



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

December 7, 2010

Mr. Fortunato G. Paredes
Escamilla, Poneck & Cruz, L.L.P.
For United Independent School District
216 West Village Boulevard, Suite 202
Laredo, Texas 78041

OR2010-18291

Dear Mr. Paredes:

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# 402206.

The United Independent School District (the "district"), which you represent, received a request for twenty-three categories of information related to request for proposals 2010-001 (the "RFP"). You indicate the district does not maintain information responsive to request items 7, 8, 10, 11, 15, 16, 19, 20, 22, and 23. We note the Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983). You claim 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 arguments submitted by the requestor. *See Gov't Code § 552.304* (interested party may submit comments to this office stating why the information at issue should or should not be released).

Initially, we understand the requestor to assert that the district failed to comply with the procedural requirements of section 552.301(e-1) of the Government Code by not including copies of Exhibits A, B, C, and D along with the copy of the district's brief sent to the requestor. Exhibit A consists of the information at issue in this request. Exhibit B consists of a notice of complaint filed by the requestor's client with the district regarding the awarding of a contract subsequent to the RFP. Exhibit C is a copy of the district's policy for

handling complaints of the kind in Exhibit B. Exhibit D is a copy of correspondence from the requestor's client to the district concerning the dismissal of the requestor's complaint. Section 552.301(e-1) states a "governmental body that submits written comments to the attorney general . . . shall send a copy of those comments to the person who requested the information from the governmental body not later than the 15th business day after the date of receiving the written request." Gov't Code § 552.301(e-1). We find the requestor's receipt of the district's October 5, 2010 brief, which provides the substance of the district's arguments under section 552.103, satisfies the statutory requirement under section 552.301(e-1). Thus, the district did not fail to comply with the procedural requirements set out in section 552.301(e-1).

Next, we note the submitted information contains purchase orders related to the expenditure of public funds. This information is deemed public under the Act, unless expressly made confidential under "other law." *Id.* § 552.022(a)(3). Section 552.103 is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *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 No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 is not "other law" that makes information expressly confidential for purposes of section 552.022(a)(3). Therefore, the district may not withhold the purchase orders under section 552.103 of the Government Code.

Section 552.103 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 has the burden of providing relevant facts and documents to show the section 552.103 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 that 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.

This office has held that for the purposes of section 552.103, "litigation" includes "contested cases" conducted in a quasi-judicial forum. See Open Records Decision Nos. 474 (1987), 368 (1983), 336 (1982), 301 (1982). Likewise, "contested cases" conducted under the Texas Administrative Procedure Act, chapter 2001 of the Government Code, constitute "litigation" for purposes of section 552.103. See Open Records Decision Nos. 588 (1991) (concerning former State Board of Insurance proceeding), 301 (1982) (concerning hearing before Public Utilities Commission). In determining whether an administrative proceeding is conducted in a quasi-judicial forum, this office has focused on the following factors: (1) whether the dispute is, for all practical purposes, litigated in an administrative proceeding where (a) discovery takes place, (b) evidence is heard, (c) factual questions are resolved, and (d) a record is made; and (2) whether the proceeding is an adjudicative forum of first jurisdiction, i.e., whether judicial review of the proceeding in district court is an appellate review and not the forum for resolving a controversy on the basis of evidence. See Open Records Decision No. 588 (1991).

You state, and provide documentation showing, the requestor's client has filed a grievance concerning the manner in which the contract related to the RFP was awarded. You explain that grievances filed with the district are "litigation" in that the district follows administrative procedures in handling such disputes. You indicate, and provide documentation showing, the district's policy includes a three-level process wherein an administrator hears the grievance at Level I, the superintendent hears the grievance at Level II, and the board of trustees hears the grievance at Level III. Additionally, you indicate a record is made of the proceedings at each level. You explain the requestor's client in this case received a Level I and Level II hearing and attempted to appeal to a Level III hearing; however, the appeal to the Level III hearing was not timely filed. Subsequently, the requestor's client sent a letter, which you have provided, stating the requestor's client "would like to avoid litigation costs by using the [d]istrict's complaint process." The requestor's client further stated, "dismissing our complaint on a mere technicality may prove to be very costly for all concerned." Based on these representations and our review of the documents you have provided, we find the district reasonably anticipated litigation at the time the request was received. Additionally, we find the information at issue directly relates to the anticipated litigation. Accordingly, we conclude section 552.103 is generally applicable to the submitted information.

We note, however, that the submitted information contains a response to the RFP submitted by the requestor's client and other correspondence between the district and the requestor's client. The purpose of section 552.103 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. Therefore, if the opposing party has seen or had access to information relating to the litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Accordingly, the district may withhold under section 552.103 only the remaining submitted information the opposing party to the litigation has not seen or had access to. We note the applicability of this exception ends once the litigation has been concluded or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, with the exception of the purchase orders and the information submitted to the district or previously seen by the requestor's client, the district may withhold the submitted information under section 552.103 of the Government Code. The purchase orders and the information submitted to the district or previously seen by the requestor's client 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,



Neal Falgoust
Assistant Attorney General
Open Records Division

NF/dls

Ref: ID# 402206

Enc. Submitted documents

c: Requestor
(w/o enclosures)