



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 12, 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

OR2010-03601

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# 372551.

The Alief Independent School District (the "district"), which you represent, received a request for information relied upon by the district in forming the opinions referenced in a specified letter and copies of "rules, regulations, guidelines, etc." the district adhered to in forming those opinions. You claim that the submitted information is excepted from disclosure under section 552.103 of the Government Code.¹ We have considered the exception you claim and reviewed the submitted information.

Initially, we note that some of the submitted information, which we have marked, was the subject of two previous requests from this requestor as a result of which this office issued Open Records Letter No. 2010-02306 (2010). In Open Records Letter No. 2010-02306, we ruled that the district may withhold some of the submitted information under section 552.103 of the Government Code and must release the remaining information. We have no indication that there has been any change in the law, facts, or circumstances on which the previous ruling was based. We therefore conclude that the district may continue to rely on Open Records Letter No. 2010-02306 as a previous determination and withhold or release the previously ruled upon information in accordance therewith. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is

¹Although, you also initially raised sections 552.101, 552.104, 552.107, 552.111, 552.116, 552.117, 552.128, 552.136, and 552.137 of the Government Code as exceptions to disclosure of the requested information, you have provided no arguments regarding the applicability of these sections. Since you have not submitted arguments concerning these exceptions, we assume that you no longer urge them. *See* Gov't Code §§ 552.301(b), (e), .302

addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). However, the present requests seek additional information that was not addressed in the previous ruling; therefore, we will consider your arguments against disclosure of the remaining information.

Next, we note that one of the remaining e-mails, which we have marked, was responsive to one of this requestor's previous requests, dated November 23, 2009, which asked for "all e-mail communications by and between employees and/or agents working for the [district] that concern and/or relate to Interboró's fitness and/or performance under or pursuant to any contract to supply goods to the [district]." Accordingly, we must address the district's obligations under the Act with respect to the marked document. Pursuant to section 552.301(e) of the Government Code, a governmental body is required to submit to this office within fifteen business days of receiving the request a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. See Gov't Code § 552.301(e)(1)(D). In your correspondence to this office related to Open Records Letter No. 2010-02306, you informed this office that the previous request was received by the district on November 30, 2009. The district timely submitted to this office a copy of the specific information requested and did not contend that the information it submitted was a representative sample. This office subsequently issued Open Records Letter No. 2010-02306 for the timely submitted information. However, you did not submit the marked e-mail, which existed and was responsive to the earlier request, until January 11, 2010. Consequently, we find the district failed to comply with the procedural requirements of section 552.301(e) with respect to the marked e-mail.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption the requested information is public and must be released unless a compelling reason exists to withhold the information from disclosure. See *id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); see also Open Records Decision No. 630 (1994). Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Although you seek to withhold the marked e-mail under section 552.103 of the Government Code, that section is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. 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.) (section 552.103 may be waived); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general), 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions). Because your claim under section 552.103 does not provide a compelling reason for non-disclosure under section 552.302, in failing to comply with section 552.301 you have waived that exception. Accordingly, the district may not withhold the marked e-mail on the basis of section 552.103. As you raise no further exceptions against its disclosure, the marked e-mail must be released.

Next, we note the remaining information includes 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 district may withhold the submitted purchase orders 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* 4 S.W.3d at 475-76; *see also* ORDs 665 at 2 n.5, 663. 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 purchase orders, which we have marked, under section 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").²

You inform us, and provide documentation showing, that in this instance, the requestor is trial counsel for Interboro Packaging, 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. You state the district has taken the position and informed the requestor that it will not issue a retraction statement. Additionally, you inform us and have provided documentation, that in his most recent communication with the district, the requestor has threatened to file suit against the district pursuant to section 1982 of title 42 of the United States Code and for defamation. After reviewing your arguments and the submitted information, we agree that the district reasonably anticipated litigation on the date it received the request at issue. Further, based on our review of the remaining information, we conclude the remaining information is related to the anticipated litigation for purposes of section 552.103(a) because it pertains 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

² 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).

seen or had access to this information, which we have marked, 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.

In summary, the district may continue to rely on Open Records Letter No. 2010-02306 as a previous determination and withhold or release the previously ruled upon information in accordance with that ruling. The district may withhold the remaining information we have marked under section 552.103 of the Government Code. The remaining information must be released.

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,



Laura Ream Lemus
Assistant Attorney General
Open Records Division

LRL/jb

Ref: ID# 372551

Enc. Submitted documents

c: Requestor
(w/o enclosures)