



July 18, 2000

Mr. Edward R. Smith, Jr.
Special Assistant to Superintendent
Chief, Intergovernmental Relations Department
Dallas Independent School District
3700 Ross Avenue, Box 74
Dallas, Texas 75204-5491

OR2000-2697

Dear Mr. Smith:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 137730.

The Dallas Independent School District (the "district") received requests for all information relating to Bid Package #345 in the 1992 Facilities Bond Program including change requests, cost estimates, plans, payment records for all professional services, legal department opinions and directions regarding contracts, a list of all contractors, sub-contractors, and suppliers and complaints or information regarding fraud or theft. The requestor also asked for information concerning specified employees and any fraud, theft or other ethics complaints regarding district employees and relationships with contractors. Further, the requestor asked for investigation reports regarding the contracts for Bid Package #345 and the sub-contractor's complaints regarding the contractor. The requestor also made a request for all district claims against any contractor or vendor, any and all contracts between the district and any contractor that was breached or terminated, and any complaints by any contractors against the district. You state that you will release to the requestor the information which is not subject to this request. You claim that the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the representative samples of information.¹

¹In reaching our conclusion here, 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.

First, we note that you claim that legal review and opinions are excepted under section 552.107. However, you have not labeled the specific information that you claim is protected by section 552.107. *See* Gov't Code § 552.301(e)(2) (governmental body must label the specific information to indicate which exceptions apply to which parts of the document). After reviewing the submitted information, we have not found any documents that reflect the legal opinion of the district's attorney. *See* Gov't Code § 552.301(e)(1)(D) (governmental body must submit a copy of the specific information requested or a representative sample). Thus, you have not demonstrated that the submitted information is excepted from disclosure under section 552.107.

You also assert that the submitted information is excepted from disclosure under section 552.108 of the Government Code. Generally, a governmental body claiming an exception under section 552.108 must reasonably explain, if the information does not supply the explanation on its face, how and why the release of the requested information would interfere with law enforcement. *See* Gov't Code §§ 552.108(a), (b), .301(b)(1); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). Section 552.108 applies to information held by a law enforcement agency or prosecutor. The district does not qualify as a law enforcement agency. However, you assert that the Federal Bureau of Investigations and the United States Attorney are currently investigating allegations of fraud, conspiracy and theft within the district. Further, you claim that any documents that the district may have would be subject to that investigation. *See, e.g.,* Open Records Decision Nos. 474 (1987), 372 (1983) (where incident involving allegedly criminal conduct is still under active investigation or prosecution, section 552.108 may be invoked by any proper custodian of information which relates to incident); *see also* Open Records Decision No. 586 (1991) (need of another governmental body to withhold requested information may provide compelling reason for nondisclosure under section 552.108). You assert that release of the submitted information would interfere with the detection, investigation and prosecution of any crimes that may exist. Although you indicate that a federal investigation is pending, you have not represented that the federal authorities requested that the submitted information be withheld. Further, you do not indicate that the submitted information will be given to the federal authorities but rather state that the documents *would* be subject to the federal investigation. After reviewing your arguments and the submitted information, we conclude that you have not demonstrated that release of the submitted information would interfere with the detection, investigation, or prosecution of crime. Thus, you may not withhold the submitted information under section 552.108.

Further, you assert that the requested information is excepted from disclosure under section 552.103 of the Government Code. Section 552.103(a) provides 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). Further, litigation must be pending or reasonably anticipated on the date the requestor applies to the public information officer for access. Gov't Code § 552.103(c).

You have submitted an original petition in a suit filed by Associated Contract Engineers and Scientists, Inc. ("ACES") against the district and the project manager for the 1992 Facilities Bond Program (the "program"). You explain that ACES was hired as a contractor for the program and has asserted several claims against the district including breach of contract and fraud regarding the program. After reviewing your arguments, we conclude that the district is involved in pending litigation and the submitted information relates to the pending litigation. Therefore, you may withhold the submitted information under section 552.103.

However, 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). After reviewing the information, we find that a large portion of the documents have been seen by the opposing party. The submitted information contains information that ACES submitted to the district, as well as a letter from ACES's attorney and letters which reflect that ACES received a copy of the letter. We have marked the types of information that we believe ACES has seen or had access to which may not be withheld under section 552.103. We note 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, if 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.

Further, a large portion of the submitted documents must be released pursuant to section 552.022 of the Government Code. Section 552.022 provides in pertinent part:

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:

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;

...

(17) information that is also contained in a public court record; and

(18) a settlement agreement to which a governmental body is a party.

Section 552.103 is a discretionary exception under the Public Information Act and is, therefore, not other law that makes the submitted information confidential. *See* Open Records Decision No. 551 (1990) (statutory predecessor to section 552.103 serves only to protect a governmental body's position in litigation and does not itself make information confidential). The submitted information contains bid proposal contracts as well as accounts that reflect the expenditure of public funds and must be released under section 552.022(a)(3). Further, the submitted information contains an original petition filed with a court which must be released pursuant to section 552.022(a)(17). We also note that the submitted information contains settlement agreements. To the extent that the documents are final settlement agreements between the district and another party, you must release these documents which are public information under section 552.022(a)(18). We have marked the types of documents that the district must release under section 552.022(a).

In conclusion, we find that the submitted information may not be withheld under sections 552.107 and 552.108. However, we conclude that you may withhold information under section 552.103, except for the information to which ACES has had prior access or which falls under the categories in section 552.022(a).

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

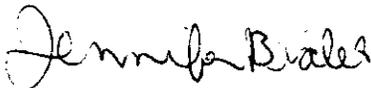
full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit 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,



Jennifer Bialek
Assistant Attorney General
Open Records Division

JHB\nc

Ref: ID# 137730

Encl: Marked documents

cc: Mr. Philip Timmons
615 D East Abram Street, # 349
Arlington, Texas 76010
(w/o enclosures)