



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

March 12, 2003

Ms. Chris G. Elizalde
Walsh, Anderson, Brown, Schulze & Aldridge, P.C.
P.O. Box 2156
Austin, Texas 78768

OR2003-1649

Dear Ms. Elizalde:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 177772.

The Austin Independent School District (the "district"), which you represent, received a request for information relating to the district's Early Childhood program, a specified district campus, a specified petition, and information relating to the requestor, a district teacher. 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.¹ We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

As a preliminary matter, the requestor contends that the district failed to comply with section 552.301 of the Government Code in requesting a decision from this office. Under section 552.301(b), a governmental body receiving a request for information that it wishes to withhold pursuant to an exception to disclosure must ask for an attorney general's decision within ten business days of receiving the request. Gov't Code § 552.301(b). The district received the present request on December 10, 2002. You advise that the district's offices

¹ 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). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

were closed from December 20, 2002, through January 6, 2003. We received the district's request for a decision on January 6, 2003. Accordingly, we find that the district timely complied with section 552.301(b).

Under section 552.301(d), a governmental body must provide the requestor with a written statement that the governmental body has asked for a decision from the attorney general, and a copy of the governmental body's written communication to the attorney general, within ten business days of receiving a request. Gov't Code § 552.301(d)(1), (2). The requestor states, and the submitted documents reflect, that the district sent notice that the district was seeking a decision from this office to the requestor's attorney on January 6, 2003. We determine that notice sent to the requestor's attorney satisfies the notice requirement of section 552.301(d). *See Preston Farm & Ranch Supply, Inc., v. Bio-Zyme Enters.*, 625 S.W.2d 295, 300 (Tex. 1981) (notice to agent of matters over which agent has authority is deemed notice to principal); *Allied Resources Corp. v. Mo-Vac Serv. Co., Inc.*, 871 S.W.2d 773, 778 (Tex.App.—Corpus Christi 1994, writ denied) (notice to attorney, acquired during existence of attorney-client relationship, is imputed to client). *Cf.* Tex. R. Civ. P. 21a (notice required by Texas Rules of Civil Procedure, and every pleading, plea, motion, or other form of request required to be served under Rule 21, may be served by delivering a copy to the party to be served, or the party's duly authorized agent or attorney of record).

The requestor also states that the district did not provide the requestor with information provided to this office pursuant to section 552.301(e). Section 552.301(e) describes information that a governmental body requesting a decision from the attorney general must provide to this office within fifteen business days of receiving a request for information. Gov't Code § 552.301(e) (governmental body must submit to attorney general written comments stating reasons why claimed exceptions would allow information to be withheld, copy of written request for information, signed statement as to date on which written request for information was received, and copy or representative samples of specific information requested, within fifteen business days of receiving request). Section 552.301(e) does not require a governmental body to provide this information to a requestor. Based on our review of the information provided, we determine that the district timely complied with the procedural requirements of section 552.301 in requesting a decision from this office.

Next, we note that the submitted information includes a document that is subject to required public disclosure under section 552.022 of the Government Code, which provides in relevant part:

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[.]

The submitted documents include a completed district police report. Therefore, as prescribed by section 552.022, the district must release this report unless it is excepted from disclosure under section 552.108 or confidential under other law. You do not raise section 552.108 as an exception to disclosure. Section 552.103 of the Government Code is a discretionary exception to disclosure that protects the governmental body's interests and is therefore not other law that makes information expressly confidential for purposes of section 552.022(a). *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103). Therefore, the district may not withhold the report we have marked pursuant to section 552.103 of the Government Code.

Next, we address whether the remaining information is excepted from disclosure under section 552.103. Section 552.103 of the Government Code 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.

A governmental body 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 was pending or reasonably anticipated on the date the governmental body received the request for information, 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). A governmental body must meet both prongs of this test for information to be excepted under 552.103(a).

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.* Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

You have submitted information to this office showing that the requestor has filed a complaint with the Equal Employment Opportunity Commission ("EEOC") alleging discrimination and retaliation. This office has stated that a pending EEOC complaint indicates litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982). By showing that the complaint filed with the EEOC is pending, you have shown that litigation is reasonably anticipated. Our review of the records at issue also shows that they are related to anticipated litigation for purposes of section 552.103(a). Thus, we agree that section 552.103 is generally applicable to the remaining records.

We note, however, that once information has been obtained by all parties to 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).² Thus, information that has either been obtained from or provided to all opposing parties in the anticipated litigation is generally not excepted from disclosure under section 552.103(a) and must be disclosed. In this case, it is clear that many of the submitted documents have been seen or obtained by the requestor. This information is not excepted from disclosure under section 552.103.

In summary, the district must release the completed report we have marked pursuant to section 552.022(a)(1) of the Government Code. With the exception of information already seen by the requestor, the remainder of the submitted information may be withheld under section 552.103 of the Government Code.

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

² We also note that the applicability of section 552.103(a) ends when the anticipated litigation has concluded or is no longer anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

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 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. 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,



David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 177772

Enc: Submitted documents

c: Ms. Mary Shepard
2610 Albata Avenue
Austin, Texas 78757
(w/o enclosures)