



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 16, 2013

Mr. Jaime J. Muñoz
Attorney for the La Joya Independent School District
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P.O. Box 47
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OR2013-06184

Dear Mr. Muñoz :

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# 484029.

The La Joya Independent School District (the "district"), which you represent, received a request for (1) the dates and settlement amount for all plaintiffs in a specified lawsuit; (2) the board minutes for the approval of the settlement amounts and the vote of each board member pertaining to the specified lawsuit; (3) the names of the attorneys representing the plaintiffs in the lawsuit; (4) the financial campaign reports pertaining to seven named individuals; (5) the job description of the transportation director; (6) the salary of a named individual; (7) the dates of suspensions for three named individuals; and (8) the salary and specified years of experience for all executive directors. You state the district does not have information responsive to the dates of suspension for the three named individuals.¹ You claim the submitted information is excepted from disclosure under sections 552.101

¹The Act does not require a governmental body to release information that did not exist when it received a request or to create responsive information. *See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

Initially, we note the submitted information includes the notice and minutes of an open meeting of the district's board of trustees (the "board"), which we have marked. The minutes of a governmental body's public meetings are specifically made public under provisions of the Open Meetings Act, chapter 551 of the Government Code. *See* Gov't Code §§ 551.022 (minutes and tape recordings of open meeting are public records and shall be available for public inspection and copying on request to governmental body's chief administrative officer or officer's designee), .041 (governmental body shall give written notice of date, hour, place, and subject of each meeting), .043 (notice of meeting of governmental body must be posted in place readily accessible to general public for at least 72 hours before scheduled time of meeting). Although you seek to withhold this information under section 552.103, as a general rule, this exception to disclosure found in the Act does not apply to information that other statutes make public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Thus, the marked notice and minutes may not be withheld under section 552.103.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses section 551.104 of the Government Code. This section provides "[t]he certified agenda or tape of a closed meeting is available for public inspection and copying only under a court order issued under Subsection (b)(3)." *Id.* § 551.104(c). Thus, such information cannot be released in response to an open records request. *See* Attorney General Opinion JM-995 at 5-6 (1988) (public disclosure of certified agenda of closed meeting may be accomplished only under procedures provided in Open Meetings Act). However, other than certified agendas and tape recordings, records relating to closed meetings are not expressly made confidential by chapter 551 of the Government Code. *See, e.g.,* Open Records Decision No. 485 at 6 (1987) (investigative report not excepted from disclosure under statutory predecessor to section 552.101 simply by virtue of its having been considered in executive session); *see also* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality provision must be express, and confidentiality requirement will not be implied from statutory structure), 649 at 3 (1996) (language of confidentiality provision controls scope of its protection), 478 at 2. You state the information contained in the marked notice and minutes of an open meeting was discussed in executive session. You have not demonstrated, however, nor does it appear, the information at issue consists of a certified agenda or tape. Therefore, the notice and minutes of an open meeting we have marked may not be withheld under section 552.101 of the Government Code in conjunction with section 551.104 of the Government Code.

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

Next, we note the remaining information includes information subject to section 552.022 of the Government Code, which provides:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under [the Act] or other law:

...

(2) the name, sex, the ethnicity, salary, title, and dates of employment of each employee and officer of a governmental body;

...

(15) information regarded as open to the public under an agency's policies; [and]

...

(18) a settlement agreement to which a governmental body is a party.

Id § 552.022(a)(2), (15), (18). The submitted information includes the salary information of the named individual and executive directors that is subject to section 552.022(a)(2) and may not be withheld unless it is made confidential under the Act or other law. *See id.* § 552.022(a)(2). The job description we have marked must be released pursuant to section 552.022(a)(15), if the district considers job descriptions to be open to the public under its policies, unless the information is expressly confidential under the Act or other law. Furthermore, the settlement agreement we have marked is subject to section 552.022(a)(18) and must be released unless it is confidential under the Act or other law. Although you assert this information is excepted from disclosure under section 552.103 of the Government Code, this section is discretionary and does not make information confidential under the Act. *See 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 No. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the district may not withhold the salary information under section 552.103. Likewise, the job description may not be withheld under section 552.103, and must be released, if it is considered to be open to the public under the district's policies for purposes of section 552.022(a)(15). Furthermore, the settlement agreement we have marked may not be withheld under section 552.103. As you raise no further exceptions to disclosure of the salary information and marked settlement agreement, they must be released. However, we will consider your assertion of section 552.103 for the marked job description if it is not

considered to be open to the public under the district's policies, and for the information not subject to section 552.022 of the Government Code.

Next, we note most of the remaining information is subject to section 1.012 of the Election Code, which provides in relevant part as follows:

(a) Subject to Subsection (b), an election record that is public information shall be made available to the public during the regular business hours of the record's custodian.

...

(c) Except as otherwise provided by this code or [the Act], all election records are public information.

(d) In this code, "election record" includes:

...

(3) a certificate, application, notice, report, or other document or paper issued or received by government under this code.

Elec. Code § 1.012(a), (c), (d)(3). Most of the remaining information consists of campaign contribution and finance reports filed under the Election Code. *See* Elec. Code §§ 254.031, .061, .091. Therefore, under section 1.012(a) of the Election Code, the submitted campaign contribution and finance reports shall be made available to the public, except as provided by the Act. Accordingly, we will address your argument against disclosure of these reports, as well as the remaining information.

Next, we address your argument under section 552.103 of the Government Code for the information not subject to section 552.022 and the job description if the district does not consider it to be open to the public under the district's policies. Section 552.103 of the 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 applies in a particular situation. The test for meeting this burden is a showing (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the requested information 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, orig. proceeding); *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 parts of this test for information to be excepted under section 552.103(a). *See* ORD 551 at 4.

Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To establish litigation is reasonably anticipated, a governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *Id.* This office has stated a pending Equal Employment Opportunity Commission (“EEOC”) complaint indicates litigation is reasonably anticipated. *See* Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982).

You state, and provide documentation showing, the requestor's client filed a complaint against the district with the EEOC prior to the date the district received the instant request. You explain the remaining information pertains to the requestor's client's claim of political retaliation. Based on your representations and our review, we agree the district reasonably anticipated litigation on the date the district received the present request for information. We also agree the remaining information is related to the anticipated litigation. Thus, the district may withhold the remaining information under section 552.103, including and the marked job description if the district does not consider that information to be open to the public under the district's policies.

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. *See* Open Records Decision Nos. 349 (1982), 320 (1982). We note 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 must release the notice and minutes of an open meeting, which we have marked, pursuant to section 551.022 of the Government Code. The district must release the salary information and the settlement agreement we have marked pursuant to section 552.022. The district must also release the job description we have marked under section 552.022, if they are considered to be open to the public under the district's policies for the purposes of section 552.022(a)(15). The district may withhold the remaining information, including and the job description if the district does not consider that information to be open to the public under the district's policies, under section 552.103.

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,



Kathleen J. Santos
Assistant Attorney General
Open Records Division

KJS/som

Ref: ID# 484029

Enc. Submitted documents

c: Requestor
(w/o enclosures)