



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 28, 2008

Mr. Christopher M. Jones  
Senior Counsel  
Texas Education Agency  
1701 North Congress Avenue  
Austin, Texas 78701

OR2008-05701

Dear Mr. Jones:

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# 308606.

The Texas Education Agency (the "TEA") received a request for any documents that relate to the January 14, 2008 allegations against a named teacher. 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 sample of information.<sup>1</sup> We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit written comments concerning availability of requested information).

Initially, we address the requestor's assertions that the TEA failed to follow its procedural obligations under subsections 552.301(b), 552.301(d), and 552.301(e-1) of the Government Code. Pursuant to section 552.301(b) of the Government Code, a governmental body must ask for the attorney general's decision and state the exceptions that apply within ten business days after receiving the request. Gov't Code § 552.301(a), (b). In addition, not later than the tenth business day after receiving the requestor's written request for information, the governmental body must provide the requestor with (1) a written statement that the governmental body wishes to withhold the requested information and has asked for a

---

<sup>1</sup>We 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.

decision from the attorney general and (2) a copy of the governmental body's written communication to the attorney general. *Id.* § 552.301(d). A governmental body that submits written comments to the attorney general under Subsection (e)(1)(A) shall send a copy of those comments to the person who requested the information from the governmental body. *Id.* § 552.301(e-1).<sup>2</sup>

The requestor asserts that the TEA was required to request a decision from our office by February 20, 2008. The TEA received the instant request for information on February 7, 2008. The requestor claims that February 7<sup>th</sup> should be calculated as the first business day for purposes of subsections 552.301(b) and 552.301(d). We note, however, that this office does not count the date the request was received or holidays, as business days for the purpose of calculating a governmental body's deadlines under the Act. We further note, that state offices were closed for business on February 18, 2008 in observance of President's Day. Therefore, neither February 7<sup>th</sup> nor February 18<sup>th</sup> constitutes a business day for purposes of the Act. Accordingly, the tenth business day after the receipt of the instant request was February 22, 2008. We received the TEA's request for a decision to this office on February 22, 2008. Accordingly, we find that the TEA's request for a ruling was timely submitted.

Next, the requestor contends that he did not receive notice of the request for a decision from the TEA until March 26, 2008; therefore, the TEA did not comply with the requirements under section 552.301(d). The requestor also contends that he was not provided with the TEA's written comments to our office in violation of section 552.301(e-1). The TEA indicates from its correspondence that it provided the requestor with the request for a decision by facsimile and U.S. mail on February 22, 2008. The TEA further states that it provided the requestor with the written comments by facsimile and U.S. mail on February 29, 2008. Whether the TEA timely sent its notice of the request for a decision and copy of the written comments to the requestor are questions of fact. This office cannot resolve disputes of fact in its decisional process. *See* Open Records Decision Nos. 592 at 2 (1991), 552 at 4 (1990), 435 at 4 (1986). Where a fact issue cannot be resolved as a matter of law, we must rely on the facts alleged to us by the governmental body requesting our opinion, or upon those facts that are discernible from the documents submitted for our inspection. *Id.* Therefore, based on the TEA's representations and our review, we conclude that the TEA complied with the procedural requirements of subsections 552.301(d) and 552.301(e-1) in requesting this ruling, and we will address the TEA's arguments against disclosure.

Next, we note that the submitted information contains court-filed documents. Information filed with a court is generally a matter of public record under section 552.022(a)(17) of the Government Code and may only be withheld if expressly confidential under other law. *See* Gov't Code § 552.022(a)(17). Although the TEA raises section 552.103 of the Government

---

<sup>2</sup> Although the requestor cites to section 552.301(e)(1), which requires a governmental body to submit certain information to this office, we assume the requestor is actually referring to section 552.301(e-1).

Code for this information, this exception is discretionary and, thus, does not make information confidential. 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 No. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived). Thus, section 552.103 does not constitute other law for the purpose of section 552.022(a)(17). Accordingly, the TEA must release the information we have marked in accordance with section 552.022(a)(17) of the Government Code.

We now turn to your argument under section 552.103 of the Government Code for the information that is not subject to section 552.022. Section 552.103 provides:

(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 TEA 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, 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 TEA must meet both prongs of this test for information to be excepted under section 552.103(a).

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). In the context of anticipated litigation by a governmental body, the concrete evidence must at least reflect that litigation is "realistically contemplated." See Open Records Decision No. 518 at 5 (1989); see also Attorney General Opinion MW-575 (1982) (finding that investigatory file may be withheld from disclosure if governmental body attorney determines that it should be withheld pursuant to section 552.103 and that litigation is "reasonably likely to result"). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. See Open Records Decision No. 452 at 4 (1986).

You inform us that the TEA is investigating “allegations that the educator engaged in conduct that subjects her to disciplinary action pursuant to the [TEA’s] rules.” You indicate that there is an anticipated action to sanction the named teacher’s certificate pursuant to section 249.15 of title 19 of the Administrative Code. *See* 19 T.A.C. § 249.15(c) (TEA staff may commence contested case to sanction teacher’s certificate). You also explain that the TEA’s contested cases are heard by the State Office of Administrative Hearings and are governed by the Administrative Procedure Act (the “APA”), chapter 2001 of the Government Code. This office has concluded that a contested case under the APA constitutes litigation for purposes of statutory predecessor to section 552.103. Open Records Decision No. 588 (1991). Based on your representations and our review, we determine that the TEA reasonably anticipated litigation on the date that it received this request for information. Furthermore, upon review of the information at issue, we find that the submitted information relates to the anticipated litigation.

We note, however, that the submitted information contains correspondence to the TEA from the opposing party. 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* ORD 551 at 4-5. If the opposing party has seen or had access to information that is related to 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). Therefore, the TEA may not withhold the information that the opposing party has seen or had access to under section 552.103(a). Furthermore, the applicability of section 552.103(a) ends once the litigation has concluded or is no longer anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982). Accordingly, except for the information we marked, the TEA may withhold the remaining information under section 552.103 of the Government Code.

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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 challenge 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,



Henisha D. Anderson  
Assistant Attorney General  
Open Records Division

HDA/ma

Ref: ID# 308606

Enc. Submitted documents

c: Mr. John Grey  
Staff Attorney  
316 West 12<sup>th</sup> Street  
Austin, Texas 78701-1815  
(w/o enclosures)