



July 19, 2000

Mr. Edward W. Dunbar
Dunbar, Armendariz, Crowley & Hegeman, L.L.P.
4726 Transmountain Drive
El Paso, Texas 799247

OR2000-1628A

Dear Mr. Dunbar:

You ask this office to examine Open Records Letter No. 2000-1628 (2000) and whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 136719.

The El Paso Community College District (the "district"), which you represent, received requests for information relating to the district's accounts payable files, attorney fee bills, and employee records. You argued that the information was excepted from public disclosure pursuant to Government Code section 552.103. In Open Records Letter No. 2000-1628 (2000) we stated that the district had not submitted to this office copies or representative samples of the specific information requested: the attorney fee bills and employee records. Consequently, we found that the district could not withhold these requested documents. You ask this office to examine Open Records Letter No. 2000-1628 (2000) in light of your contention that this office mistakenly found that the district did not provide this office with some of the requested information that you wish to withhold. Where this office determines that a factual error is made when determining a governmental body's timeliness in submitting required information in the decision process under section 552.301, and that error resulted in an incorrect decision, we will correct the previously issued ruling.

Open Records Letter No. 2000-1628 addressed three categories of information: the district's accounts payable files, attorney fee bills, and employee records. In Open Records Letter No. 2000-1628, this office concluded that the district must release the information related to the accounts payable files in accordance with Government Code section 552.022(a)(3). You should continue to rely upon Open Records Letter No. 2000-1628 for the information related to the accounts payable files. You have informed this office that your "firm never intended to exclude . . . [the] attorney's fees from disclosure." You explain that you have since forwarded copies of the attorney's fees statement to the requestor. Consequently, we will examine Open Records Letter No. 2000-1628 only to the extent that it involves the requested employee information.

You have submitted an argument to this office that you did timely submit the employee information on April 14, 2000. We have reviewed our records and agree that you did indeed timely submit the employee information on April 14, 2000. Therefore, we now consider your claimed section 552.103 exception in regards to the submitted employee information.

Section 552.103(a), the “litigation exception,” excepts from disclosure information relating to litigation to which the state is or may be a party. A governmental body has the burden of providing relevant facts and documents to show that 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, and (2) the information at issue is related to that litigation. *See University of Tex. Law Sch. v. Texas 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.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To establish that litigation is reasonably anticipated, a governmental body must provide this office “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” Open Records Decision No. 452 at 4 (1986).

You explain that the requestor has brought a whistle-blower action against the district and that litigation is currently pending as cause number 99-3824 in the 346th District Court of El Paso County. You contend that the information responsive to the instant request is directly related to the issues and subject matter of this ongoing litigation. We agree that litigation is pending. Upon review of the information, we additionally find that the submitted information relates to the pending litigation. Therefore, we conclude that you may withhold the submitted information pursuant to section 552.103(a).

We note, however, that 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 and such information must be disclosed. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. In addition, the applicability of section 552.103(a) ends once the litigation has concluded. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

This letter ruling is limited to the particular records 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 records or any other circumstances.

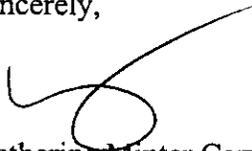
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Katherine Minter Cary
Assistant Attorney General
Interim Chief, Open Records Division

KMC/JRW/pr

Ref: ID# 136719

Encl. Submitted documents

cc: Mr. Mathew Babick
P. O. Box 9776
El Paso, Texas 79995
(w/o enclosures)