



June 19, 2000

Mr. Edward W. Dunbar
Dunbar, Armendariz, Crowley & Hegeman, L.L.P.
4726 Transmountain Drive
El Paso, Texas 79924

OR2000-2343

Dear Mr. Dunbar:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 136280.

The El Paso Community College District (the "district") received a request for information, as follows:

1. Dr. Dominguez's and Nancy Nelson's official appointment calendars for 1998 and 1999.
2. All records, including all e-mails, regarding the consideration of a college procedure or policy whereby the new internal auditor is only allowed to examine those college activities specifically identified and directed by the auditor's direct supervisor.
3. All records, including all e-mails, indicating the position(s), duties, responsibilities, and pay for Dr. Truelock during 2000.

You have provided for our review information that is responsive to the request.¹ You claim that the requested information is excepted from disclosure under the “litigation exception,” section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

In relevant part, 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).

As to the first prong, litigation must be pending or reasonably anticipated on the date that the information is requested. Gov’t Code § 552.103(c). In this instance, we agree that you have demonstrated that, on the date that the request at issue was received by the district, litigation was pending in the case of *Mathew Babick, Jr. v. El Paso Community College District, and William Campion*, No. 99-3824 in the 346th Judicial District Court of El Paso County, Texas. As to the second prong, we believe that you have made the requisite showing that the requested information relates to litigation for purposes of section 552.103(a). Except as

¹You do not indicate whether you have released any responsive information to the requestor. You have submitted a “representative sample,” as well as enclosures numbered 1 through 12. Enclosures 1 and 2 consist of information that is responsive to an earlier request of this requestor (the request that you refer to as “Babick 8”). This information was addressed in Open Records Letter No. 2000-1628 (2000), a decision which you have asked this office to re-examine. We have assigned your re-examination request as ID# 136719, and we have accordingly associated enclosures 1 and 2 with the file for ID# 136719. The information in enclosures 1 and 2 is therefore not addressed in this decision. Enclosures 3, 4, and 5 appear to consist of information that is responsive to items 1 and 3 of the present request, and we herein address this information. Enclosures 6 through 12 do not appear to contain responsive information. We assume that enclosures 6 through 12 were submitted to this office as additional information in support of the exception you assert. The “representative sample” contains responsive information, consisting of twelve pages from one or more calendars, and a portion of an audit. We thus assume the representative sample is responsive to items 1 and 2 of the present request. To the extent that the information you have submitted comprises representative samples rather than the entirety of the responsive information that you seek to withhold, we note that we assume that 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.

noted below, we accordingly determine that the requested records may be withheld from public disclosure pursuant to section 552.103.

We note that if the opposing party in the litigation has seen or had access to any of the information in these records, there is no section 552.103(a) interest in withholding that information from the requestor. Open Records Decision Nos. 349 (1982), 320 (1982). We have no indication that the requestor has seen or had access to the information you have submitted. We additionally note that information that has previously been released to a member of the public may not now be withheld under section 552.103. See Gov't Code § 552.007(b); Open Records Decision No. 463 at 1-2 (1987) (prohibiting the selective disclosure of information that has been released to the public). We have marked with green flags certain documents in enclosure 5 that appear to have been previously released to the public. Also, we find that the audit contained in the submitted representative sample may not be withheld pursuant to section 552.103. In pertinent part, section 552.022(a)(1) of the Government Code provides that unless confidential under other law, "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body" is not excepted from required public disclosure. See Gov't Code § 552.022(a)(1). Because section 552.103 does not constitute other law that makes confidential the information at issue, we conclude the audit must be released to the requestor.

As to the information that is excepted from disclosure under section 552.103, we caution that the applicability of section 552.103(a) ends once the litigation concludes. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). However, we also note that the records contain information that is confidential by law. You must not release such information even at the conclusion of the litigation. Gov't Code §§ 552.101, .352. Thus, if you receive another request for the information at issue after the litigation concludes, you should again ask this office for a decision.

In summary, you may withhold most of the information pursuant to section 552.103, and as provided above. You must release the information that we have marked with green flags if this information has already been made available to the public. You must also release the completed audit.

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. *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

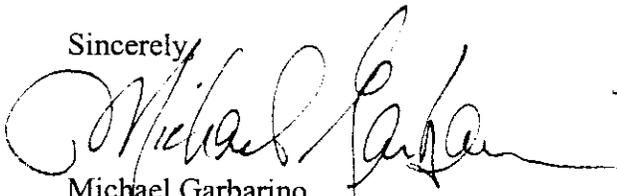
have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

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,



Michael Garbarino
Assistant Attorney General
Open Records Division

MG/ljp

Ref: ID# 136280

Encl. Submitted documents

cc: Mr. Matt Babick
P.O. Box 9776
El Paso, Texas 79995
(w/o enclosures)