Office of the Attorney General · State of Texas
John Cornyn

May 21, 2001

Mr. David Anderson
General Counsel
Texas Education Agency
1701 North Congress Avenue
Austin, Texas 78701-1494

OR2001-2086

Dear Mr. Anderson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 147477.

The Texas Education Agency (the "TEA") received a request for a copy of the tape of a meeting held on February 27 with Defensive Driver Online ("DDO") also known as TexasDefensiveDriving.net. You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code. You ask whether the information must be withheld pursuant to section 552.110 of the Government Code. We have considered the asserted exceptions and reviewed the submitted information.

You assert that section 552.103 of the Government Code excepts from disclosure the requested information. Section 552.103 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.
>
> (b) For purposes of this section, the state or a political subdivision is considered to be a party to litigation of a criminal nature until the applicable

> statute of limitations has expired or until the defendant has exhausted all appellate and postconviction remedies in state and federal court.
>
> (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.

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). TEA must meet both prongs of this test for information to be excepted under 552.103(a). Contested cases conducted under the Administrative Procedure Act, chapter 2001 of the Government Code, are considered litigation under section 552.103. Open Records Decision No. 588 at 7 (1991).

In support of section 552.103, you state only that DDO and another third party "are facing sanctions based on violations of the law and rules relating to driver training." Section 552.103 requires concrete evidence that litigation may ensue. To demonstrate that litigation is reasonably anticipated, TEA must furnish evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 at 5 (1989). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986). In this instance, based on the limited information provided this office, we do not believe that you have established that litigation is pending or reasonably anticipated. Thus, you may not withhold the requested information under section 552.103.

Since the property rights of a third party may be implicated by the release of the requested information, your office notified DDO of the request in accordance with section 552.305 of the Government Code. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances). Section 552.110 protects the property interests of third parties by excepting from disclosure two types of information: (1) trade secrets, and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. You did not take a position as to whether the release of the requested information would impact DDO's proprietary interest. DDO did not respond to your notice and did not provide this

office with any arguments against disclosure. Therefore, we have no basis to conclude that the requested information is excepted from disclosure by section 552.110. *See* Open Records Decision Nos. 639 at 4 (1996) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure), 552 at 5 (1990) (party must establish prima facie case that information is trade secret), 542 at 3 (1990). In summary, you must release the requested information.

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).

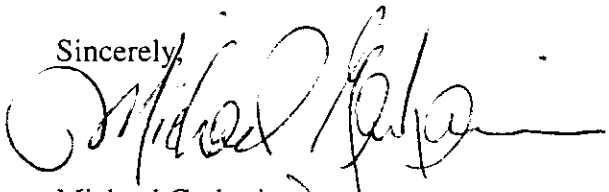
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be

sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

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/LM/seg

Ref: ID# 147477

Encl. Submitted documents

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