ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 6, 2005

Mr. Jeffrey A. Davis
McGinnis, Lochridge & Kilgore, L.L.P.
3200 One Houston Center
1221 McKinney Street
Houston, Texas 77010

OR2005-05957

Dear Mr. Davis:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 227502.

The Spring Branch Independent School District (the "district"), which you represent, received a request for information relating to the "disclosure of information about [the requestor] to Fort Bend ISD concerning activities while working with HVAC Consultants employed by [the district] during 2004." 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 information.

Initially, we note that the submitted documents contain certain information that must be released under section 552.022(a) of the Government Code. Section 552.022(a) 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:

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

Gov't Code § 552.022(a)(1). You state that the district's Professional Standards Department conducted an investigation into the district's relationships with a named contractor and the contractor's employees. You also inform us that the Professional Standards Department completed a report concerning this investigation. You have submitted a portion of this completed report for our review. As prescribed by section 552.022, the district must release this portion of the completed report unless it is excepted from disclosure under section 552.108 or expressly confidential under other law. You claim that the submitted information may be withheld under section 552.103. As section 552.103 is a discretionary exception, it is not "other law" for purposes of section 552.022. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 663 (1999) (governmental body may waive section 552.103), 522 at 4 (1989) (discretionary exceptions in general). Therefore, this portion of the completed report must be released to the requestor.

We note, however, that we are unable to determine whether some of the remaining submitted information was specifically compiled as part of the district's investigation. Therefore, to the extent that any of the remaining information was compiled as part of the district's investigation, it must be released under section 552.022(a)(1) of the Government Code. To the extent that any of the remaining information was not compiled as part of the investigation, we will address your arguments for withholding this information under section 552.103 of the Government Code.

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.

Gov't Code § 552.103(a), (c). 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 when the request for information was received, 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 district must meet both prongs of this test for information to be excepted under section 552.103(a).

In order to establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

You inform us, and provide documentation showing, that the district is involved in a contract dispute with a consulting firm employed by the district. You also state that the consulting firm, through its attorney, has threatened litigation over this contract dispute. Further, you state that the submitted information consists of documents related to issues involving the contract dispute and the anticipated litigation. Based on your representations, and our review of the submitted information, we agree that you have shown litigation was reasonably anticipated when the district received the request for information. In addition, we find that the remaining submitted information is related to the anticipated litigation for purposes of section 552.103(a). Therefore, to the extent that the remaining submitted information was not compiled as part of the completed investigation, the district may withhold it under section 552.103.

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 all opposing parties in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, 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).

In summary, you must release the documents we have marked under section 552.022(a)(1) of the Government Code. To the extent that any of the remaining submitted information was compiled as part of the district's investigation, it must be released under section 552.022(a)(1) of the Government Code. To the extent that any of the remaining information

was not compiled as part of the investigation, the district may withhold it under section 552.103 of the Government Code.[1]

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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).

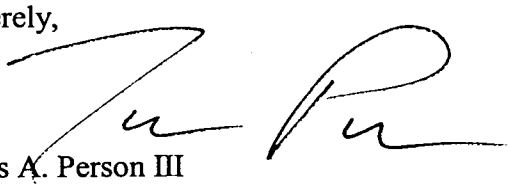
Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

---

[1]We note, however, that some of the submitted information may be confidential by law and must not be released even after litigation has concluded. If you receive a subsequent request for the information, you should seek another ruling from this office at that time. Gov't Code § 552.352 (distribution of confidential information is criminal offense).

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,



James A. Person III
Assistant Attorney General
Open Records Division

JAP/sdk

Ref: ID# 227502

Enc. Submitted documents

c: Mr. William F. Steber
522 Land Grant Drive
Richmond, Texas 77469
(w/o enclosures)