



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 14, 2019

Ms. Ana Vieira Ayala
Assistant General Counsel
The University of Texas System
210 West 7th Street
Austin, Texas 78701-2901

OR2019-12951

Dear Ms. Ayala:

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# 765359 (OGC# 189314).

The University of Texas Southwestern Medical Center (the "university") received a request for four categories of information concerning disciplinary records and specified communications pertaining to a named employee. You state you will release some information to the requestor. You state you do not maintain information responsive to a portion of the request.¹ You claim the submitted information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of the submitted information is 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:

¹The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

(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). You state a portion of the submitted information pertains to closed compliance investigations. This information is subject to section 552.022(a)(1). The university must release the information subject to section 552.022(a)(1), unless it is excepted from disclosure under section 552.108 of the Government Code or expressly made confidential under the Act or other law. *See id.* 552.022(a)(1). Although you raise section 552.103 of the Government Code for the information at issue, this section is a discretionary exception to disclosure 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 Gov't Code § 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, none of the information subject to section 552.022 may be withheld under section 552.103. However, as section 552.101 of the Government Code makes information confidential for purposes of section 552.022, we will address the applicability of this exception to the information subject to 552.022(a)(1). Further, we will consider your arguments under section 552.103 of the Government Code for the information not subject to section 552.022.

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.

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 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.² 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. *See* Open Records Decision No. 331 (1982).

You state, and provide documentation showing, prior to the university’s receipt of the instant request, the requestor filed a charge of discrimination with the Texas Workforce Commission, Civil Rights Division. Thus, you state on the date the university received the request for information, it reasonably anticipated litigation. Based on your representations and our review, we determine the university reasonably anticipated litigation on the date it received the request. You also assert, and we agree, the information at issue relates to the anticipated litigation. Therefore, the university may withhold the information pertaining to the open compliance investigation under section 552.103 of the Government Code.³

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).

We will now address your arguments against disclosure of the information subject to section 552.022(a)(1) of the Government Code. Section 552.101 of the Government Code excepts

²In addition, this office has concluded that 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).

³As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses information protected by other statutes. Section 51.971 of the Education Code provides, in pertinent part, the following:

(a) In this section:

(1) “Compliance program” means a process to assess and ensure compliance by the officers and employees of an institution of higher education with applicable laws, rules, regulations, and policies, including matters of:

(A) ethics and standards of conduct;

(B) financial reporting;

(C) internal accounting controls; or

(D) auditing.

(2) “Institution of higher education” has the meaning assigned by Section 61.003.

...

(c) The following are confidential:

(1) information that directly or indirectly reveals the identity of an individual who made a report to the compliance program office of an institution of higher education, sought guidance from the office, or participated in an investigation conducted under the compliance program; and

(2) information that directly or indirectly reveals the identity of an individual as a person who is alleged to have or may have planned, initiated, or participated in activities that are the subject of a report made to the compliance program office of an institution of higher education if, after completing an investigation, the office determines the report to be unsubstantiated or without merit.

(d) Subsection (c) does not apply to information related to an individual who consents to disclosure of the information.

Educ. Code § 51.971(a), (c)-(d). You state the university is an institution of higher education for purposes of section 61.003 of the Education Code. *See id.* § 51.971(a)(2). You state the information at issue relates to closed internal compliance investigations conducted by the university relating to ethical questions and standards of conduct of a university employee and the allegations were found to be substantiated. You state the investigations were conducted in response to allegations of misconduct and were initiated in order to assess and ensure compliance with all applicable laws, rules, regulations, and policies. Based on your representations, we find this information relates to investigations conducted under the university's compliance program. *See id.* § 51.971(a)(1).

The university seeks to withhold the remaining information, which consists of information pertaining to closed investigations, in its entirety. The university asserts release of the information at issue would directly or indirectly reveal the identities of individuals making reports to or participating in the compliance program investigations. Subsection (c) does not apply to information related to an individual who consents to disclosure of the information. *Id.* § 51.971(d). You inform us none of these individuals at issue consented to release of their information. We note that, because the allegations were substantiated, the identifying information of the individuals alleged to have committed the activities at issue in the investigations is not confidential under section 51.971(c)(2). Upon review, we agree release of portions of the information at issue would directly or indirectly identify individuals as complainants or as participants in the compliance program investigations. *See id.* § 51.971(c)(1). Accordingly, the university must withhold the names of the individuals who served as complainants or participants in the closed compliance program investigations under section 552.101 of the Government Code in conjunction with section 51.971(c)(1) of the Education Code. However, we find the university failed to demonstrate release of the remaining information would directly or indirectly identify individuals as complainants or as participants in the investigations. Thus, the university may not withhold the remaining information under section 552.101 in conjunction with section 51.971(c).

In summary, the university may withhold the information pertaining to the open compliance investigation under section 552.103 of the Government Code. In the information subject to section 552.022(a)(1) of the Government Code, the university must withhold the names of the individuals who served as complainants or participants in the closed compliance program investigations under section 552.101 of the Government Code in conjunction with section 51.971(c)(1) of the Education Code. The university must release the remaining information.

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,



Lecelle Clarke
Attorney
Open Records Division

LC/gw

Ref: ID# 765359

Enc. Submitted documents

c: Requestor
(w/o enclosures)