



October 9, 2001

Mr. S. Anthony Safi  
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Attorneys And Counselors At Law  
P.O. Box 1977  
El Paso, Texas 79950-1977

OR2001-4557

Dear Mr. Safi:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 152993.

The El Paso Independent School District (the "district"), which you represent, received a request for 1) materials, correspondence, and position statements from Jobe Concrete regarding two items on the school board's July 10, 2001, agenda and 2) materials, correspondence, position statements, and any proposed contracts from a law firm pertaining to the same two agenda items. The district has released or will release request item 1. You claim that information responsive to item 2 is excepted from disclosure under sections 552.103, 552.104, 552.107 and 552.111 of the Government Code. We have considered the exception you claim and reviewed the submitted information. We have also considered the requestor's comments. Gov't Code § 552.304.

To show that section 552.103(a) is applicable, the district must demonstrate 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, 481 (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). Section 552.103 applies only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information. Gov't Code § 552.103(c). Section 552.103 requires concrete evidence that litigation may ensue. To demonstrate that litigation is reasonably anticipated, the department 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).

The district explains that as a result of the Environmental Protection Agency's finding of elevated levels of lead and arsenic in the soil samples of the district's school sites, the district's Board of Trustees has had discussions with a law firm concerning the possibility of retaining the firm to represent the district in potential environmental contamination litigation. The law firm already represents clients in pending litigation against various entities at issue here. The July 10, 2001 agenda contains two items regarding discussion of retaining the law firm for potential litigation arising from possible contamination of the district's sites. We conclude that the district reasonably anticipated litigation on July 19, 2001, the date the district received the request for information. We additionally find that the submitted correspondence and drafts of a retention agreement for attorney services relate to the reasonably anticipated litigation for purposes of section 552.103(a). *Texas Legal Found.*, 958 S.W.2d at 483. The submitted information may, therefore, be withheld 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). In addition, the applicability of section 552.103(a) ends once the litigation concludes. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). Based on this finding, we need not address your other arguments.

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,



Yen-Ha Le  
Assistant Attorney General  
Open Records Division

YHL/er

Ref: ID# 152993

Enc: Submitted documents

c: Ms. Nicole Jarman  
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(w/o enclosures)