February 4, 2015

Fernando C. Gomez, J.D., Ph.D.
Vice Chancellor and General Counsel
The Texas State University System
208 East 10th Street, Suite 600
Austin, Texas 78701-2407

OR2015-02208

Dear Dr. Gomez:

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# 552514 (Ref. Nos. 14-0281, 14-0282, 14-0283).

Sam Houston State University (the "university") received three requests from the same requestor for 1) merit pay records, faculty evaluation system scores, and comparative data for faculty members in a specified department for a specified time period; 2) information pertaining to any public information requests made by a named individual; 3) all records pertaining to grievances filed by named individuals during a specified time period; 4) all records pertaining to specified categories of complaints filed by named individuals; 5) documentation from a specified consulting firm pertaining to the search and hiring of a new dean; 6) tenure and/or promotion recommendations for a specified position from the university provost to the university president; and 7) all records pertaining to the tenure and/or promotion applications of specified individuals during a specified time period. You state you do not have information responsive to some categories of the request.[1] You claim the submitted information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code and privileged under Texas Rule of Evidence 503. We have

[1]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 dism'd); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

considered the exceptions you claim and reviewed the submitted representative sample of information.[2]

Initially, you state the university has previously released some of the submitted information in response to prior requests for information. We note the Act does not permit the selective disclosure of information. *See* Gov't Code §§ 552.007(b), .021; Open Records Decision No. 463 at 1-2 (1987). If information has been voluntarily released to any member of the public, then that same information may not subsequently be withheld unless public disclosure of the information is expressly prohibited by law or the information is confidential under law. *See* Gov't Code § 552.007(a); Open Records Decision Nos. 518 at 3 (1989), 490 at 2 (1988); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, the university may not withhold previously released information unless its release is expressly prohibited by law or the information is confidential under law. Although you raise sections 552.103 and 552.107 for the submitted information, these sections are discretionary exceptions and do not make information confidential. *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); Open Records Decision Nos. 676 at 6 (2002) (attorney-client privilege under section 552.107(1) may be waived), 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the university may not withhold any portion of the information that has been previously released under section 552.103 or 552.107. However, we will consider your arguments against disclosure of the information that has not previously been released.

Next, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides, in part:

> (a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:
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> > (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

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[2]We 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.

Gov't Code § 552.022(a)(1). We note the submitted information includes completed evaluations, which we have marked, that are subject to section 552.022(a)(1). Although you seek to withhold the information at issue under sections 552.103 and 552.107 of the Government Code, these sections are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See Dallas Area Rapid Transit*, 4 S.W.3d 469, 475-76 (governmental body may waive Gov't Code § 552.103). *See also* ORDs 676 at 6 (attorney-client privilege under section 552.107 may be waived), 665 at 2 n.5 (discretionary exceptions generally). Thus, the university may not withhold the information at issue under section 552.103 or 552.107 of the Government Code. However, the Texas Supreme Court has held the Texas Rules of Evidence are "other law" that make information expressly confidential for the purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will consider your assertion of the attorney-client privilege under Texas Rule of Evidence 503 for the information at issue. Further, we will consider your arguments for the submitted information not subject to section 552.022.

Texas Rule of Evidence 503(b)(1) provides the following:

> 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:
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> > (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
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> > (B) between the lawyer and the lawyer's representative;
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> > (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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> > (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 it is 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 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 the communication is confidential by explaining it was not intended to be disclosed to third persons and it was made in furtherance of the rendition of professional legal services to the client. *Id.* Upon a demonstration of all three factors, the entire communication 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). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 457 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding) (privilege extends to entire communication, including factual information).

You state the submitted information subject to section 552.022 that you have indicated consists of communications between university employees and attorneys for the Texas State University System, of which the university is a component institution. You state these communications were made for the purpose of facilitating the rendition of professional legal services. You further state these communications have remained confidential. Upon review, however, we find the information at issue consists of communications with parties whom you have not established are privileged parties for purposes of rule 503. Therefore, the university has not demonstrated the information at issue constitutes privileged attorney-client communications for the purposes of Texas Rule of Evidence 503. Thus, the university may not withhold the information at issue on that basis.

Section 552.103 of the Government Code provides, in 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.
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> . . .
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> (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 the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing (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. *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). 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 with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *See* Open Records Decision No. 452 at 4 (1986). 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 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 a pending complaint with the Equal Employment Opportunity Commission (the "EEOC") indicates litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982).

You state, and provide documentation showing, prior to the university's receipt of the instant requests for information, the requestor filed a discrimination claim against the university with the EEOC. You state the remaining information not subject to section 552.022 is directly related to the anticipated litigation. Based on your representations and our review of the information at issue, we find the university reasonably anticipated litigation on the date these requests were received, and the remaining information not subject to section 552.022 of the Government Code relates to the anticipated litigation. Therefore, the university may withhold the remaining information not subject to section 552.022 of the Government Code under section 552.103 of the Government Code.

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing parties in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the university may not withhold any portion of the information that has been previously released under section 552.103 or 552.107 of the Government Code. The university must release the information we have marked under section 552.022(a)(1) 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.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,

Meredith L. Coffman
Assistant Attorney General
Open Records Division

MLC/dls

Ref: ID# 552514

Enc. Submitted documents

c: Requestor
(w/o enclosures)