OFFICE OF THE ATTORNEY GENERAL · STATE OF TEXAS
JOHN CORNYN

December 11, 2001

Ms. Melody G. Thomas
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OR2001-5791

Dear Ms. Thomas:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 156072.

The Port Arthur Independent School District (the "school district") received requests for the school district's consolidation plan submitted to the United States Department of Justice (the "Department of Justice") as well as correspondence from the Department of Justice regarding the proposed consolidation plan. You claim that a responsive proposed settlement agreement and proposed consent decree are excepted from disclosure under sections 551.071 and 552.103 of the Government Code.[1] We have considered the exceptions you claim and reviewed the submitted information.

We first address your apparent contention that the submitted information is excepted from public disclosure under section 551.071 of the Government Code. Section 551.071 provides:

> A governmental body may not conduct a private consultation with its attorney except:
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> > (1) when the governmental body seeks the advice of its attorney about:
> >
> > > (A) pending or contemplated litigation; or
> > >
> > > (B) a settlement offer; or

[1]Because you seek to withhold only a portion of the requested information, we assume you have released the remainder of the requested information to the appropriate requestors. If you have not released the remainder of the requested information, you must do so now. Gov't Code §§ 552.021, .221, .301, .302.

> (2) on a matter in which the duty of the attorney to the governmental body under the Texas Disciplinary Rules of Professional Conduct of the State Bar of Texas clearly conflicts with this chapter.

Thus, as you correctly indicate, the school district may discuss pending or contemplated litigation or settlement offers in closed meetings. *See id.* However, records held by a governmental body are not made confidential merely because they can be discussed during a closed meeting. Open Records Decision Nos. 605 (1992), 485 (1987). Thus, the submitted information is not confidential simply because the school district could discuss it in a closed meeting.

You also claim that the submitted information is excepted from disclosure under section 552.103 of the Government Code. Section 552.103 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.
>
> . . . .
>
> (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.

The school district has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. 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). The school district must meet both prongs of this test for information to be excepted under 552.103(a).

You indicate that the school district is currently involved in litigation with the Department of Justice. You further indicate that the submitted information is a proposed settlement sent by the Department of Justice to the school district. Therefore, we agree that the submitted information relates to pending litigation. However, section 552.103 does not apply to information that has been obtained by all parties to the litigation through discovery or

otherwise. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, the submitted information is not excepted from disclosure under section 552.103(a), and it must be disclosed.

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).

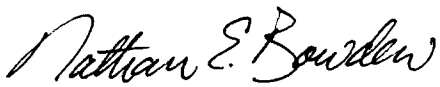
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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); *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,



Nathan E. Bowden
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NEB/sdk

Ref: ID# 156072

Enc. Submitted documents

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