



May 13, 1999

Mr. S. Anthony Safi
Mounce, Green, Myers, Safi & Galatzan
100 N. Stanton, Suite 1700
El Paso, Texas 79901-1448

OR99-1321

Dear Mr. Safi:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 124415.

The El Paso Independent School District (the "district"), which you represent, received a request for "a copy of the Corrective Action Plan concerning the Department of Labor's Wage and Hour Division Audit for the 2 years ending December 31, 1998." You claim that the requested information is excepted from disclosure under sections 552.103 and 552.111 of the Government Code. You have submitted the responsive information to our office for review. We have considered the exceptions you claim and reviewed the submitted information.

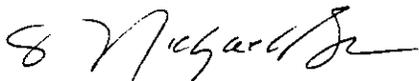
We first address the applicability of section 552.103(a) of the Government code, "the litigation exception." This section excepts certain information related to pending or anticipated litigation in which a governmental body is or may be a party. You identify the Department of Labor as a potential adverse party with which the district is negotiating a settlement agreement. You also indicate that the subject information has been presented to Department of Labor representatives. While you have not established that litigation is "reasonably anticipated" in this instance, we note that in any event, the litigation exception does not protect information to which the opposing party to the anticipated litigation has previously had access; 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). As the potential opposing party in the litigation has seen and had access to the subject information, there is no justification for now withholding that information from the requestor pursuant to section 552.103(a).

We now address the applicability of section 552.111 of the Government Code. This section excepts from required public disclosure interagency and intra-agency memoranda and letters,

but only to the extent that they contain advice, opinion, or recommendation intended for use in the entity's policymaking process. Open Records Decision No. 615 at 5 (1993). The purpose of this section is "to protect from public disclosure advice and opinions on policy matters and to encourage frank and open discussion within the agency in connection with its decision-making processes." *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.--San Antonio 1982, writ ref'd n.r.e.) (emphasis added). In this case, the information was prepared by the district in draft form and was supplied by the district to a federal agency. When determining if an interagency memorandum is excepted from disclosure under section 552.111 of the Government Code, we must consider whether the agencies between which the memorandum passed share a privity of interest or common deliberative process. Open Records Decision No. 561 at 9 (1990). Here, the agencies are adverse rather co-operative. We conclude that the district and the Department of Labor do not share a privity of interest or common deliberative process with regard to the audit information at issue. The information is therefore not excepted from disclosure by section 552.111 of the Government Code.

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,



Michael Jay Burns
Assistant Attorney General
Open Records Division

MJB/ch

Ref: ID# 124415

encl. Submitted documents

cc: Ms. Frances Wever
Federation of Teachers & Support Personnel
4024 Frombridge
El Paso, Texas 79903
(w/o enclosures)