



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 8, 2003

Mr. David J. Labrec
Strasburger
901 Main Street, Suite 4300
Dallas, Texas 75202-3794

OR2003-5557

Dear Mr. LaBrec:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 185654.

The Cedar Hill Independent School District (the "district"), which you represent, received a written request for four categories of information pertaining to the district's superintendent and a bond election from 2001. You contend that the requested information is exempted from required disclosure pursuant to section 552.103 of the Government Code.

We first address the district's obligations under section 552.301 of the Government Code. Subsections 552.301(a) and (b) of the Public Information Act (the "Act") provide:

(a) A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the [Act's] exceptions . . . must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions.

(b) The governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request.

Further, section 552.301(e) provides that a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the

information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents.

You state that the district received the records request on March 24, 2003. Therefore, the district had until ten business days following its receipt of that request to request a decision from this office regarding the requested information, and until fifteen business days following its receipt of that request to submit the items of information required to be submitted to this office under section 552.301(e) of the Government Code. After speaking with a representative of this office regarding a complaint from the requestor, you asked for a decision on June 4, 2003 as to whether the information at issue is excepted from disclosure. However, you state that in withholding the requested information, the district relied on "previous determinations" of this office on requests for opinions that the district determined were substantially similar to the present request.

We note that there are two types of previous determinations that may exist under section 552.301(a). The first type of previous determination requires that all of the following criteria be met:

1. the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D) of the Government Code;
2. the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general;
3. the attorney general's prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Act; and
4. the law, facts, and circumstances on which the prior attorney general ruling was based have not changed since the issuance of the ruling.

Open Records Decision No. 673 at 6-7 (2001). "This first instance of a previous determination does not apply to records that are substantially similar to records previously submitted to this office for review, nor does it apply to information that may fall within the same category as any given records on which this office has previously ruled." *Id.* at 6. The second type of previous determination requires that all of the following criteria be met:

1. the requested records or information at issue fall within a specific, clearly delineated category of information about which this office has previously rendered a decision;

2. the previous decision is applicable to the particular governmental body or type of governmental body from which the information is requested;¹
3. the previous decision concludes that the specific, clearly delineated category of information is or is not excepted from disclosure under the Act;
4. the elements of law, fact, and circumstances are met to support the previous decision's conclusion that the requested records or information at issue is or is not excepted from required disclosure; and²
5. the previous decision explicitly provides that the governmental body or bodies to which the decision applies may withhold the information without the necessity of again seeking a decision from this office.

Id. at 7-8. "Absent all of the above criteria for one of the two types of previous determinations, a governmental body must ask for a decision from this office if it wishes to withhold from the public information that is requested under the Act." *Id.* at 8. In this instance, neither type of previous determination exists that is applicable to the information at issue. Thus, your reliance on prior rulings issued by this office was misplaced and does not negate the fact that the district failed to comply with section 552.301 in requesting this decision from us. *See* Gov't Code §§ 552.021, .301, .302; *see also* Open Records Decision No. 511 (1988) (attorney for governmental body may not unilaterally decide to withhold information under litigation exception without requesting decision from attorney general).

¹ Previous determinations of the second type can apply to all governmental bodies if the decision so provides. *See, e.g.*, Open Records Decision No. 670 (2001) (concluding that all governmental bodies subject to the Act may withhold information that is subject to section 552.117(2) of Government Code without necessity of seeking decision from this office). The second type of previous determination can also apply to all governmental bodies of a certain type. *See, e.g.*, Open Records Decision No. 634 (1995) (applying to any governmental body that meets the definition of "educational agency or institution" as defined in federal Family Educational Rights and Privacy Act, *see* 20 U.S.C. § 1232g(a)(3)). On the other hand, if the decision is addressed to a particular governmental body and does not explicitly provide that it also applies to other governmental bodies or to all governmental bodies of a certain type, then only the particular governmental body to which the decision is addressed may rely on the decision as a previous determination. *See, e.g.*, Open Records Decision No. 662 (1999) (constituting the second type of previous determination but only with respect to information held by Texas Department of Health).

² Thus, in addition to the law remaining unchanged, the facts and circumstances must also have remained unchanged to the extent necessary for all of the requisite elements to be met. As with the first type of previous determination, a governmental body seeking to withhold requested information must make an initial finding that it in good faith reasonably believes the information is excepted from disclosure. With respect to previous determinations of the second type, a governmental body should request a decision from this office if it is unclear to the governmental body whether all of the elements on which the previous decision were based have been met with respect to the requested records or information.

Pursuant to section 552.302, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). Normally, a compelling reason for non-disclosure exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977).

As noted above, you contend that the submitted records are excepted from disclosure pursuant to section 552.103 of the Government Code. Section 552.103 is a discretionary exception to disclosure that protects the governmental body's interests and therefore does not constitute a compelling reason to withhold information. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.); Open Records Decision No. 542 at 4 (1990) (governmental body may waive litigation exception). Thus, none of the submitted documents may be withheld on the basis of section 552.103. Consequently, the district may withhold those records only to the extent they are made confidential under other law. After reviewing the submitted records, we conclude that none of the information contained therein is made confidential by other law. We therefore conclude that the district must release the requested information in its entirety.

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

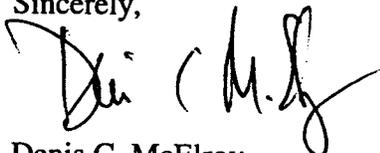
will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure 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 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,



Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/RWP/sdk

Ref: ID# 185654

Enc: Submitted documents

c: Mr. Phillip Bielamowicz
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Cedar Hill, Texas 75104
(w/o enclosures)