



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 13, 2010

Mr. Erik T. Dahler
General Counsel
Alamo Community College District
201 West Sheridan, Building. C-8
San Antonio, Texas 78204-1429

OR2010-18669

Dear Mr. Dahler:

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# 403187.

The Alamo Community College District (the "district") received a request for performance evaluations from a specified person for all full-time faculty for a specified school year, annual self-evaluation forms for all full-time Northeast Lakeview College faculty in the social and behavioral sciences for a specified year, and photo release forms for all individuals appearing in specified images and videos. You state the district is not in possession of documents responsive to the request for the performance evaluations. 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 representative sample of information.¹

¹We assume the "representative sample" of information submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than those submitted to this office.

We note some of the information at issue is subject to section 552.022 of the Government Code, which states in relevant part:

(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:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code. § 552.022(a)(1). The information at issue includes completed self-evaluation forms. Pursuant to section 552.022(a)(1) of the Government Code, a completed evaluation is expressly public, unless it is excepted under section 552.108 of the Government Code or is expressly confidential under "other law." Section 552.103 of the Government Code is a discretionary exception to public disclosure that protects a governmental body's interests and may be waived. *See id.* § 552.007; *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), 473 (1987) (section 552.103 may be waived). As such, section 552.103 is not "other law" that makes information confidential for the purposes of section 552.022. Consequently, the completed self-evaluation forms may not be withheld under section 552.103 of the Government Code. As you raise no further exceptions to the disclosure of the completed self-evaluation forms, the district must release this information.²

We will now consider your argument under section 552.103 of the Government Code for the remaining information at issue. Section 552.103 of the Government Code states 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.

²We note you have redacted the social security numbers on the completed self-evaluation forms. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. Gov't Code § 552.147(b).

(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 district 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 district must meet both prongs of this test for information to be excepted under section 552.103(a).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To demonstrate litigation is reasonably anticipated, the governmental body must furnish concrete evidence litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* This office has stated a pending Equal Employment Opportunity Commission (“EEOC”) complaint indicates litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982).

You state the requestor filed a claim of discrimination with the EEOC prior to the date of the district’s receipt of the present request for information. Thus, we agree the district reasonably anticipated litigation on the date it received the present request for information. You also argue the submitted information is related to the anticipated litigation. Upon review, we agree the submitted information is related to the anticipated litigation for purposes of section 552.103. We therefore conclude the district may withhold the remaining information at issue under section 552.103 of the Government Code.

We note the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to that litigation to obtain it through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). Therefore, if the opposing party has seen or had access to information relating to anticipated litigation through discovery or otherwise, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). We also note the applicability of section 552.103 ends once the related litigation concludes or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the district must release the completed self-evaluation forms under section 552.022(a)(1) of the Government Code. The district may withhold the remaining information at issue 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, 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,



Sean Nottingham
Assistant Attorney General
Open Records Division

SN/vb

Ref: ID# 403187

Enc. Submitted documents

c: Requestor
(w/o enclosures)