



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 10, 2012

Ms. Cheryl G. Cash
Assistant General Counsel
Texas Southern University
3100 Cleburne Avenue
Houston, Texas 77004

OR2012-02178

Dear Ms. Cash:

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# 445621.

Texas Southern University (the "university") received two requests from the same requestor for several categories of information pertaining to a named professor and the credentials and transcripts for thirty-six other named professors. You state you have no records pertaining to some of the requested categories of information.¹ You claim that the requested information is excepted from disclosure under sections 552.103 and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

¹The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

²We 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.

Initially, you state you have informed the requestor that portions of the requested information are available on the university's website. We note that section 552.228 of the Government Code requires a governmental body to provide a requestor with a "suitable copy" of requested public information. Gov't Code § 552.228(a). We also note that "[a] public information officer does not fulfill his or her duty under the Act by simply referring a requestor to a governmental body's website for requested public information." Open Records Decision No. 682 at 7 (2005). Instead, section 552.221 of the Government Code requires a governmental body "to either provide the information for inspection or duplication in its offices or to send copies of the information by first class United States mail." *Id.*; see Gov't Code § 552.221(b). Thus, the university must provide access to or copies of the responsive information you state is on the university's website to the requestor; however, we note that a requestor may agree to accept information on a governmental body's website in fulfillment of a request for information under the Act. ORD 682 at 7.

Next, we note the submitted information contains information subject to section 552.022(a)(2) of the Government Code, which provides the name, sex, ethnicity, salary, title, and dates of employment of each employee and officer of a governmental body are expressly public under section 552.022 of the Government Code and may not be withheld unless it is made confidential under the Act or other law. See Gov't Code § 552.022(a)(2). Although you assert the submitted information is excepted from disclosure under section 552.103 of the Government Code, that exception is discretionary and does not make information confidential under the Act. 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 Gov't Code § 552.103); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the university may not withhold the name, salary, title, and date of employment information at issue under section 552.103 of the Government Code. We note section 552.117 of the Government Code makes information confidential under the Act for purposes of section 552.022. Therefore, we will consider the applicability of this exception to the information subject to section 552.022, as well as the remaining submitted information.

Next, we address your argument under section 552.103 for the information not subject to section 552.022 of the Government Code. Section 552.103 of the Government Code provides in 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 documentation sufficient to establish the applicability of this exception to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See* Open Records Decision No. 551 at 4 (1990).

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.” *Id.* This office has stated that a pending Equal Employment Opportunity Commission (“EEOC”) complaint indicates that litigation is reasonably anticipated. *See* Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982).

You inform us, and have provided documentation showing, that prior to the date the university received the request, the requestor filed a complaint against the university with the Texas Workforce Commission and the EEOC alleging gender, age, and racial discrimination. Based on your representations and the submitted documentation, we find that the university reasonably anticipated litigation on the date of its receipt of this request for information. We also find that the information at issue is related to the anticipated litigation. We, therefore, conclude that the university may withhold the information not subject to section 552.022 under section 552.103 of the Government Code.³

We note that 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 that litigation to obtain it through discovery procedures. *See* ORD 551 at 4-5. Therefore, if the opposing party has seen or had access to information relating to anticipated litigation through discovery or otherwise, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). We also note that the applicability of section 552.103 ends once the related litigation concludes or is no

³As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government Code.⁴ We note the name, salary, title, and date of employment information subject to section 552.022(a)(2), which we have marked, does not contain the home address and telephone number, emergency contact information, social security number, and family member information of the employee at issue. Accordingly, the information subject to section 552.022(a)(2) may not be withheld under section 552.117(a)(1) of the Government Code.

In summary, the university must release the marked name, salary, title, and date of employment information pursuant to section 552.022(a)(2) of the Government Code. 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.

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,



Sarah Casterline
Assistant Attorney General
Open Records Division

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⁴Although the university cites to section 552.117(a)(2) in its brief, we note section 552.117(a)(1) is the proper subsection to claim, as section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure.

Ref: ID# 445621

Enc. Submitted documents

c: Requestor
(w/o enclosures)