



November 20, 2001

Ms. Nancy Nelson  
Associate Vice-President  
Employee Relations  
El Paso Community College  
P.O. Box 20500  
El Paso, Texas 79998-0500

OR2001-5381

Dear Ms. Nelson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 155130.

The El Paso Community College (the "college") received a written request from a college employee for the following categories of information:

- I All of my class-room evaluation performance documents.
- II List of the part-time faculty (math faculty) and their resumes, and their college transcripts (who taught classes during the spring, summer, and fall 2001) for VV campus, MDP campus only.
- III Applications, resumes, and the college transcripts for the finalists for the mathematics position that was processed this spring (April 2001).

You contend that the requested information is excepted from required public disclosure pursuant to section 552.103 of the Government Code.

We note at the outset that you did not submit to our office copies of the requestor's evaluation documents. Section 552.301 of the Government Code dictates the procedure that a governmental body must follow when it seeks a decision from the attorney general as to whether requested information falls within an exception to disclosure. Among other requirements, the governmental body must submit to this office within fifteen business days of receipt of an information request "a copy of the *specific* information requested, or . . .

representative samples of the information if a voluminous amount of information was requested.” Gov’t Code § 552.301(e)(1)(D) (emphasis added). Otherwise, the requested information “is presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information.” Gov’t Code § 552.302.

Because you did not submit to this office a copy of the performance evaluations, we have no basis on which to conclude that there exists a compelling reason for withholding the requested information. Consequently, we have no choice but to conclude that the requested evaluations are presumed to be public under section 552.302 and therefore must be released to the requestor. If you believe the information is confidential and may not lawfully be released, you must challenge the ruling in court as outlined below.

We next note that some of the information before us is specifically made public under section 552.022 of the Government Code. Section 552.022(a) provides in pertinent part:

(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:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108; [and]
- (2) the name, sex, ethnicity, salary, title, and dates of employment of each employee and officer of a governmental body[.]

Among the documents at issue are a document entitled “Initial Candidate Evaluation Scoring Record” and two documents containing lists of part-time math instructors. This information, which you seek to withhold pursuant to section 552.103, is specifically made public under subsections (a)(1) and (a)(2), respectively, of section 552.022(a). Our office has previously concluded that section 552.103 is a discretionary exception that does not make information confidential. *See* Open Records Decision No. 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body’s position in litigation, and does not itself make information confidential). Accordingly, the college may not withhold the “Initial Candidate Evaluation Scoring Record” or the list of part-time math instructors under section 552.103 of the Government Code; this information must be released. We have marked these documents accordingly.

We now address the applicability of section 552.103 of the Government Code to the remaining information you submitted to this office. Section 552.103 of the Government Code is commonly referred to as the “litigation exception.” Under section 552.103(a) and (c), the governmental body raising this exception must demonstrate that (1) litigation

involving the governmental body was pending or reasonably anticipated at the time of the records request, and (2) the information at issue is related to that litigation. *See also 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103.

In this instance, you have demonstrated that the information at issue relates to litigation against the college that was pending on the date of the request. We therefore conclude that the college may withhold most of the submitted information at this time pursuant to section 552.103 of the Government Code. 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.<sup>1</sup> Open Records Decision Nos. 349 (1982), 320 (1982). The requested information includes information that the college either obtained from or has previously provided to the opposing party which must be released. Otherwise, the college may withhold the remaining information from disclosure under section 552.103, except as discussed above.

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

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<sup>1</sup> 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).

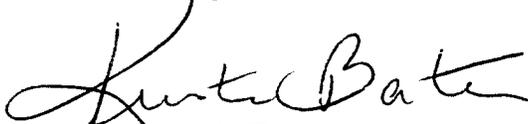
body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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); *Tex. Dep't of Pub. 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 Texas Building and Procurement 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,



Kristen A. Bates  
Assistant Attorney General  
Open Records Division

KAB/RWP/sdk

Ref: ID# 155130

Enc: Submitted documents

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(w/o enclosures)