining to "ethical questions and standards of conduct relating to employees of the university." Based on your representations and our review, we agree the remaining information pertains to the university's compliance program for purposes of section 51.971. *See id.* § 51.971(a). You inform this office the remaining information pertains to an ongoing compliance investigation by the university. You further assert release of the information at this time would interfere with the investigation. Accordingly, we conclude the university must withhold the remaining information under section 552.101 of the Government Code in conjunction with section 51.971(e) of the Education Code.[3]

In summary, with the exception of the information the opposing party has seen or had access to, which we have marked, the university may withhold the submitted information under section 552.103 of the Government Code. The university must withhold the remaining information under section 552.101 of the Government Code in conjunction with section 51.971(e) of the Education 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,

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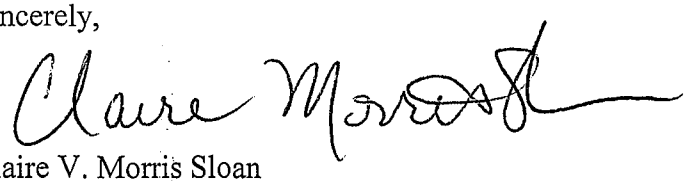
[3]As our ruling is dispositive with respect to the remaining information, we need not address your remaining arguments against its disclosure.

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,



Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/tf

Ref: ID# 405305

Enc. Submitted documents

c: Requestor
(w/o enclosures)