



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 16, 2010

Ms. LeAnne Lundy
Feldman, Rogers, Morris & Grover, L.L.P.
Attorneys for Alief Independent School District
5718 Westheimer Road, Suite 1200
Houston, Texas 77057

OR2010-02306

Dear Ms. Lundy:

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# 370344.

The Alief Independent School District (the "district"), which you represent, received two requests from the same requestor for information pertaining to the district's relationship with a specified vendor. You claim that the submitted information is excepted from disclosure under sections 552.103 and 552.104 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the submitted information includes invoices and purchase orders subject to section 552.022 of the Government Code. Section 552.022(a)(3) provides:

(a) [T]he following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(3). Thus, the city may withhold the submitted purchase orders and invoices only if they are "expressly confidential under other law." Although you raise sections 552.103 of the Government Code for this information, this is a discretionary exception that protects a 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); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 (1999) (governmental body may waive section 552.103). 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 the submitted invoices and purchase orders, which we have marked, under sections 552.103 of the Government Code. As you raise no further exceptions to disclosure of this information, it must be released.

We next address your assertion that the remaining information is confidential under section 552.103 of the Government Code. Section 552.103 provides in part:

(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 district 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, 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). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See id.*

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). Whether litigation is reasonably

anticipated must be determined on a case-by-case basis. *See id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. *See* Open Records Decision No. 555 (1990); *see also* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated").¹

You inform us, and provide documentation showing, that in this instance, the requestor is trial counsel for Interboro Packaging, Inc. Inc. ("Interboro"). You further state that the requestor is asserting claims against the district for allegedly disparaging communications the district made regarding Interboro's products, and that the requestor is demanding a retraction of these communications. After reviewing your arguments and the submitted information, we agree that based on the totality of the circumstances, the district reasonably anticipated litigation on the date it received the instant request. Further, based on our review of the information at issue, we conclude the submitted documents are related to the anticipated litigation for purposes of section 552.103(a) because they all pertain to the district's dealings with Interboro. Accordingly, we agree section 552.103 is generally applicable to the remaining information.

We note, however, that once an opposing party in pending litigation has seen or had access to information that is related to litigation, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, the information the opposing party in the anticipated litigation has seen or had access to is not excepted from disclosure under section 552.103(a) and must be disclosed. In this instance, some of the information at issue consists of communications with the opposing party, bid forms to which the opposing party had access, and shipping and order information from the opposing party. Therefore, as the opposing party has already seen or had access to this information, it may not be withheld under section 552.103 of the Government Code. However, the district may withhold the remaining information, which we have marked, under section 552.103.²

In summary, the district may withhold the information we have marked under section 552.103 of the Government Code. The remaining information must be released.

¹ In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

² As our ruling is dispositive, we do not address your remaining argument under section 552.104 of the Government Code for this information.

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, 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, toll free, at (888) 672-6787.

Sincerely,



James McGuire
Assistant Attorney General
Open Records Division

JM/cc

Ref: ID# 370344

Enc. Submitted documents

c: Requestor
(w/o enclosures)