



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 3, 1998

Ms. Cindy L. Becker
Lloyd, Gosselink, Blevins, Rochelle,
Baldwin & Townsend, P.C.
111 Congress Avenue, Suite 1800
Austin, Texas 78701

OR98-2569

Dear Ms. Becker:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, (the "Act") chapter 552 of the Government Code. Your request was assigned ID# 119299.

The Hays County Independent School District (the "district") received a request for thirty-three separate categories of information related to Tom Green Elementary School ("TGES"), the district, complaints by occupants of TGES, the indoor air quality of TGES, budgets, contracts, reports, and other documents related to the structure and maintenance of TGES. You agree to make available to the requestor the requested information that has been distributed to the public. You represent that this information is available at the IAQ library maintained at TGES. You also agree to make available to the requestor minutes of open meetings and tape recordings of these meetings, if any. You do not represent whether you are making available to the requestor information that was previously provided to the requestor. There is no basis in the Act for withholding requested information that has been previously furnished to the requestor. Therefore, you must release to the requestor information that you previously provided to the requestor.

There appears to be a dispute between the district and the requestor concerning the amount and identity of information that has been previously disclosed to the requestor and to the public. We cannot resolve disputes of fact in the opinion process. Where fact issues are not resolvable as a matter of law or ascertainable from the face of documents submitted for our inspection, we rely on the representations of the governmental body requesting our opinion. Open Records Decision No. 552 at 4 (1990).

You claim that the remainder of the requested 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 information that you submit as a representative sample of the information requested¹.

Section 552.103(a) was intended to prevent the use of the Open Records Act as a method of avoiding the rules of discovery in litigation.² Attorney General Opinion JM-1048 at 4 (1989). The litigation exception enables a governmental body to protect its position in litigation by requiring information related to the litigation to be obtained through discovery. Open Records Decision No. 551 at 3 (1990). Although section 552.103(a) gives the attorney for a governmental body discretion to determine whether section 552.103(a) should be claimed, that determination is subject to review by the attorney general. Open Records Decision Nos. 551 at 5 (1990), 511 at 3 (1988).

When asserting section 552.103(a), a governmental body must establish that the requested information relates to pending or reasonably anticipated litigation.³ Thus, under section 552.103(a) a governmental body's burden is two-pronged. The governmental body must establish that (1) litigation to which the governmental body is a party is either pending or reasonably anticipated, and that (2) the requested information relates to that litigation. *See University of Texas Law School v. Texas Legal Foundation*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no writ); Open Records Decision No. 551 at 4 (1990). In this instance,

¹In reaching our conclusion here, we assume that 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) (where requested documents are numerous and repetitive, governmental body should submit a representative sample; but if each record contains substantially different information, all must be submitted). 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.

²The Open Records Act is not a substitute for the discovery process under the Texas Rules of Civil Procedure. *See* Attorney General Opinion JM-1048 at 3 (1989) ("the fundamental purposes of the Open Records Act and of civil discovery provisions differ"); Open Records Decision No. 551 at 3-4 (1990) (discussion of relation of Open Records Act to discovery process).

³Section 552.103(a) excepts from required public disclosure information:

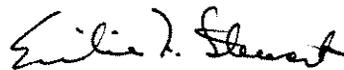
(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

the district has met its burden of showing that the litigation is pending and that the requested information relates to that litigation. Therefore, you may withhold the requested information at this time. In reaching this conclusion, however, we assume that the opposing party to the anticipated litigation has not previously had access to the records at issue; absent special circumstances, once information has been obtained by all parties to the litigation, *e.g.*, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). We also note that the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). Having decided that portions of the requested information may be withheld under Government Code section 552.103, we need not address section 552.107(1).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Emilie F. Stewart
Assistant Attorney General
Open Records Division

EFS/nc

Ref.: ID# 119299

Enclosures: Submitted documents

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(w/o enclosures)