



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

January 31, 2019

Ms. Linda A. Samples  
Associate General Counsel  
Texas Tech University System  
4801 Alberta Avenue, Suite B-09  
El Paso, Texas 79905

OR2019-02942

Dear Ms. Samples:

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# 748562.

The Texas Tech University Health Sciences Center at El Paso (the "university") received a request for the requestor's time sheets and specified categories of information pertaining to non-faculty employees during a stated period of time.<sup>1</sup> You indicate the university released some information to the requestor. You claim the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered the claimed exception and reviewed the submitted representative sample of information.<sup>2</sup>

Initially, we address your contention that complying with the request will require the university "to generate a report of all employees who were terminated . . . and then search

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<sup>1</sup>You state, and provide documentation demonstrating, the university sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing 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 overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

<sup>2</sup>We 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.

each such employee's file for any records that may be responsive to the request." Although a governmental body is not required to create new information in response to a request, it does have a duty to make a good-faith effort to relate a request for information to information in existence at the time of the request. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); see also Open Records Decision No. 561 at 8–9 (1990). A governmental body may not refuse to comply with a request on the ground of administrative inconvenience. See *Indus. Found v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 687 (Tex. 1976). The university has submitted information that it indicates is responsive to the request. Accordingly, we will address your argument against public disclosure of the submitted information.

Next, we note some of the submitted information is subject to section 552.022 of the Government Code, which 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[.]

Gov't Code § 552.022(a)(1). Some of the submitted information consists of completed evaluations subject to section 552.022(a)(1). This information must be released 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.* Although you assert the information subject to section 552.022(a)(1) 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 No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, none of the information subject to section 552.022(a)(1), which we marked, may be withheld under section 552.103. Accordingly, as no other exceptions to disclosure of the information at issue are raised, the university must release the information we marked pursuant to section 552.022(a)(1) of the Government Code. However, we will consider your argument against disclosure of the remaining information, which is not subject to section 552.022(a)(1).

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.

...

(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 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). See ORD 551.

Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986). To establish that 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." *Id.* This office has stated a pending complaint with the Equal Opportunity Employment Commission ("EEOC") indicates litigation is reasonably anticipated. See Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982), 281 at 1 (1981).

You state, and submit documentation showing, before the university received the instant request for information, the requestor filed a complaint against the university with the EEOC. Upon review, we find you demonstrated litigation was reasonably anticipated when the university received the instant request for information. Our review of the information at issue also shows it is related to the anticipated litigation for purposes of section 552.103(a). Accordingly, we agree the university may withhold the remaining information 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 concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the university must release the information we marked pursuant to 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](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,



James M. Graham  
Assistant Attorney General  
Open Records Division

JMG/gw

Ref: ID# 748562

Enc. Submitted documents

c: Requestor  
(w/o enclosures)