



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 16, 2014

Ms. Ruth E. Shapiro  
Senior Assistant General Counsel  
Office of the General Counsel  
University of Houston System  
311 E. Cullen Building  
Houston, Texas 77204-2028

OR2014-12289

Dear Ms. Shapiro:

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# 529243.

The University of Houston (the "university") received a request for ten categories of information pertaining to a specified incident on a specified date. You state the university released some information to the requestor. You also state the university has no information responsive to a portion of the request.<sup>1</sup> You claim a portion of the submitted information is excepted from disclosure under sections 552.103 and 552.111 of the Government Code.<sup>2</sup> Although the university takes no position with respect to the public availability of the remaining information at issue, you state release of this information may implicate the

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<sup>1</sup>The 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).

<sup>2</sup>Although you also raise section 552.101 of the Government Code in conjunction with Texas Rule of Civil Procedure 192.5, this office has concluded section 552.101 does not encompass discovery privileges. See Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Further, although you raise Texas Rule of Civil Procedure 192.5, we note the proper exception to raise when asserting the attorney work product privilege for information not subject to section 552.022 of the Government Code is section 552.111 of the Government Code. See Open Records Decision No. 677 at 9 (2002).

proprietary interests of Affiliated Engineers, Inc. ("Affiliated"); Fisk Electric Company ("Fisk"); FRC Electrical Services, L.L.C. ("FRC"); and Tron Electric, Inc. ("Tron"). Accordingly, you inform us, and provide documentation showing, you notified these third parties of the request and of their right to submit arguments to this office explaining why their information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances). We have considered the submitted arguments and reviewed the submitted information.

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from any of the interested parties explaining why the submitted information should not be released. Therefore, we have no basis to conclude Affiliated, Fisk, FRC, or Tron has a protected proprietary interest in the information at issue. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of the requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the university may not withhold any of the information at issue on the basis of any proprietary interest these third parties may have in it.

Section 552.103 of the Government Code provides, in relevant part, the following:

(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 claiming section 552.103 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 on the date the governmental body received the request, 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, 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 prongs of this test for information to be excepted under section 552.103(a).

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 that 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 threat to sue the governmental body from an attorney for a potential opposing party.<sup>3</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 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 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 information in Exhibit 2 relates to anticipated litigation by the university. You state the university reasonably anticipates litigation arising out of an accident, which resulted in injury to subcontractors performing work at the university. You inform us the requestor is an attorney for an individual who was involved in the accident. However, you have not demonstrated that the requestor had taken any objective steps toward filing a lawsuit prior to the date the university received the request for information. See Gov't Code § 552.301(e); ORD 331. Thus, we find you have not established the university reasonably anticipated litigation on the date it received the request. Accordingly, the university may not withhold the information at issue under section 552.103 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. Section 552.111 encompasses the attorney work

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<sup>3</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).

product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. Open Records Decision No. 677 at 4-8 (2002); *see City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 377 (Tex. 2000). Rule 192.5 defines work product as

(1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5(a)(1)-(2). A governmental body seeking to withhold information under this exception bears the burden of demonstrating the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. *Id.*; ORD 677 at 6-8. In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied that

a) a reasonable person would have concluded from the totality of the circumstances . . . that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

*Nat'l Tank Co. v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204; ORD 677 at 7.

You claim the information in Exhibit 2 is protected under the attorney work product privilege. Upon review, we find you have failed to establish the information at issue consists of material prepared, mental impressions developed, or a communication made in anticipation of litigation or for trial. Therefore, the university may not withhold the information at issue as attorney work product under section 552.111 of the Government Code.

We note some of the submitted information is subject to section 552.136 of the Government Code.<sup>4</sup> Section 552.136 states "[n]otwithstanding any other provision of [the Act], a credit

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<sup>4</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. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). This office has determined an insurance policy number is an access device number for the purposes of section 552.136. *See* Open Records Decision No. 684 (2009). Therefore, the university must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code.

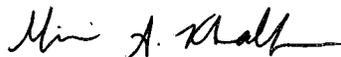
We also note some of the submitted information may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the university must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code. The university must release the remaining information; however, any information protected by copyright may only be released in accordance with copyright law.

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.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml), 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Miriam A. Khalifa  
Assistant Attorney General  
Open Records Division

MAK/tch

Ref: ID# 529243

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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