



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 31, 2011

Mr. Andrew D. Clark
Powell & Leon, L.L.P.
1706 West Sixth Street
Austin, Texas 78703

OR2011-04447

Dear Mr. Clark:

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# 413075.

The Del Valle Independent School District (the "district"), which you represent, received a request for (1) the requestor's personnel file and specified audio recordings created by the requestor; (2) letters issued in the 2010 fall semester to employees notifying them they were being put on paid administrative leave; (3) documents pertaining to specified investigations; and (4) documents pertaining to disciplinary action against four named individuals. You state the district provided some of the requested information to the requestor. You also state the district does not have any responsive information pertaining to one of the named individuals.¹ You claim the submitted information is excepted from disclosure under section 552.103 of the Government Code and some of the information is privileged under

¹The 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 dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

Texas Rule of Civil Procedure 192.3.² We have considered your arguments and reviewed the submitted information, portions of which are representative samples.³

Initially, we note most of the submitted information 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). Exhibits C, E, F, and G pertain to a completed investigation conducted for the district. Furthermore, Exhibit F consists of a completed report. Pursuant to section 552.022(a)(1) of the Government Code, completed investigations and completed reports are expressly public unless they either are excepted under section 552.108 of the Government Code or are expressly confidential under other law. You claim Exhibits C, E, F, and G are excepted under section 552.103 of the Government Code. This section, however, 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 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), 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential). As such, it is not other law that makes information confidential for the purposes of section 552.022. Consequently, the district may not withhold Exhibits C, E, F, and G under section 552.103 of the Government Code. As you have not claimed any other exceptions to disclosure for Exhibits C, E, and F, the district must release this information. You also claim, however, Exhibit G is privileged under Texas Rule of Civil Procedure 192.3. The Texas Supreme Court has held the Texas Rules of Civil

²Although you also raise section 552.101 of the Government Code in conjunction with Texas Rule of Civil Procedure 192.3, this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Furthermore, although you also raise section 552.022 of the Government Code in conjunction with Texas Rule of Civil Procedure 192.3, section 552.022 is not an exception to disclosure. Rather, section 552.022 enumerates categories of information that are not excepted from disclosure unless they are expressly confidential under other law. *See* Gov't Code § 552.022.

³We assume the "representative sample" of records 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 that submitted to this office.

Procedure are “other law” within the meaning of section 552.022 of the Government Code. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will consider your arguments under Texas Rule of Civil Procedure 192.3 for Exhibit G, as well as your claim under section 552.103 of the Government Code for Exhibit D.

Texas Rule of Civil Procedure 192.3(e) provides “[t]he identity, mental impressions, and opinions of a consulting expert whose mental impressions and opinions have not been reviewed by a testifying expert are not discoverable.” TEX. R. CIV. P. 192.3. A “consulting expert” is defined as “an expert who has been consulted, retained, or specially employed by a party in anticipation of litigation or in preparation for trial, but who is not a testifying expert.” TEX. R. CIV. P. 192.7(d). You state the district employed a consulting expert to conduct an investigation of allegations pertaining to employees inappropriately accessing student information and stealing district computer equipment. You explain that, at the time the district hired the consulting expert, the district anticipated litigation surrounding the allegations based on the serious nature of the allegations and the value of the stolen computer equipment. You contend the consulting expert’s completed investigation documents represented by Exhibit G contain the expert’s notes, mental impressions, and results of the investigation. We note, however, the representative sample of documents submitted as Exhibit G consists solely of outlined notes pertaining to questions asked during interviews of certain individuals involved in the investigation and the answers those individuals gave in response to the asked questions. You have not explained, or otherwise demonstrated, how the information in Exhibit G consists of or contains the identity, mental impressions, or opinions of the consulting expert at issue. Therefore, you have failed to establish the applicability of rule 192.3. Consequently, the district may not withhold the information represented in Exhibit G under Texas Rule of Civil Procedure 192.3(e). As you have not claimed any other exceptions to disclosure for Exhibit G, the district must release that information.

You claim Exhibit D is excepted under section 552.103 of the Government Code, which 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). A governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing (1) litigation is pending or reasonably anticipated on the date the governmental body receives the request for information, and (2) the information at issue is related to that litigation. *See 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). *See* ORD 551 at 4.

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.* Concrete evidence to support a claim 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. Open Records Decision No. 555 (1990); *see also* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982).

You assert the district, at the time it received the request for information, reasonably anticipated litigation pertaining to the requestor's termination from employment with the district. You state the requestor engaged the services of an attorney and, although a lawsuit has not been filed, is pursuing a claim against the district under the Whistleblower Act, chapter 554 of the Government Code. You also indicate the requestor filed a grievance with the district regarding her termination and you inform us the requestor's attorney has represented the requestor in the district's grievance process. You explain the grievance process is the administrative procedure that must be exhausted before the requestor may file a lawsuit against the district. *See* Gov't Code § 554.006(a) (providing an aggrieved party must initiate action under the grievance or appeal procedures of the employing state or local governmental entity before filing suit). You also state the requestor's attorney has notified the district the requestor fully intends to file a lawsuit against the district, if necessary, after exhausting her administrative remedies. Based on your representations and our review, we conclude the district reasonably anticipated litigation when it received the request for information. You state the information in Exhibit D relates to the litigation because it pertains to the district's anticipated defense against the requestor's claims that form the basis of the anticipated litigation. Accordingly, the district may withhold Exhibit D under section 552.103 of the Government Code.

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.

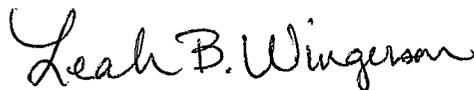
Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and must be disclosed. Further, the applicability of section 552.103(a) ends 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, the district may withhold Exhibit D under section 552.103 of the Government Code. The district must release the remaining requested 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,



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/dls

Ref: ID# 413075

Enc. Submitted documents

c: Requestor
(w/o enclosures)