



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 1, 2011

Mr. S. Anthony Safi
Mounce, Green, Myers, Safi, Paxson & Galatzan
P.O. Box 1977
El Paso, Texas 79950

OR2011-11009

Dear Mr. Safi:

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# 425477.

The El Paso Independent School District (the "district"), which you represent, received a request for records pertaining to the following three categories of information: (1) disciplinary action or pending disciplinary action against a named district principal; (2) the suspension of the named district principal; and (3) a specified incident. You claim the submitted information is excepted from disclosure under sections 552.103, 552.108, and 552.135 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by an attorney representing the named district principal. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, we note the district has only submitted documentation responsive to the first and third categories of the request. To the extent information responsive to the second category of the request existed on the date the district received the request, we assume the district has released it. If not, you must do so at this time. *See id.* §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

Section 552.108(a)(1) of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). A governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state the submitted incident report pertains to a pending criminal investigation being conducted by the district’s police department (the “department”). Based on your representations and our review, we determine the release of this incident report at this time would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976).

However, section 552.108 does not except from disclosure “basic information about an arrested person, an arrest, or a crime.” Gov’t Code § 552.108(c). Section 552.108(c) refers to the basic “front-page” information held to be public in *Houston Chronicle*. *See* 531 S.W.2d at 186-187; *see also* Open Records Decision No. 127 at 3-4 (1976) (summarizing types of information deemed public by *Houston Chronicle*). We note basic information includes the identification and description of the complainant, but does not include the identity of other involved parties. *See* ORD 127. Thus, with the exception of basic information, the district may withhold the submitted incident report under section 552.108(a)(1) of the Government Code. However, you claim the identifying information of the complainant, who is the listed reporting party in the submitted incident report, is excepted from disclosure under section 552.135 of the Government Code.

Section 552.135 of the Government Code provides:

- (a) “Informer” means a student or former student or an employee or former employee of a school district who has furnished a report of another person’s possible violation of criminal, civil, or regulatory law to the school district or the proper regulatory enforcement authority.
- (b) An informer’s name or information that would substantially reveal the identity of an informer is excepted from [required public disclosure].

Gov’t Code § 552.135. In this instance, you contend the complainant’s identifying information is excepted under section 552.135 because, as the submitted information reflects, the complainant reported a possible violation of criminal law to the department. Based on your representation and our review, we conclude the district must withhold the complainant’s identifying information from the basic information under section 552.135 of the Government Code.

Next, you claim the submitted executive summary is excepted under section 552.103 of the Government Code. Section 552.103 provides, in part, the following:

(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 the section 552.103(a) 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 of the receipt of the request for information and (2) the information at issue is related to the pending or anticipated 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).

To establish 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). Contested cases conducted under the Administrative Procedure Act, chapter 2001 of the Government Code (the "APA"), are considered litigation under section 552.103. Open Records Decision No. 588 at 7 (1991). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* ORD 452 at 4.

You inform this office that, prior to the district's receipt of the request for information, the named district principal hired an attorney who requested a hearing regarding his client's termination from the district before an independent hearing examiner under Chapter 21 of the Education Code. We note that such hearings are governed by the APA and thus constitute litigation for purposes of section 552.103. *See* Educ. Code § 21.041(b)(7); 19 T.A.C. § 249.4(a)(1). Therefore, based on your representations and our review, we determine the district reasonably anticipated litigation when it received the request for information. You also state, and upon review we agree, that the anticipated litigation

pertains to the matters at issue in the submitted executive summary. Therefore, based on your representations and our review, we find the district may withhold the submitted executive summary under section 552.103 of the Government Code.¹

We note, however, once information has been obtained by all parties to the anticipated 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 it must be disclosed. Further, the applicability of section 552.103(a) ends when the litigation has concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

In summary, with the exception of basic information, the district may withhold the submitted incident report under section 552.108(a)(1) of the Government Code. In releasing basic information, the district must withhold the complainant's identifying information under section 552.135 of the Government Code. The district may withhold the submitted executive summary 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,



Bob Davis
Assistant Attorney General
Open Records Division

RSD/tf

¹As our ruling is dispositive, we need not address the arguments against disclosure of this information submitted by an attorney for the named district principal.

Ref: ID# 425477

Enc. Submitted documents

c: Requestor
(w/o enclosures)