



May 4, 2000

Mr. Joe De Los Santos
Walsh, Anderson, Brown, Schulze
and Aldridge, P.C.
Renaissance Plaza, Suite 800
70 N.E. Loop 410
San Antonio, Texas 78216

OR2000-1740

Dear Mr. Santos:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 134764.

The Del Valle Independent School District (the “district”), which you represent, received a request for six items of documents relating to allegations of violations of the Educator’s Code of Ethics by certain named district employees. You state that the documents relating to item 6 of the request may be accessed via the district’s website. You contend that the remainder of the requested 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 that the submitted documents contain information that falls within the purview of section 552.022(a)(2) of the Government Code. Section 552.022(a)(2) states that the “name, sex, ethnicity, salary, title, and dates of employment of each employee and officer of a governmental body” are not excepted from public disclosure unless they are expressly made confidential under other law. Section 552.103 is a discretionary exception and is not “other law” for the purposes of section 552.022(a)(2).¹ We have marked the information that is not excepted from public disclosure under section 552.022(a)(2). This information must be released to the requestor.

¹Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.,* Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 592 at 8 (1991) (governmental body may waive section 552.104, information relating to competition or bidding), 549 at 6 (1990) (governmental body may waive informer’s privilege), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions therefore do not constitute “other law” that makes information confidential.

Furthermore, we note that the submitted documents contain information that falls under section 552.022(a)(3) of the Government Code. Section 552.022(a)(3) states in pertinent parts that information in ... a contract relating to the receipt or expenditure of public or other funds by a governmental body is not excepted from public disclosure unless they are expressly made confidential under other law. As noted above, section 552.103 is not “other law” for the purposes of section 552.022. We have marked the information that is not excepted from public disclosure under section 552.022(a)(3). This information must be released to the requestor.

Next, you assert that section 552.103 of the Government Code excepts from disclosure the requested information. Section 552.103(a) reads as follows:

(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.

A governmental body has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. The test for establishing that section 552.103(a) applies is a two-prong showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin, 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref’d n.r.e.); Open Records Decision No. 588 (1991).

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.” Open Records Decision No. 452 at 4 (1986). Contested cases conducted under the Administrative Procedure Act, chapter 2001 of the Government Code, are considered litigation under section 552.103 of the Government Code. Whether litigation is reasonably anticipated, must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

You state that the State Board for Educator Certification (the “board”) brought action against certain named district employees before the State Office of Administrative Hearings. You explain that the administrative law judge dismissed the action without prejudice and submitted the order which states the judge’s “understanding that the State Board for Educator Certification, as of this date, would likely refile a petition sometime in the future.” In your letter to this office, dated March 16, 2000, you demonstrate that the board has asserted its intention to refile its petition with the State Office of Administrative Hearings as a contested case under the Administrative Procedure Act. Therefore, we conclude that you have demonstrated that litigation is reasonably anticipated.

You contend that the submitted documents relate to the anticipated litigation and, therefore, are excepted from public disclosure under section 552.103(a) of the Government Code. We conclude, based on our review of the submitted documents, that the information does relate to the anticipated litigation. Consequently, the district may withhold most of the documents pursuant to section 552.103(a) of the Government Code. ²

However, we find that certain documents contain information which relate to the district's school board of trustees' meetings. Pursuant to section 551.001(3)(E) of the Government Code, a school district board of trustees is a governmental body that is subject to the Open Meetings Act. *See* Gov't Code § 551.001(3)(E). Section 551.002 of the Government Code expressly provides that "[t]he minutes and tape recordings of an open meeting are public records and shall be available for public inspection and copying on request to the governmental body's chief administrative officer or the officer's designee." The documents at issue represent minutes of open meetings, and, therefore, must be made available to the requestor. When a statute expressly makes information public and mandates the release of the information, that information cannot be withheld from disclosure under one of the exceptions in Subchapter C of chapter 552 of the Government Code. Open Records Decision No. 451 (1986) (specific statute that affirmatively requires release of information at issue prevails over litigation exception of Public Information Act). Additionally, we note that these minutes contain internal memoranda of the Del Valle school administrators. If these memoranda were part of the school district's board of trustees' meetings agenda and made public at an open meeting, then, these memoranda are not excepted from public disclosure under section 552.103 and must be released with the school district's board of trustees' meetings minutes. Otherwise, you may withhold them under section 552.103. We have marked the documents of the meetings that must be released.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days.

²As we resolve this matter under section 552.103, we need not address the other exception you have raised. We caution, however, that some of the information may be confidential by law or may implicate the proprietary interest of a third party. Therefore, if the district receives a request in the future, at a time when litigation is no longer reasonably anticipated or pending, the district should seek a ruling from this office on the other exception raised before releasing any of the requested information. *See* Gov't Code § 552.352 (distribution of confidential information may constitute criminal offense).

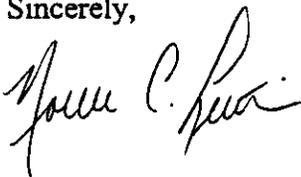
Id. § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Noelle C. Letteri
Assistant Attorney General
Open Records Division

ncl/nc

Ref: ID# 134764

Encl. Submitted documents

cc: Mr. Jack Stamps
State Board of Educator Certification
Investigation & Enforcement
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(w/o enclosures)