



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 30, 2009

Ms. Heather M. Castillo  
Hill Gilstrap, P.C.  
1400 West Abram Street  
Arlington, Texas 76013

OR2009-01231

Dear Ms. Castillo:

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# 333687.

The Arlington Independent School District (the "district"), which you represent, received a request for the following information: 1) any correspondence to or from the district's board concerning the appointment of a named individual as interim superintendent or "the possibility of doing a national search for a superintendent;" and 2) any correspondence between the district's board and a named individual from June 1, 2008 to the present. You state you have released some information to the requestor, but claim the submitted information is excepted from disclosure under section 552.103 of the Government Code. You also state portions of the submitted information may implicate the interests of the individual named in the request, and that you have notified this individual of his right to submit arguments to this office as to why the requested information should not be released.<sup>1</sup> See Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the exception you claim and reviewed the submitted information.

Initially, we note some of the submitted information, which we have marked, is not responsive to the request because it was created after the date the district received the request. This ruling does not address the public availability of any information that is not

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<sup>1</sup>We note we have not received comments from the named individual.

responsive to this request and the district is not required to release that information in response to the request.

Section 552.103 of the Government Code provides in part 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.

*Id.* § 552.103(a), (c). A governmental body that raises section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information at issue. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1<sup>st</sup> Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

To establish that litigation is reasonably anticipated for the purposes of section 552.103, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *See Open Records Decision No. 452 at 4 (1986).* In the context of anticipated litigation in which the governmental body is the prospective plaintiff, 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 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 ORD 452 at 4.*

You inform us, and provide documentation showing, that prior to the receipt of the present request, the district was involved in a dispute with the individual named in the request, a

former consultant for the district. You also provide us with a letter in which the district demands back payments from the named individual. Also, the submitted information reflects that the named individual anticipates that the district will file a lawsuit against him, and his letters to the district regarding the dispute include his own threats of litigation against the district. You state that litigation was reasonably likely to result when the district received this request and that the information at issue is relevant to the anticipated litigation. Based on your representations, we find that you have demonstrated that litigation was reasonably anticipated when the district received this request for information.

We note, however, that the submitted information consists of communications between the district and the individual named in the request. Thus, the opposing party already has seen or had access to all of the information you seek to withhold under section 552.103. The purpose of this exception is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* ORD 551 at 4-5. If the opposing party has seen or had access to information relating to litigation, through discovery or otherwise, then there is no interest in withholding such information from the public under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). We therefore conclude that the district may not withhold any of the submitted information under section 552.103 of the Government Code.

We note that some of the submitted information may be subject to sections 552.117 and 552.137 of the Government Code.<sup>2</sup> Section 552.117(a)(1) excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). The district may only withhold information under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Thus, if the individual at issue timely elected to keep his personal information confidential, the district must withhold the information we have marked pursuant to section 552.117(a)(1) of the Government Code. The district may not withhold the information we have marked under section 552.117(a)(1) if the individual at issue did not make a timely election to keep his personal information confidential.

Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its public disclosure.

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<sup>2</sup>The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Gov't Code § 552.137(a)-(b). The types of e-mail addresses listed in section 552.137(c) may not be withheld under this exception. *See id.* § 552.137(a)-(c). Likewise, section 552.137 does not apply to a government employee's work e-mail address because such an address is not that of the employee as a "member of the public," but is instead the address of the individual as a government employee. The e-mail addresses at issue are not of a type specifically excluded by section 552.137(c). We have marked the e-mail addresses that the district must withhold under section 552.137 of the Government Code, unless the owners of the e-mail addresses have affirmatively consented to their public disclosure.

In summary, if the individual at issue timely elected confidentiality, then the district must withhold the personal information we have marked pursuant to section 552.117(a)(1) of the Government Code. The district must also withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners have affirmatively consented to their release. The remaining responsive information must be released to the requestor.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



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

ALS/jb

Ref: ID# 333687

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)