



September 4, 2002

Mr. Pruett Moore, III  
Constant & Vela  
1570 Frost Bank Plaza  
Corpus Christi, Texas 78470

OR2002-4956

Dear Mr. Moore:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 168042.

The San Benito Consolidated Independent School District (the “district”), which you represent, received a request for several categories of documents regarding the construction, repairs, maintenance, the Energy Retrofit/Thermal Storage Project, the environmental control servicing contract, mold, moisture, and the mold remediation project concerning a specified elementary school, including all correspondence between the school board and ten different companies. You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.<sup>1</sup>

Initially, we note that portions of the submitted information are made expressly public under section 552.022 of the Government Code. Section 552.022 provides, in relevant 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:

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<sup>1</sup>We assume that the “representative sample” of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). Here, we do not address any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

....

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(1) and (3). Under section 552.022, such information must be released unless it is expressly confidential under other law. Although you argue that the submitted information is excepted under section 552.103 of the Government Code, section 552.103 is a discretionary exception and therefore is not "other law" for the purposes of section 552.022.<sup>2</sup> Therefore, you may not withhold the information we have marked under section 552.103.

However, some of this information is copyrighted. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

We further note that portions of the submitted information include the agenda and notices of public meetings of the district. The minutes, tape recordings, notices, and agendas of a governmental body's public meetings are specifically made public by statute, see Gov't Code 551.022 (minutes and tape recordings), 551.043 (notice), and therefore may not be withheld from the public pursuant to section 552.103 of the Government Code. Information specifically made public by statute may not be withheld from the public under any of the Public Information Act's exceptions to public disclosure. *See, e.g.,* Open Records Decision Nos. 544 (1990), 378 (1983), 161 (1977), 146 (1976). Accordingly, the district must release the marked agenda and notices.

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<sup>2</sup>Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.,* Open Records Decision No. 665 at 2 n.5 (2000) (governmental body may waive litigation exception, section 552.103). Discretionary exceptions therefore do not constitute "other law" that makes information confidential.

In regard to the remaining information you have marked as excepted from disclosure under section 552.103 of the Government Code, we will now address your claim. Section 552.103 provides in part:

(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 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. *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). Further, the litigation must be pending or reasonably anticipated on the date that the governmental body receives the request for information. See Gov't Code § 552.103(c). The district must meet both prongs of this test for information to be excepted under 552.103(a).

In this case, you assert that Cause No. 2001-08-3707-C was pending at the time the district received the request for information. In support of your assertion, you have provided this office a copy of the current pleadings which were filed prior to the district receiving the instant request for information. After reviewing your representations and the submitted information, we find that you have demonstrated that the submitted information is related to litigation that was pending at the time the district received the request for information.

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. You state that most of the requested information has been provided to the requestor through discovery in the pending litigation. Therefore, you may not withhold this information under

section 552.103 as it has been provided to the opposing party in the pending litigation. However, you may withhold the remaining information under section 552.103. Furthermore, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Finally, you have marked some of the submitted information as excepted under section 552.107 of the Government Code. Section 552.107(1) protects information coming within the attorney-client privilege. In instances where an attorney represents a governmental entity, the attorney-client privilege protects only an attorney's legal advice and the client's confidences made to the attorney. *See* Open Records Decision No. 574 (1990). Accordingly, these two classes of information are the only information contained in the records at issue that may be withheld pursuant to the attorney-client privilege. We agree that the information you have marked reflects an attorney's legal advice. The district may therefore withhold this information under section 552.107 of the Government Code.

In summary, we conclude that: 1) you must release the information we have marked pursuant to section 552.022(a)(1) and (3) in compliance with copyright law; 2) you must release the marked agenda and notices of the district's open meetings; 3) you may withhold the remaining information that has not already been provided to the requestor under section 552.103; and 4) you may withhold the information you have marked under section 552.107.

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,



W. Montgomery Meitler  
Assistant Attorney General  
Open Records Division

WMM/sdk

Ref: ID# 168042

Enc: Submitted documents

c: Mr. John W. Getsinger  
Leonard, Street and Deinard  
150 South Fifth Street, Suite 2300  
Minneapolis, Minnesota 55402  
(w/o enclosures)