



May 6, 1999

Mr. Randel B. Gibbs
Law Offices of Robert E. Luna, P.C.
4411 North Central Expressway
Dallas, Texas 75205

OR99-1234

Dear Mr. Gibbs:

You ask this office to reconsider its ruling in Open Records Letter No. 99-0945 (1999). Your request for reconsideration was assigned ID# 125478.

The Garland Independent School District (the "district") received a request for information relating to a district employee. The district sought to withhold a portion of the requested information under section 552.103 and 552.107 of the Government Code. Open Records Letter No. 99-0945 ruled that the district had not timely requested the decision of this office pursuant to section 552.301(a) of the Government Code and that, having failed to demonstrate a "compelling reason" why the information at issue should be withheld, it must release the information.

In your request for reconsideration, you contend that the district in fact timely sought the decision of this office because it was closed for "spring break" during the week of March 8 through March 12, 1999, and consequently those days did not count as "business days" for purposes of the requirement of section 552.301(a) that a governmental body must seek the decision of this office within ten business days of receiving a request for information it wishes to withhold. Assuming that the administrative offices of the district were closed during the week of March 8, we overrule Open Records Letter No. 99-0945 and consider your arguments for withholding the information in question.¹

Section 552.103 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

¹ If the administrative offices of the district were not closed during this period, you must release the information at issue pursuant to Open Records Letter 99-0945.

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.

To secure the protection of section 552.103(a), a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation to which the governmental body is a party. Open Records Decision No. 588 (1991). The mere chance of litigation will not trigger section 552.103(a). Open Records Decision No. 452 (1986) and authorities cited therein. To demonstrate that litigation is reasonably anticipated, the governmental body must furnish *concrete* evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.*

You advise that the individual to whom the information at issue pertains has appealed his termination under chapter 21, subchapter F of the Education Code, which provides for hearings on such matters before hearings examiners. Having reviewed your arguments and the information at issue, we conclude that you may withhold the information during the pendency of such litigation. *See e.g.*, Open Records Decision No. 368 (1983) (administrative hearing as litigation for purposes of section 552.103(a)).

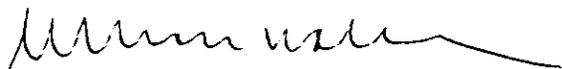
We assume, however, that none of the information in the records at issue has previously been made available to the opposing party in the litigation. Absent special circumstances, once information has been obtained by all parties to the litigation, either through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349, 320 (1982). To the extent the opposing party has seen or had access to these records, there would be no justification for now withholding such information from the requestor pursuant to section 552.103(a). Similarly, section 552.103(a) does not authorize withholding materials which have already been made available to the public. Open Records Decision No. 436 (1986). Again, 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).

Since you indicate that the hearing on which your section 552.103 claim is based was scheduled for late March 1999, and thus may have concluded before the issuance of this decision, we will also address your section 552.107 claim. Section 552.107(1) incorporates the attorney-client privilege. It protects information "that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct." *See* Open Records Decision No. 574 (1990). In instances where an attorney represents a governmental entity, the attorney-client privilege

protects only an attorney's legal advice and confidential attorney-client communications. *Id.* Accordingly, these two classes of information are the only information that may be withheld pursuant to the attorney-client privilege. Having reviewed your arguments, we conclude that you have failed to demonstrate that the information at issue constitutes privileged attorney-client communications within the ambit of section 552.107(1). Therefore, the information may not be withheld under that provision.

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 upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,



William Walker
Assistant Attorney General
Open Records Division

WMW/eaf

Ref.: ID#125478

encl: Submitted documents

cc: Mr. Doug Phillips
State Board for Educator Certification
1001 Trinity
Austin, Texas 78701-2603
(w/o enclosures)