



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 14, 2013

Ms. Ellen H. Spalding
Rogers, Morris & Grover, L.L.P.
5718 Westheimer Road, Suite 1200
Houston, Texas 77057

OR2013-19853

Dear Ms. Spalding:

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# 505582 (EISD Request No. 4311).

The Eanes Independent School District (the "district"), which you represent, received a request for specified communications and proposals pertaining to the Western Hills Little League (the "WHLL"). We understand the district has redacted personal e-mail addresses under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).¹ The district states it has released some of the requested information, but claims the submitted information is excepted from disclosure under sections 552.103 and 552.111 of the Government Code. We have considered the claimed exceptions and reviewed the submitted representative sample of information.² 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).

¹Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of seeking a decision from this office.

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

Initially, you inform us some of the requested information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2013-12057 (2013). In Open Records Letter No. 2013-12057, we determined the district (1) must release some information pursuant to section 551.022 of the Government Code; (2) may withhold some information under Texas Rules of Evidence 503, except for any of the information at issue that existed separate and apart from the privileged communications to which they were attached, which must be released; and (3) may withhold the remaining information under section 552.103 of the Government Code. We have no indication the law, facts, and circumstances on which the prior ruling was based have changed. Accordingly, to the extent the information in the current request is identical to the information previously requested and ruled upon by this office, we conclude the district must continue to rely on Open Records Letter No. 2013-12057 as a previous determination and withhold or release the information in accordance with that ruling. To the extent the submitted information is not subject to Open Records Letter No. 2013-12057, we will address your arguments against disclosure.

We next note the requestor asserts the district has waived sections 552.103 and 552.111 for the requested communications between it and the WHLL because the district exchanged this information with non-district personnel, specifically the WHLL. Section 552.007 of the Government Code provides, if a governmental body voluntarily releases information to any member of the public, then the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law. *See Gov't Code 552.007*; Open Records Decision Nos. 518 at 3 (1989), 400 at 2 (1983). Sections 552.103 and 552.111 of the Government Code are discretionary and do 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 Nos. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived), 470 at 7 (1987) (governmental body may waive statutory predecessor to section 552.111 deliberative process); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). However, upon review, we find the requestor has failed to establish the requested communications between the district and the WHLL consist of information voluntarily released to the public for purposes of section 552.007. Therefore, we will consider the district's arguments to withhold this information under section 552.103 of the Government Code.

We next note the submitted information contains attorney fee bills that are subject to section 552.022 of the Government Code. Section 552.022(a)(16) provides the following:

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 unless made confidential under this chapter or other law:

...

(16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege[.]

Gov't Code § 552.022(a)(16). You assert the submitted information subject to section 552.022(a)(16), which we have marked, is excepted from release under section 552.103 of the Government Code. However, as noted above section 552.103 is discretionary and does not make information confidential under the Act. *See Dallas Area Rapid Transit*, 4 S.W.3d at 475-76; ORD No. 542 at 4 (1990). Therefore, the district may not withhold the information subject to section 552.022(a)(16) under section 552.103 but, instead, must release it to the requestor.

You assert the remaining information not subject to section 552.022 is excepted from disclosure under section 552.103 of the Government Code, which provides in part as follows:

(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 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 that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request for information and (2) the information at issue is related to that litigation. *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 prongs of this test for information to be excepted from disclosure under section 552.103(a).

You state that prior to the district's receipt of the instant request for information, a Plaintiff's Petition for Declaratory Judgment was filed against the district regarding a lease agreement.

Thus, litigation was pending against the district on the date it received the request. The requestor argues the requested information should be disclosed because the requestor is not a party to the pending litigation. However, we note generally, the applicability of section 552.103 is dependent on whether a governmental body raising this exception, or an officer or employee of a governmental body as a consequence of the person's office or employment, is a party to pending or reasonably anticipated litigation; the status of a requestor as a party or non-party to the litigation at issue is immaterial. *See* Gov't Code § 552.103(a); Open Records Decision No. 575 at 2 (1990) (predecessor to section 552.103 only applies when governmental body is party to litigation). The requestor also argues the requested communications do not pertain to the litigation because the information existed at least two years before the district anticipated the litigation at issue. However, upon review, we find the remaining information is related to the pending litigation at issue. *See id.* § 552.103(c). Therefore, because the district has satisfied its burden of showing section 552.103 applies, the district may withhold the remaining information under section 552.103 of the Government Code.³

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. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to all parties to the pending 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. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

To conclude, to the extent the information in the current request is identical to the information previously requested and ruled upon by this office, we conclude the district must continue to rely on Open Records Letter No. 2013-12057 as a previous determination and withhold or release the information in accordance with that ruling. The district must release the information we have marked under section 552.022(a)(16) of the Government Code. The district may withhold the remaining information under section 552.103 of the Government Code.

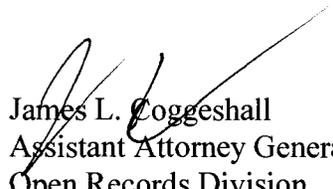
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

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.texasattorneygeneral.gov/open/>

³As our ruling is dispositive, we need not address your remaining arguments against disclosure.

[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,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/tch

Ref: ID# 505582

Enc. Submitted documents

c: Requestor
(w/o enclosures)