



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 3, 2012

Mr. Mark R. Yzaguirre  
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University of Houston System  
311 East Cullen Building  
Houston, Texas 77204-2028

OR2012-15771

Dear Mr. Yzaguirre:

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# 466769.

The University of Houston (the "university") received a request for (1) the policies, regulations, and practices applicable to the receipt and processing of complaints of discrimination or harassment based on a personal characteristic protected by law; (2) interview notes, communications, and memoranda generated and received by staff of the university's Office of Equal Opportunity Services (the "EOS") pursuant to the formal investigation of a complaint made by a named professor; and (3) documents containing statistical information pertaining to the number, basis, and results of complaints of unlawful discrimination made to the EOS since January 1, 2010 to the date of the request.<sup>1</sup> You state information responsive to items 1 and 3 of the request have been released to the requestor. You claim that the remaining information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

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<sup>1</sup>You state the university sought and received clarification of the information requested. See Gov't Code § 552.222 (if request for information is unclear, governmental body may ask requestor to clarify request); see also *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

Initially, we note the submitted information contains a completed investigation that is subject to section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) provides for required public disclosure of “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[.]” unless the information is made confidential under this chapter or other law or is excepted from disclosure under section 552.108 of the Government Code. Gov’t Code § 552.022(a)(1). Although you raise sections 552.103, 552.107, and 552.111 of the Government Code for this information, these are discretionary exceptions and do 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 section 552.103); *see also* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 470 (1987) (deliberative process privilege under statutory predecessor to section 552.111 subject to waiver). Therefore, the information subject to section 552.022 may not be withheld under sections 552.103, 552.107, or 552.111 of the Government Code. However, the Texas Supreme Court has held the Texas Rules of Evidence are “other law” for the purposes of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will consider the applicability of rule 503 of the Texas Rules of Evidence to the information subject to section 552.022. Additionally, because section 552.137 of the Government Code makes information confidential under the Act, we will address its applicability to the information subject to section 552.022.<sup>2</sup> We will also address your claims for the information not subject to section 552.022.

Rule 503 of the Texas Rules of Evidence enacts the attorney-client privilege. Rule 503(b)(1) provides as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client’s lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer’s representative;

(C) by the client or a representative of the client, or the client’s lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

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<sup>2</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is “confidential” if 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). 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. *See* ORD 676 at 6-7.

Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You state the portions of the investigation contained in Exhibit 5 constitute communications between the university’s Office of General Counsel and the EOS. You state the communications were made in order to provide legal guidance regarding employment matters and decisions related to the professor’s complaint. You further state the communications were intended to be and have remained confidential. Therefore, based on your representations and our review, we conclude the university may withhold the information we have marked in Exhibit 5, as well as the duplicate information contained in Exhibit 2, under rule 503 of the Texas Rules of Evidence.<sup>3</sup>

Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body,” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). Gov’t Code § 552.137(a)-(c). Accordingly, university must withhold the e-mail addresses we have marked under

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<sup>3</sup>As our ruling is dispositive for this information, we need not address your remaining arguments against its disclosure.

section 552.137 of the Government Code, unless the owners of the addresses have affirmatively consented to their release.<sup>4</sup> *See id.* § 552.137(b).

We address your arguments under section 552.103 for the information not subject to section 552.022. Section 552.103 of the Government Code provides, in relevant part:

(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.

*Id.* § 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 applies 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 requested information 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, orig. proceeding); *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 governmental body must meet both parts of this test for information to be excepted under section 552.103(a). *See* ORD 551 at 4.

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To demonstrate litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *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

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<sup>4</sup>Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

threat to sue the governmental body from an attorney for a potential opposing party.<sup>5</sup> 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. 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).

You state the requestor in this instance is an attorney representing the professor at issue. You inform our office the university has denied the professor’s claim of discrimination, and that the requestor and his client are appealing the university’s decision. You contend the university reasonably anticipates litigation because of several statements made by the requestor inferring litigation is the next step. Based on your representations and our review, we find the university reasonably anticipated litigation on the date the request was received. We also find that the remaining information is related to the anticipated litigation. We therefore conclude that section 552.103 is generally applicable to the remaining information in Exhibit 2 and the duplicate information in Exhibit 5.

We note however, 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). Portions of the remaining information at issue consist of communications between the attorney representing the professor and the university. Thus, the opposing party in the anticipated litigation has seen this information. Therefore, this information is not protected by section 552.103 and may not be withheld on that basis. Accordingly, the university may withhold the e-mails we have marked under section 552.103 of the Government Code.<sup>6</sup> We note the applicability of section 552.103(a) also ends once the litigation has been concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). We will address your remaining arguments under sections 552.107 and 552.111 for the information the opposing party has seen.

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<sup>5</sup>In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); 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 threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

<sup>6</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. 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. ORD 676 at 6-7. First, a governmental body must demonstrate 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 Tex. 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). 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 pet.). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain 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 the remaining information at issue consists of communications between the university’s Office of General Counsel and the EOS. However, as previously noted, the information at issue consists of communications between the university and the opposing party to the anticipated litigation. Thus, we find you have failed to demonstrate the applicability of the attorney-client privilege to the remaining information, and the university may not withhold the information under section 552.107(1) of the Government Code.

Section 552.111 of the Government Code excepts from disclosure “[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]” Gov’t Code § 552.111. This exception encompasses the deliberative process privilege. *See Open Records Decision No. 615 at 2 (1993)*. The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); *Open Records Decision No. 538 at 1-2 (1990)*.

In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. See ORD 615 at 5. A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; see also *City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. See Open Records Decision No. 631 at 3 (1995). Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. See ORD 615 at 5. But, if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. See Open Records Decision No. 313 at 3 (1982).

You contend the remaining information consists of internal communications containing advice, opinion, and recommendations regarding the university's policy on addressing allegations of discrimination. However, as previously noted, the remaining information consists of communications with the opposing party to the anticipated litigation. You have not explained how this information constitutes internal advice, recommendations, or opinions regarding policymaking issues. Therefore, the university may not withhold any of the remaining information under section 552.111 of the Government Code.

In summary, the university may withhold the information we have marked in Exhibit 5, and the duplicate information contained in Exhibit 2, under rule 503 of the Texas Rules of Evidence. The university must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners have consented to their release. The university may withhold the information we have marked in Exhibit 2, and the duplicate information contained in Exhibit 5, under section 552.103 of the Government Code. The remaining information must be released.<sup>7</sup>

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<sup>7</sup>We note the information being released contains confidential information to which the requestor has a right of access under section 552.023 of the Government Code. See Gov't Code § 552.023 (person has special right of access to information that is excepted from public disclosure under laws intended to protect person's privacy interest); see also Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when person requests information concerning himself or person for whom he is authorized representative). If the university receives another request for this same information from a requestor other than this requestor or his client, it must again seek a ruling from this office.

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](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,



Kathleen J. Santos  
Assistant Attorney General  
Open Records Division

KJS/eb

Ref: ID# 466769

Enc. Submitted documents

c: Requestor  
(w/o enclosures)