



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 3, 2008

Mr. Ricardo R. Lopez
Feldman & Rogers, L.L.P.
517 Soledad Street
San Antonio, Texas 78205-1508

OR2008-15023

Dear Mr. Lopez:

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# 326737.

The North East Independent School District (the "district"), which you represent, received two requests from the same requestor for the most recent list of district "classified administrative support employees" and district "certified administrative/professional officers and employees," "including last name, first name, hire date, local experience, total experience, pay grade, job name, hourly rate, annual salary, percent, and actual days." 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.

We must first address the applicability of section 552.007 of the Government Code to the submitted information. Section 552.007 provides that if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential under law. *See* Gov't Code 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Based on our review of the requests for information, it appears that the district may have already released portions of the submitted information to the requestor in October of 2006. Section 552.103 is a

discretionary exception under the Act and does not make information confidential under law or expressly prohibits its release for purposes of section 552.007. *See* Gov't Code § 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). Accordingly, to the extent the submitted information has already been released to any member of the public, including the requestor, the district may not now withhold that information under section 552.103 of the Government Code. As the district raises no further exceptions to disclosure, any information previously disclosed to a member of the public must be released to this requestor.

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

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:

(2) the name, sex, ethnicity, salary, title, and dates of employment of each employee and officer of a governmental body[.]

Gov't Code § 552.022(a)(2). The submitted information includes the names, salaries, titles, and dates of employment of district employees. The district must release information subject to section 552.022 unless it is expressly made confidential under other law. *See id.* You claim that this information is subject to section 552.103 of the Government Code. Section 552.103 of the Government Code is not "other law" that makes information expressly confidential for purposes of section 552.022(a). *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d at 475-76; *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Consequently, the district may not withhold the names, salaries, titles, and dates of employment of district employees listed in the submitted information under section 552.103 of the Government Code. As the district has raised no further exceptions to disclosure, the names, salaries, titles, and dates of employment of district employees listed in the submitted information must be released pursuant to section 552.022.

We will now address your claim under section 552.103 of the Government Code for the information that is not subject to section 552.022(a)(2). 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 was 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).

You state, and provide documentation showing, that prior to the district's receipt of these requests for information, a lawsuit styled *Annie L. Mzyk v. North East Independent School District*, Civil Action No. SA-08-CA-0344-FB, was filed and is currently pending in the United States District Court for the Western District of Texas. Based upon your representation and our review of the submitted documentation, we conclude litigation was pending when the district received the requests for information. You explain that the plaintiff, a district employee, alleges she was treated differently than other employees in terms of her duties. You argue that the submitted information relates to the litigation because it is information pertaining to other district employees and could be used to compare the plaintiff's situation to that of other employees'. Thus, we also conclude the submitted information not subject to section 552.022(a)(2) is related to the pending litigation for the purposes of section 552.103. Therefore, the district may withhold the submitted information not subject to section 552.022(a)(2) under section 552.103 of the Government Code.

We note once the information at issue has been obtained by all parties to the pending litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to the information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, any submitted information not subject to section 552.022(a)(2) that has either been obtained from or provided to the opposing party in the pending litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

In summary, to the extent the submitted information has already been released to any member of the public, it must be released to the requestor pursuant to section 552.007 of the

Government Code. The names, salaries, titles, and dates of employment of district employees listed in the submitted information must be released pursuant to section 552.022(a)(2) of the Government Code. With the exception of any information previously provided to or obtained from the opposing party, the district may withhold the submitted information not subject to section 552.022(a)(2) 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). If the governmental body does not file suit over 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).

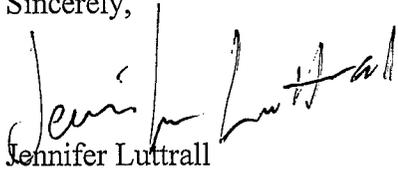
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records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



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/eeg

Ref: ID# 326737

Enc. Submitted documents

c: Mr. Leslie A. Mzyk
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San Antonio, Texas 78217
(w/o enclosures)