



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 27, 2006

Ms. Merri Schneider-Vogel
Bracewell & Giuliani, L.L.P.
711 Louisiana Street, Suite 2300
Houston, Texas 77002-2770

OR2006-13876

Dear Ms. Schneider-Vogel:

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# 265493.

The North Harris County Community College District (the "district"), which you represent, received a request for all documents related to the requestor's employment with the district. You state that the district will release some information to the requestor, including the submitted e-mails to or from the requestor. You claim that the submitted information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code and Rule 503 of the Texas Rules of Evidence and Rule 1.05 of the Texas Disciplinary Rules of Professional Conduct.¹ We have considered your arguments and reviewed the submitted information.

Initially, we note that some of the information you seek to withhold was created after the district's receipt of the instant request for information. Because this information was created after the district's receipt of the request, it is not encompassed by the request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San

¹The district asserts that some the submitted information is protected under section 552.101 of the Government Code in conjunction with Texas Rule of Disciplinary Conduct 1.05 and the attorney-client privilege pursuant to Texas Rule of Evidence 503. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. It does not encompass these rules because they are not constitutional law, statutory law, or judicial decisions. Open Records Decision No. 676 at 1-2 (2002).

Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986) (governmental body not required to disclose information that did not exist at the time request was received). Accordingly, we do not address the availability of this non-responsive information, and the district need not release it in response to this request.

Next, we note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides in pertinent part that

[w]ithout 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:

...

(15) information regarded as open to the public under an agency's policies;

Gov't Code § 552.022(a)(15). The submitted documents include job vacancy announcements that are subject to section 552.022(a)(15). The district must release this information unless it is expressly confidential under other law. Although you claim this information is excepted from disclosure under section 552.103 of the Government Code, this is a discretionary exception that protects a governmental body's interests and may be waived. *Id.* § 552.007; *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. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 is not other law that makes information confidential for the purposes of section 552.022. Therefore, the district may not withhold any of the submitted information subject to section 552.022, which we have marked, under section 552.103.

We will now consider your argument under section 552.103 of the Government Code for the remaining submitted information. Section 552.103 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). 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 is 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. *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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. See Open Records Decision No. 452 at 4 (1986). To establish that litigation is reasonably anticipated, a governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *Id.* This office has stated that a pending Equal Employment Opportunity Commission (“EEOC”) complaint indicates litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982).

You state, and provide documentation showing, that prior to the district’s receipt of the instant request for information, the requestor threatened to sue the district for causing his alleged payroll shortage, failing to keep the workplace environment free of racial discrimination and harassment, failing to reinforce fair employment practices, failing to promote a positive and productive work environment, and failing to force district representatives to perform their official duties in an impartial manner. In addition, the requestor sought a specific amount of damages and stated that he would sue the district if his monetary demand was not paid. You have also provided documentation showing that the requestor filed a complaint with the EEOC against the district alleging racial discrimination. Based on your representations and our review of the submitted documents, we find you have demonstrated that litigation was reasonably anticipated when the district received the request for information. Our review of the information at issue also shows that it is related to the anticipated litigation for purposes of section 552.103(a). Thus, section 552.103 is applicable to the remaining submitted 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. 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, we conclude that the district must release the information we have marked pursuant to section 552.022 of the Government Code. The district may withhold the rest of the submitted information at this time under section 552.103.²

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).

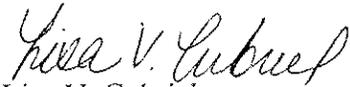
Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling,

²We note that some the documents to be released contain information, such as the requestor's personal e-mail address, that the district would ordinarily be required to withhold from the public to protect individuals' privacy. In this instance, however, the requestor has a right of access to his own private information. *See* Gov't Code § 552.023(a); Open Records Decision No. 481 at 4 (1987). Should the district receive another request for these same records from a person who would not have a right of access to the present requestor's private information, the district should resubmit these same records and request another ruling. *See* Gov't Code §§ 552.301(a), .302; *see also id.* §§ 552.117, .137.

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,



Lisa V. Cubriel
Assistant Attorney General
Open Records Division

LVC/eb

Ref: ID# 265493

Enc. Submitted documents

c: Mr. Patrick Jerome Ouzenne
6931 Foxmar Lane
Humble, Texas 77338-1415
(w/o enclosures)