



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 24, 2013

Ms. Ylise Janssen
Senior School Law Attorney
Legal Services Department
Austin Independent School District
1111 West Sixth Street, Suite A230
Austin, Texas 78703

OR2013-12726

Dear Ms. Janssen:

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# 494315.

The Austin Independent School District (the "district") received a request for specified e-mails sent or received by a named individual during a specified time period. You indicate the district has released some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹ We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we address the requestor's claim the district failed to comply with the procedural requirements of the Act in requesting a decision from this office. The requestor alleges he was not properly notified of the district's request for a ruling from this office as required by

¹We 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.

sections 552.301(d) and (e-1) of the Government Code. Pursuant to section 552.301(d), a governmental body must provide the requestor with (1) a written statement that the governmental body wishes to withhold the requested information and has asked for a decision from the attorney general, and (2) a copy of the governmental body's written communication to the attorney general within ten business days of receiving the request for information. *See id.* § 552.301(d). Section 552.301(e-1) requires a governmental body that submits written comments to the attorney general under subsection (e)(1)(A) to send a copy of those comments to the person who requested the information from the governmental body within fifteen business days of receiving the request for information. *Id.* § 552.301(e-1). The determination of whether or when a governmental body mailed its notice of the request for a decision or a copy of the written comments to the requestor is a question of fact. This office cannot resolve disputes of fact in its decisional process. *See* Open Records Decision Nos. 592 at 2 (1991), 552 at 4 (1990), 435 at 4 (1986). Where a fact issue cannot be resolved as a matter of law, we must rely on the facts alleged to us by the governmental body requesting our opinion, or upon those facts that are discernible from the documents submitted for our inspection. *See id.* The submitted information reflects the requestor was mailed a copy of each brief concurrent with the timely mailings to this office. Consequently, based on the submitted information, we find the district complied with sections 552.301(d) and (e-1) of the Government Code in requesting this ruling.

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). In determining whether an administrative proceeding is conducted in a quasi-judicial forum, some of the factors this office considers are whether the administrative proceeding provides for discovery, evidence to be heard, factual questions to be resolved, the making of a record, and whether the proceeding is an adjudicative forum of first jurisdiction with appellate review of the resulting decision without a re-adjudication of fact questions. *See* Open Records Decision No. 588 (1991).

You contend the submitted information is related to a grievance filed with the district by a district employee. You explain that under the district’s grievance procedures, the grievant proceeds through several tiers of administrative review and decisions, appealing up through the tiers until the grievant reaches the district’s Board of Trustees (the “board”). You inform us the grievant is allowed to have representation, present her 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 is made by audio or audio/video recording or a court reporter. 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 inform us, and submit documentation confirming, the employee at issue filed her grievance prior to the district’s receipt of the instant request for information. However the requestor argues the employee at issue has no grievance pending with the district since June 12, 2013, and thus litigation is no longer pending. We note the district states it received the request on May 16, 2013. A requestor’s right of access to information must be construed at the time the request is made. *See* Open Records Decision No. 530 (1989). Thus, we determine the district was a party to pending litigation at the time it received the present request for information. We also find the submitted information is related to the pending litigation for purposes of section 552.103. Accordingly, we conclude the district may withhold the submitted information under section 552.103 of the Government Code.²

²As our ruling is dispositive, we need not address your remaining argument against disclosure.

However, we note 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. Therefore, once the information at issue has been obtained by all parties to the litigation through discovery or otherwise, a section 552.103(a) interest no longer exists as to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). We also note the applicability of section 552.103(a) ends once the litigation has concluded. 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Kenneth Leland Conyer
Assistant Attorney General
Open Records Division

KLC/bhf

Ref: ID# 494315

Enc. Submitted documents

c: Requestor
(w/o enclosures)