



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

November 4, 2015

Ms. Audra Gonzalez Welter
Attorney & Public Information Coordinator
Office of General Counsel
The University of Texas System
201 West Seventh Street
Austin, Texas 78701-2902

OR2015-23126

Dear Ms. Welter:

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# 585874 (OGC# 164054).

The University of Texas at El Paso (the "university") received a request for fourteen categories of information, including employment, promotion, and tenure documentation related to the requestor's client, as well as seven other named individuals. You state the university will redact or withhold some of the requested information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.¹ You indicate you will withhold information subject to section 552.117 of the Government Code as permitted by section 552.024(c) of the Government Code and e-mail addresses of members of the public under section 552.137 of the Government Code pursuant

¹The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office FERPA does not permit state and local educational authorities to disclose to this office, without parental or student consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act. The DOE has determined FERPA determinations must be made by the educational authority in possession of the education records. A copy of this letter may be found on the Office of the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

to Open Records Decision No. 684 (2009).² You claim the submitted information is excepted from disclosure under section 552.103 of the Government Code and protected by copyright. We have considered your arguments and reviewed the submitted representative sample of information.³ We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (permitting interested third party to submit to attorney general reasons why requested information should or should not be released).

We note portions of the submitted information are subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108; [and]

...

(15) information regarded as open to the public under an agency's policies[.]

Id. § 552.022(a)(1), (15). Some of the submitted information consists of completed evaluations of a professor, which are subject to section 552.022(a)(1). The university must release this information pursuant to section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code, or is made confidential under the Act or other law. *See id.* § 552.022(a)(1). Additionally, the submitted information includes class syllabi, which are generally open to the public. If the university regards the submitted class syllabi as open to the public, then this information is subject to section 552.022(a)(15),

²Section 552.117 of the Government Code excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body. *See* Gov't Code § 552.117(a)(1). Section 552.024 of the Government Code authorizes a governmental body to withhold information subject to section 552.117 without requesting a decision from this office if the current or former employee or official chooses not to allow public access to the information. *See id.* § 552.024(c). Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain 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.

³We 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 that those records contain substantially different types of information than that submitted to this office.

and the university may only withhold the class syllabi if they are made confidential under the Act or other law. Although the university asserts the information subject to section 552.022 is excepted from disclosure under section 552.103 of the Government Code, this section 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 section 552.103); Open Records Decision No. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions). Therefore, the information subject to section 552.022 of the Government Code may not be withheld under section 552.103 of the Government Code. As you raise no further exceptions for the information subject to section 552.022(a)(1), the university must release the completed evaluations pursuant to section 552.022(a)(1) of the Government Code. Additionally, if the university regards the submitted class syllabi as open to the public, then the university must release the class syllabi under section 552.022(a)(15) of the Government Code. If the university does not regard the class syllabi at issue as open to the public, then we will consider your argument under section 552.103 for that information. Further, we will address your argument under section 552.103 for the remaining information not subject to section 552.022.

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).

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." Open Records Decision No. 452 at 4 (1986). In the context of anticipated litigation in which the governmental body is the prospective plaintiff, the concrete evidence must at least reflect that litigation is "realistically contemplated." See Open Records Decision No. 518 at 5 (1989); see also Attorney General Opinion MW-575 (1982) (finding that investigatory file may be withheld from disclosure if governmental body attorney determines that it should be withheld pursuant to section 552.103 and that litigation is "reasonably likely to result"). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. See ORD 452 at 4.

We note this office has held for purposes of section 552.103, "litigation" includes "contested cases" conducted in a quasi-judicial forum. See Open Records Decision Nos. 474 (1987), 368 (1983), 336 (1982), 301 (1982). In determining whether an administrative proceeding is conducted in a quasi-judicial forum, some of the factors this office considers are whether the administrative proceeding provides for discovery, evidence to be heard, factual questions to be resolved, the making of a record, and whether the proceeding is an adjudicative forum of first jurisdiction with appellate review of the resulting decision without a re-adjudication of fact questions. See Open Records Decision No. 588 (1991).

You argue the submitted information relates to reasonably anticipated litigation. You provide documentation from the requestor in which he states he is representing his client in a matter concerning the university and his client, that the university is to "forward all future communication directly to the [requestor]," and that the requestor will "be submitting a request for review [of the matter at issue] by a hearing tribunal." You further note the requestor references his client's "current situation" and "forthcoming filing." You also state the requestor referred to the matter at hand in a manner similar to the way in which court cases are styled. However, upon review, we find you have failed to demonstrate that a proceeding before the university is a judicial or quasi-judicial forum. Further, you have not demonstrated that the requestor has taken any concrete steps towards filing a lawsuit against the university. Accordingly, we find the information at issue does not relate to reasonably anticipated litigation for the purposes of section 552.103. As such, none of the information at issue may be withheld under section 552.103 of the Government Code.

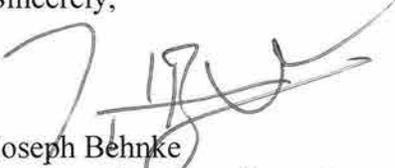
You indicate some of the remaining information may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of 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. As you raise no further exceptions to disclosure, the university must release the submitted 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, 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,



Joseph Behnke
Assistant Attorney General
Open Records Division

JB/som

Ref: ID# 585874

Enc. Submitted documents

c: Requestor
(w/o enclosures)