



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 3, 2007

Mr. Jay Youngblood
Henslee, Fowler, Hepworth & Schwartz, L.L.P.
1116 Plaza Tower
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Taylor, Texas 75702

OR2007-09903

Dear Mr. Youngblood:

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# 285595.

The Lindale Independent School District (the "district"), which you represent, received a request for eight categories of information, consisting of: 1) the total legal expenditures associated with all employee medical insurance claim matters for the years 2003 through 2006; 2) total legal expenditures involving two named individuals for the years 2004 through 2006; 3) information regarding a named district employee; 4) documentation verifying the number of 2005/2006 district employees and their covered family members involved with district medical insurance claims for subrogation; 5) all legal invoices from 2005 and 2006 involving four named individuals; 6) legal invoices from 2005 and 2006 involving a named district employee or another named individual; 7) school board minutes or documentation involving two named individuals from 2005 and 2006; and 8) the total number school board meetings during 2005 and 2006 in which two named individuals were discussed.¹ You state that you have no responsive information regarding category number one or two of the request.² You state you have released some information to the requestor,

¹You inform us that the requestor clarified category seven of his request, stating that he sought the official school board minutes and the closed session minutes of all district board meetings in 2005 and 2006 in which two named individuals were discussed. See Gov't Code § 552.222(b) (stating that if information requested is unclear, governmental body may ask requestor to clarify or narrow request).

²The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); *Open Records Decision* Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990).

but claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.117, and 552.147. of the Government Code. We have considered the exceptions you claim and reviewed the submitted information, portions of which consist of representative samples.³

Initially, we note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 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:

(16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege:

....

(17) information that is also contained in a public court record;

Gov't Code § 552.022(a)(16), (17). The submitted information contains attorney fee bills and court-filed documents. Thus, the district must release this information pursuant to section 552.022 unless it is expressly confidential under other law. You argue that this information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code. However, these sections are discretionary exceptions to public disclosure that protect the governmental body's interests and may be waived. *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. 665 at 2 n.5 (2000) (discretionary exceptions generally), 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived). As such, sections 552.103 and 552.107 do not qualify as other law that makes information confidential for the purposes of section 552.022. The district therefore may not withhold the section 552.022 records pursuant to these exceptions.

You also argue that the court-filed documents submitted in Exhibit M are excepted from disclosure under sections 552.101 and 552.102 of the Government Code in conjunction with common-law privacy and section 552.117 of the Government Code. We note that information that has been filed with a court is not protected by common-law privacy. *See*

³We 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.

Star-Telegram v. Walker, 834 S.W.2d 54 (Tex. 1992) (common-law privacy not applicable to court-filed document). Accordingly, the district may not withhold the court-filed documents under sections 552.101 or 552.102 in conjunction with common-law privacy. However, because section 552.117 is “other law” for purposes of section 552.022, we will address your argument regarding this section. Additionally, the Texas Supreme Court has held, that the Texas Rules of Evidence are “other law” within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). The attorney-client privilege also is found at Texas Rule of Evidence 503. Therefore, we will consider whether rule 503 is applicable to the information contained in the attorney fee bills in Exhibit O, for which you claim the attorney-client privilege. With respect to the remaining information, which is not subject to section 552.022, we will address your claims under sections 552.101 and 552.103.

Texas Rule of Evidence 503 enacts the attorney-client privilege. Rule 503(b)(1) provides as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

- (A) between the client or a representative of the client and the client’s lawyer or a representative of the lawyer;
- (B) between the lawyer and the lawyer’s representative;
- (C) by the client or a representative of the client, or the client’s lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
- (D) between representatives of the client or between the client and a representative of the client; or
- (E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is “confidential” if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5).

Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify

the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You state that the attorney fee bills in Exhibit O “contain privileged information that should not be subject to disclosure.” Upon review, however, we find that you have failed to establish the applicability of rule 503 to any of the information at issue. Therefore, no portion of Exhibit O may be withheld on the basis of the attorney-client privilege under Texas Rule of Evidence 503. As you raise no further arguments against disclosure for this information, the district must release Exhibit O to the requestor.

You claim that the court-filed documents in Exhibit M are excepted from disclosure pursuant to section 552.117 of the Government Code. Section 552.117(a)(1) of the Government Code excepts from public disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. We note, however, that the information at issue does not contain any information that is encompassed by section 552.117. Accordingly, the district may not withhold any portion of this information under section 552.117 of the Government Code.

Next, we address the information that is not subject to section 552.022. Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses information protected by other statutes, such as section 551.104(c) of the Government Code, which provides that “[t]he certified agenda or tape of a closed meeting is available for public inspection and copying only under a court order issued under Subsection (b)(3).” *Id.* § 551.104(c). The district is not required to submit the certified agenda or tape recording of a closed meeting to this office for review. *See* Open Records Decision No. 495 at 4 (1988) (attorney general lacks authority to review certified agendas or tapes of executive sessions to determine whether a governmental body may withhold such information from disclosure under statutory predecessor to section 552.101 of the Government Code). Such information cannot be released to a member of the public in response to an open records request. *See* ORD 495 (1988). In addition, minutes of a closed meeting are confidential. *See* Open Records Decision No. 60 (1974) (closed meeting minutes are confidential under predecessor to section 551.104); *see also* Open Records Decision Nos. 563 (1990) (minutes of properly held executive session are confidential under OMA); ORD 495 (1988) (information protected under predecessor to section 551.104 cannot be released to member of public in response to open records

request). You inform us that some of the information responsive to category seven of the request consists of certified agendas and session minutes from closed meetings of the district's school board meetings. Accordingly, the district must withhold any responsive certified agendas or session minutes of closed meetings of the district's board under section 552.101 of the Government Code in conjunction with section 551.104(c) of the Government Code.

We now address your assertion that the remaining submitted information is excepted from disclosure under section 552.103 of the Government Code, which provides in part the following:

(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 inform us, and have provided documentation demonstrating, that a former district employee filed a claim of discrimination with the EEOC prior to the district's receipt of this request. You also state that the information at issue is related to this discrimination claim. Based on your arguments and the submitted documentation, we find that the district reasonably anticipated litigation on the date of its receipt of this request. We also find that the remaining submitted information is related to the anticipated litigation. Therefore, the district may withhold the remaining information pursuant to section 552.103 of the Government Code.⁴

In reaching this conclusion, we assume that the opposing party in the anticipated litigation has not seen or had access to any of the information in question. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information that is related to litigation through discovery procedures. See Open Records Decision No. 551 at 4-5 (1990). If the opposing party has seen or had access to information that is related to anticipated litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. See Open Records Decision Nos. 349 (1982), 320 (1982). We further note that the applicability of section 552.103 ends once the related litigation concludes or is no longer reasonably anticipated. See Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the district must release the attorney fee bills and court-filed documents we have marked pursuant to section 552.022 of the Government Code. The district must withhold any responsive certified agendas or session minutes of closed meetings of the district's board under section 552.101 of the Government Code in conjunction with section 551.104 of the Government Code. The district may withhold the remaining submitted information under section 552.103 of the Government Code.⁵

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

⁴As our ruling is dispositive, we need not address your remaining arguments regarding this information. We note, however, that the applicability of section 552.103(a) ends once the litigation has concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

⁵We note that the submitted information contains social security numbers. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

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).

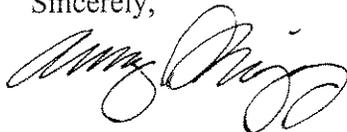
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records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



Amy L.S. Shipp
Assistant Attorney General
Open Records Division

ALS/mcf

Ref: ID# 285595

Enc. Submitted documents

c: Mr. Richard W. Beasley
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(w/o enclosures)