



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 12, 2012

Mr. Humberto Aguilera
Escamilla, Poneck & Cruz, LLP
P.O. Box 200
San Antonio, Texas 78291-0200

OR2012-05278

Dear Mr. Aguilera:

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# 450531.

The Weslaco Independent School District (the “district”), which you represent, received a request for ten categories of information pertaining to postings made by named individuals, documents generated by and e-mails between named individuals during specified periods of time, all documents regarding Facebook postings generated by named individuals during a specified time period, all documents pertaining to surveillance of named individuals, and all documents regarding a named individual’s effort to obtain employment with the district. You state you do not possess some of the requested information.¹ You claim the submitted information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

¹We note the Act does not require a governmental body to release information that did not exist when it received a request, create responsive information, or obtain information that is not held by the governmental body or on its behalf. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism’d).

²We assume that 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 that those records contain substantially different types of information than that submitted to this office.

Section 552.103 of the Government Code provides in 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 that claims section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information it seeks to withhold. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

This office has long held that "litigation," for purposes of section 552.103, 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 ORD 588.*

You contend the submitted information is related to a grievance filed with the district by the requestor's client. You explain that under the district's grievance procedures, the grievant

may request a hearing before an arbitrator if mediation fails and may appeal the arbitrator's decision to the district's board of trustees (the "board") or the board's designee. You state the grievant is allowed to have representation, present his case, and offer witnesses and other evidence at the hearing before the board. You also state the board hears a response from the district and, acting as the fact finder, is allowed to question the parties and witnesses. You explain a record of the proceeding made by audio or audio/video recording or a court reporter is required. You note that in the event of an appeal from the board's decision to the state commissioner of education, the record of the grievance hearing and the evidence presented to the board are reviewed. *See* Educ. Code § 7.057(c) (in appeal against school district, commissioner shall issue decision based on review of record developed at district level under substantial evidence standard of review). Based on your representations, we find you have demonstrated the district's grievance process is conducted in a quasi-judicial forum and therefore constitutes litigation for purposes of section 552.103 of the Government Code. You state the named employee filed her grievance prior to the district's receipt of the instant request for information. Accordingly, we find the district was a party to pending litigation on the date of its receipt of the request. We also find the submitted information is related to the pending litigation. We therefore conclude the district may withhold the submitted information under section 552.103 of the Government Code.³

In reaching this conclusion, we assume the requestor's client, as the opposing party in the pending litigation, has not seen or had access to any of the information at issue. 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. Thus, if the opposing party has seen or had access to information relating to 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 note information to which the requestor's client had access in the usual scope of his employment is not considered to have been obtained by the opposing party to pending litigation and thus may be withheld under section 552.103. We also note the applicability of section 552.103 ends once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

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,

³As we are able to make this determination, we need not address your claim under section 552.107 of the Government Code.

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 cursive script that reads "Jonathan Miles".

Jonathan Miles
Assistant Attorney General
Open Records Division

JM/em

Ref: ID# 450531

Enc. Submitted documents

c: Requestor
(w/o enclosures)