



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 16, 2010

Ms. Laura C. Rodriguez  
Walsh, Anderson, Brown, Gallegos and Green, P.C.  
P.O. Box 460606  
San Antonio, Texas 78246

OR2010-08794

Dear Ms. Rodriguez:

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# 382996.

The Northside Independent School District (the "district"), which you represent, received a request for: (1) specified heating, ventilating, and air conditioning overlays or drawings; (2) a specified e-mail; (3) information generated or received by a named individual pertaining to indoor air quality at a specified location; and (4) a specified bond election proposal and a list showing bond expenditures. You claim that the submitted 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 have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, we address the requestor's assertion that the district possesses responsive information that it did not submit to this office. The district states that it does not maintain or possess information responsive to each item of the request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism'd) (governmental body not required to disclose documents no longer in its possession); Open Records Decision No. 555 at 1-2 (1990) (governmental body not required to disclose

information that did not exist at time request was received). Whether the district has additional information that it has not provided to this office is a question of fact. This office cannot resolve factual disputes in the opinion process. *See* Open Records Decision Nos. 592 at 2 (1991), 552 at 4 (1990), 435 at 4 (1986). Where fact issues are not resolvable as a matter of law, we must rely on the facts alleged to us by the governmental body requesting our decision, or upon those facts that are discernible from the documents submitted for our inspection. *See* ORD 552 at 4. Accordingly, we must accept the district's representation that it has no information responsive to portions of the request.

Next, the requestor asserts that some of the submitted information was previously released to the public. In support of this claim, the requestor has provided this office with e-mail messages from October 2002 that indicate the district released some of the information at issue to another member of the public. The Act does not permit selective disclosure of information to the public. *See* Gov't Code §§ 552.007(b), .021; Open Records Decision No. 463 at 1-2 (1987). Information that has been voluntarily released to a member of the public may not subsequently be withheld from another member of the public, unless public disclosure of the information is expressly prohibited by law or the information is confidential under law. *See* Gov't Code § 552.007(a); Open Records Decision Nos. 518 at 3 (1989), 490 at 2 (1988); *but see* Open Records Decision Nos. 579 (1990) (exchange of information among litigants in "informal" discovery is not "voluntary" release of information for purposes of statutory predecessor to section 552.007), 454 at 2 (1986) (governmental body that disclosed information because it reasonably concluded that it had constitutional obligation to do so could still invoke statutory predecessor to section 552.108). Although you seek to withhold the submitted information 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 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 Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). As such, section 552.103 neither expressly prohibits the release of information to the public nor makes information confidential under law. Therefore, to the extent the district has previously voluntarily released any of the submitted information to another member of the public, it may not now withhold any such information from the present requestor under section 552.103.

Next, we note some of the submitted information is made expressly public under section 552.022 of the Government Code, which provides in relevant part as follows:

- (a) Without limiting the amount or kind of information that is public information under this chapter, 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:

....

(5) all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate;

....

(15) information regarded as open to the public under an agency's policies[.]

Gov't Code § 552.022(a)(5), (15). In this instance, the submitted information includes information used to estimate the expenditure of public funds by the district and information published on the district's website. That information, which we have marked, is subject to sections 552.022(a)(5) and 552.022(a)(15). The district may only withhold the information subject to subsections 552.022(a)(5) and 552.022(a)(15) if it is confidential under other law. Although you raise section 552.103 of the Government Code for this information, section 552.103 is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See id.* § 552.007; *Dallas Area Rapid Transit*, 4 S.W.3d at 475-76; ORD 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 any of the marked section 552.022 information under section 552.103 of the Government Code. As you claim no further exceptions to disclosure of the information subject to section 552.022, that information must be released to the requestor. We will, however, address your arguments under section 552.103 for the remaining information.

Section 552.103 of the Government Code provides in relevant 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 governmental body claiming this exception bears the burden of providing relevant facts and documents to demonstrate the applicability of the exception. 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 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). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You inform us that the information at issue relates to litigation that was pending on the date the district received the request for public information. You state that the district is party to the litigation. You also state that a judgment was entered in this lawsuit before the district received the request for information. However, you argue that the litigation is nevertheless still pending because “the trial court maintains plenary power to alter that judgement and the parties are within their rights to file post-judgement motions seeking to alter that judgement.” Based on our review of your arguments and the information at issue, we find that the remaining information relates to pending litigation to which the district is a party. Thus, the district may withhold the remaining information under section 552.103(a) of the Government Code.

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information 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 been concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, (1) the district must release the information we have marked pursuant to section 552.022 of the Government Code; and (2) the district may withhold the remaining information under section 552.103 of the Government Code.

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

Sincerely,

A handwritten signature in black ink, appearing to read "Chris Sterner". The signature is written in a cursive, somewhat stylized font.

Christopher D. Sterner  
Assistant Attorney General  
Open Records Division

CDSA/eeg

Ref: ID# 382996

Enc. Submitted documents

c: Requestor  
(w/o enclosures)