



May 24, 2000

Mr. Frank Rey Gonzales
Escamilla & Poneck, Inc.
603 Navarro Street
San Antonio, Texas 78205-1826

OR2000-2052

Dear Mr. Gonzales:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 135921.

The Mercedes Independent School District (the “district”), which you represent, received a request for “a copy of the Superintendent affidavit and any other documents the Mercedes ISD will be submitting at the Level III Grievance on March 21, 2000 regarding [a named person].” You claim that 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, you contend that some of the information must be withheld pursuant to a common law right of privacy under section 552.101. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Section 552.101 encompasses common law privacy and excepts from disclosure private facts about an individual. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Therefore, information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 at 1 (1992). The court addressed the applicability of the common law privacy doctrine to files of an investigation of allegations of sexual harassment in *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied).

In this case, however, the requestor represents the victim, and the information does not implicate the privacy interests of any other individuals, so withholding the information from this requestor serves no purpose. In addition, section 552.023 (a) provides:

(a) A person or a person's authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to that person and that is protected from public disclosure by laws intended to protect that person's privacy interests.

Therefore, none of the submitted information may be withheld from this requestor under section 552.101. We caution the district to seek another determination from this office if asked for this information from another requestor.

You also contend that the requested information may be withheld under section 552.103 of the Government Code. Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state or a political subdivision is or may be a party. The governmental body 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, 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, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The district must meet both prongs of this test for information to be excepted under section 552.103(a).

The mere chance of litigation will not trigger section 552.103(a). Open Records Decision No. 452 at 4 (1986). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986). You inform this office that an Equal Employment Opportunity Commission ("EEOC") investigation is currently pending. This office has stated that a pending EEOC complaint indicates that litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982). Based on your arguments and the information before us, we conclude that you have shown that litigation is reasonably anticipated. Furthermore, we find that the requested information relates to the anticipated litigation. Thus, you may withhold pursuant to section 552.103(a) the requested information which we do not specifically direct you to release below.

However, this office has held that 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 and such information must be disclosed. Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, you must release to the requestor all documents to which the potential opposing party or her attorney has already had access, including all correspondence to or from the potential opposing party or her attorney. In this instance, most of the submitted documents have apparently been delivered to the potential opposing party and may not now be withheld.

Specifically, you must release all of the packet labeled "2," except for the cover page. You must release all of the packet labeled "3," except for the cover page and the home telephone numbers and personal cellular telephone numbers, if any, listed on the final page of that packet, of any of those employees who elected not to allow public access to those numbers under section 552.024 of the Government Code. *See* Gov't Code § 552.117. You must release all of the packet labeled "4," except the cover page and possibly two social security numbers appearing on one page. You must redact under section 552.117 the social security number of any employee who elected not to allow public access to the number under section 552.024.¹ You must release all of the packet labeled "5," except for the cover page. Only the packet labeled "1" is left to discuss.

The packet labeled "1" contains information which may be withheld pursuant to section 552.103, which we have marked. It also contains information to which the potential opposing party or her attorney have apparently already had access, which may not be withheld under section 552.103. We have marked that information for release.

In addition, section 552.103 does not protect from required disclosure information which is specifically made public by section 552.022 of the Government Code. You submitted several documents titled "Employee Standards of Conduct." Section 552.022 sets forth the categories of public information and provides in pertinent part that:

(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 under this chapter unless they are expressly confidential under other law:

...

(8) a statement of the general course and method by which an agency's functions are channeled and determined, including the nature and requirements of all formal and informal policies and procedures;

(9) a rule of procedure, a description of forms available or the places at which forms may be obtained, and instructions relating to the scope and content of all papers, reports, or examinations;

¹We additionally note that a social security number is excepted from required public disclosure under section 552.101 of the Government Code in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), *if it was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990. See* Open Records Decision No. 622 (1994). It is not apparent to us that the social security numbers contained in the records at issue were obtained or are maintained by the district pursuant to any provision of law enacted on or after October 1, 1990. We caution the district, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing the social security numbers, the city should ensure that these numbers were not obtained or are maintained by the city pursuant to any provision of law enacted on or after October 1, 1990.

(10) a substantive rule of general applicability adopted or issued by an agency as authorized by law, and a statement of general policy or interpretation of general applicability formulated and adopted by an agency; [and]

(13) a policy statement or interpretation that has been adopted or issued by an agency[.]

Section 552.103 is a discretionary exception and is not “other law” for the purposes of section 552.022(a).² We conclude that the district’s “Employee Standards of Conduct” is included in the above categories of section 552.022 and, therefore, must be released as public information.

Because we find that the district must release most of the information as having already been available to the potential opposing party and therefore not excepted from required disclosure under section 552.103, we do not discuss the availability of some of the submitted records as minutes of open meetings. *See* Gov’t Code §§ 551.001(3)(E) (providing that school district board of trustees is governmental body subject to Open Meetings Act), 551.022 (providing that minutes and tape recordings of open meeting are public records and shall be available for public inspection and copying on request to governmental body’s chief administrative officer or officer’s designee). We further note that the applicability of section 552.103(a) ends once the litigation concludes.³ Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

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

²Discretionary 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.

³Again, we caution that some of the information may be confidential by law. Therefore, if the district receives a request from another requestor, the district should seek a ruling from this office before releasing any potentially confidential information. *See* Gov’t Code § 552.352 (distribution of confidential information may constitute criminal offense). Information which the district knows to be available for public inspection, such as minutes of open meetings and published district policies, must be released promptly. *See* Open Records Decision No. 664 (2000).

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. *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,



Patricia Michels Anderson
Assistant Attorney General
Open Records Division

PMA/pr

Ref: ID# 135921

Encl. Submitted documents

cc: Mr. Jose Guerrero
Montalvo & Ramirez
900 North Main
McAllen, Texas 78501
(w/o enclosures)