



August 13, 2002

Ms. Angelica E. Rodriguez-Barrera
McKinney & Rodriguez-Barrera
P.O. Box 2747
Corpus Christi, Texas 78403-2747

OR2002-4447

Dear Ms. Rodriguez-Barrera:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 166989.

The Robstown Independent School District (the "district"), which you represent, received a written request for, among other things, "copies of reports and/or results of any air quality or mold tests that have been conducted at any of the campuses in [the district]." You have submitted to this office as responsive to the request information detailing a claim for mold and water damage losses to district property, including a "Limited Indoor Microbial Assessment" and a "Mold Remediation and Reconstruction Estimate" (the "reports"). You contend that the submitted information is excepted from public disclosure pursuant to section 552.103 of the Government Code. We assume the district has released the other requested information, to the extent it exists. If the district has not done so, it must do so at this time. *See Gov't Code §§ 552.301, .302.*

We note at the outset that you state that some of the submitted records "were not in existence" on the date the district received the current records request. It is well established that the Public Information Act applies only to information already transcribed into tangible form; consequently, a governmental body is not required to comply with a standing request for information to be collected or prepared in the future. *See Attorney General Opinion JM-48 (1983).* This ruling does not reach and therefore does not require the release of any of the submitted records that the district did not maintain on the date of the district's receipt of the current records request.

We next note that the two reports you submitted to this office as being responsive to the request are specifically made public under section 552.022 of the Government Code. Section 552.022(a) provides in pertinent part as follows:

(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. [Emphasis added.]

The submitted reports constitute “completed reports” made public under section 552.022(a)(1). Therefore, the district may withhold these two records only if they are made confidential under other law or are excepted from disclosure under section 552.108 of the Government Code. Although you argue that the submitted records are excepted under section 552.103 of the Government Code, this provision is a discretionary exception and therefore is not “other law” for purposes of section 552.022. *See, e.g.,* Open Records Decision Nos. 665 at 2 n.5 (2000) (governmental body may waive section 552.103). Accordingly, we conclude that the district must release the submitted reports in their entirety, with the following exceptions.

We note that some of the records contained in the “Limited Indoor Microbial Assessment” contain an individual’s e-mail address. Section 552.137 of the Government Code makes certain e-mail addresses confidential and provides in relevant part:

- (a) An e-mail address *of a member of the public* that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release. [Emphasis added.]

It does not appear to this office that the individual whose e-mail address appears in the “Limited Indoor Microbial Assessment” has affirmatively authorized the district to release the e-mail address. Accordingly, section 552.137 of the Government Code requires the district to withhold the e-mail address unless the individual who provided the e-mail address has affirmatively consented to its release.

We now address you section 552.103 claim for the remaining submitted information. You state that the district has submitted some of the information at issue to the district’s insurance company in connection with a “Notice of Loss.” You inform us that the purpose of the notice of loss

was to make a claim under the insurance policy for mold and water damage loses [sic] within the School District, and to pursue these matters into

litigation if necessary. . . . It is very rare that this magnitude of a claim would resolve itself completely out side [sic] a courtroom. As of today's date, it is clear that certain issues, such as roof damage, would have to be litigated. As of today's date, there have been numerous experts conducting mold and air testing with the School District, and visiting each specific location of loss claimed by the District. . . . The amount of these loses [sic] . . . exceeds ten million dollars (\$10,000,000).

We infer from these representations that the district anticipates bringing litigation against its insurance carrier if the carrier refuses the district's claim.

Section 552.103 of the Government Code is referred to as the "litigation exception." To secure the protection of section 552.103, a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation to which the governmental body is a party. Open Records Decision No. 588 (1991). Additionally, the governmental body must demonstrate that the litigation was pending or reasonably anticipated as of the day it received the records request. Gov't Code § 552.103(c). The mere chance of litigation will not trigger section 552.103(a). Open Records Decision No. 452 at 4 (1986). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.*

In this instance, however, we need not determine whether the district has demonstrated the applicability of section 552.103. Even assuming *arguendo* that such is the case, once information has been obtained by all parties to the litigation, either through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Consequently, because the district's insurance carrier, as the potential opposing party in the litigation, has already been provided these records, there is no justification for now withholding such information from the requestor pursuant to section 552.103(a). Accordingly, we conclude that the records that the district provided its insurance carrier in connection with its notice of loss are not excepted from public disclosure under section 552.103 and therefore must be released to the requestor in their entirety, except for the e-mail addresses we have marked 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 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 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Maverick F. Fisher
Assistant Attorney General
Open Records Division

MFF/RWP/sdk

Ref: ID# 166989

Enc: Submitted documents

c: Mr. Juan Perales
320 West Avenue J
Robstown, Texas 78380
(w/o enclosures)