



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 9, 2006

Mr. Ricardo Lopez
Feldman & Rogers, L.L.P.
517 Soledad Street
San Antonio, Texas 78205

OR2006-01359

Dear Mr. Lopez:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code, the Public Information Act (the "Act"). Your request was assigned ID# 242155.

The North East Independent School District (the "district"), which you represent, received a request for, among other things, "the names of all school employees interrogated or questioned by school personnel or [district] representatives, concerning [a specified lawsuit]... Also the names of the [district] representatives conducting the interrogations and questioning, and all written or electronically recorded notes, records or memoranda concerning such." The district claims that the requested information is excepted from disclosure under section 552.103 of the Government Code and "the attorney-client and/or work product privileges."¹ We have considered the exception you claim.

We initially note that the request for information includes a series of questions. The district has not addressed this aspect of the request in asking for this decision. The Act does not require a governmental body that receives a request for information to answer factual questions, conduct legal research, or create new information. *See Economic Opportunities Dev. Corp. of San Antonio v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); *see also* Attorney General Opinion H-90 (1973); Open Records Decision Nos. 572 at 1 (1990), 555 at 1-2 (1990), 452 at 2-3 (1986), 416 at 5 (1984), 342 at 3 (1982), 87 (1975). Likewise, the Act does not require a governmental body to take affirmative steps to create or obtain information that is not in its possession, so long as no other individual or entity holds that information on behalf of the governmental body that received the request. *See* Gov't Code § 552.002(a); Open Records Decision Nos. 534 at 2-3 (1989), 518 at 3

¹The attorney-client and work product privileges are encompassed by sections 552.107 and 552.111 of the Government Code, respectively.

(1989). However, a governmental body must make a good-faith effort to relate a request to information that is within the governmental body's possession or control. *See* Open Records Decision No. 561 at 8-9 (1990). We assume that the district has made a good-faith effort to relate the requestor's questions to responsive information and that you have released such information, if any. If not, then you must do so at this time. *See* Gov't Code §§ 552.301, .302; Open Records Decision No. 664 (2000).

Next, we address your assertions about the existence of any responsive information. The district states that it "does not currently have or maintain any documents that are responsive to [the instant request]." As discussed above, it is implicit in several provisions of the Act that the Act applies only to information already in existence. *See* Gov't Code §§ 552.002, .021, .227, .351. However, a governmental body must make a good-faith effort to relate a request to information which it holds or to which it has access. *See* Open Records Decision Nos. 563 at 8 (1990), 561 at 8-9 (1990), 555 at 1-2 (1990), 534 at 2-3 (1989). You state that "any notes or other documents prepared by any attorneys representing [the district] are in the possession of the attorneys, not the district, and are therefore not subject to [the instant request]." We disagree. This office has previously and consistently held that records held by a private attorney employed by a governmental body that relate to legal services performed at the request of the governmental body are subject to disclosure under the Act. Open Records Decision No. 499 (1988); *see also* Open Records Decision Nos. 585 (1991), 462 (1987), and 437 (1986). Accordingly, any responsive information that is in the possession of attorneys representing the district is subject to the instant request and therefore subject to disclosure under the Act.

Section 552.301(e) of the Government Code provides that a governmental body that requests an attorney general decision under section 552.301(a) must, within a reasonable time, but not later than the fifteenth business day after the date of receiving the written request, submit to the attorney general, among other items, a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the information. *See* Gov't Code § 552.301(e). To date, the district has not provided us with any of the requested information, including responsive information held by attorneys for the district. Therefore, we find that the district failed to comply with the procedural requirements of section 552.301 of the Government Code in requesting this decision from us.

Because the district failed to comply with the procedural requirements of section 552.301 in requesting this decision from us, the information at issue is now presumed public. *See* Gov't Code § 552.302; *see also* *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.—Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.—Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). The district must demonstrate a compelling interest in order to overcome the presumption that the information at issue is now public. Normally, a compelling interest is demonstrated when some other source of law makes the information at issue confidential or third party

interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). Although the district claims that the information at issue is excepted from disclosure pursuant to section 552.103 of the Government Code and “the attorney-client and/or work product privileges,” we note that these exceptions to disclosure are discretionary exceptions to disclosure under the Act that may be waived by a governmental body. *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. 676 at 11-12 (2002) (claim of attorney-client privilege under section 552.107 or Texas Rule of Evidence 503 does not provide compelling reason for purposes of section 552.302 if it does not implicate third party rights), 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body’s position in litigation and does not itself make information confidential), 473 (1987) (governmental body may waive section 552.111), 522 at 4 (1989) (discretionary exceptions in general). Thus, in this case, the applicability of section 552.103 or the attorney-client or work product privileges is not a compelling reason to overcome the presumption of openness. Furthermore, although the district states that some of the requested information is excepted under the attorney-client and work product privileges, we have no basis for concluding that it is so excepted because the district failed to submit the information for our review. Consequently, the district must release the information at issue to the requestor.

However, we caution that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. *See* Gov’t Code § 552.352. Prior to releasing the information at issue, the district should ensure that it does not contain any such confidential information. If the district believes that any portion of the information at issue is indeed confidential and may not lawfully be released, it must challenge this ruling in court as outlined below.

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).

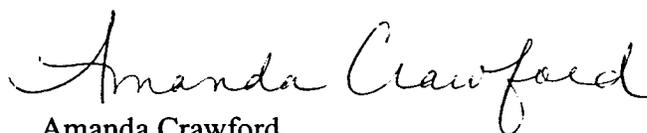
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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 Office of the Attorney General 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. 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,



Amanda Crawford
Assistant Attorney General
Open Records Division

AEC/segh

Ref: ID# 242155

c: Mr. RG Griffing
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