



July 11, 2001

Ms. Kelli H. Karczewski
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P.O. Box 3685
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OR2001-2996

Dear Ms. Karczewski:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 149306.

The Irion County Independent School District (the "school district"), which you represent, received a request for eight categories of information concerning the school district's participation in the West Texas Rural Counties Association Medical Benefits Pool (the "pool"). Specifically, the requestor seeks:

- (1) Copies of all financial statements and related documents in the possession of the [school district] covering the period from January 1, 1999 to the present. This request includes, but is not limited to, documents addressing your entity's: (a) revenues and expenditures; (b) assets and debts; (c) budget information; and (d) fiscal statements (audited and unaudited);
- (2) Copies of all contracts, agreements and understandings between [the school district] and the West Texas Rural Counties Association [{"WTRCA"}];
- (3) Copies of all documents and communications, written and electronic, between the [school district] and the [WTRCA] concerning the payment of creditors of the [WTRCA] in the period between October 1, 1998 and the date of your response to this request;

(4) Copies of all communications and documents, written and electronic, in the possession of the [school district] which refer to, mention or relate to the [WTRCA];

(5) Copies of all documents and communications, written and electronic, in the possession of the [school district] which refer to, mention or relate to [Eckerd Health Services ("EHS")] in the period of time between April 1, 1996 to date of your response to this request;

(6) Copies of the charter, charter amendments, by-laws, by-law amendments, minutes and resolutions of the [WTRCA];

(7) Copies of all reports, correspondence or communications between the members of the [WTRCA] and the [WTRCA], in the period of time between April 1, 1996 to the date of your response to this request; and

(8) Copies of the Interlocal Participation Agreement (Employee Benefit Pool) and all amendments thereto between the [WTRCA] and [the school district].

You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

We note at the outset that you have not submitted for our review copies of the pool's charter, charter amendments, or board minutes and resolutions. Among other requirements, a governmental body must submit to this office no later than the fifteenth business day after the date of receiving the written request a copy of the specific information requested, or representative samples if the information is voluminous. *See* Gov't Code § 552.301(e)(1)(D). If a governmental body fails to comply with section 552.301, the requested information is "presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information." Gov't Code § 552.302. Because the school district has not demonstrated a compelling reason under section 552.302 to withhold from the requestor the pool's charter, charter amendments, or board minutes and resolutions, we conclude that to the extent the information exists, the school district must release this information to the requestor.

We further note that some of the information submitted to this office is expressly made public under section 552.022 of the Government Code. Section 552.022 of the Government Code provides several categories of information that are not excepted from required disclosure unless they "are expressly confidential under other law." In pertinent part this section provides:

(a) 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 under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by [s]ection 552.108;

....

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;

Gov't Code § 552.022(a)(1), (3). Section 552.103 is a discretionary exception under the Public Information Act and is, therefore, not "other law" that makes the submitted information confidential. *See* Open Records Decision No. 551 (1990) (statutory predecessor to section 552.103 serves only to protect a governmental body's position in litigation and does not itself make information confidential). Therefore, the school district must release those documents we have marked that fall within the categories of information enumerated above that are made expressly public by section 552.022 of the Government Code.

We now address your section 552.103 claim for the remainder of the submitted information. Section 552.103, the "litigation exception," provides 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 school district 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. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *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 school district must meet both prongs of this test for information to be excepted under 552.103(a).

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). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.¹ Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). You state that simultaneous with the request for information you also received a Notice of Claim and Demand for Payment pursuant to sections 101.001, *et seq.* of the Texas Tort Claims Act and section 89.004(a) of the Texas Local Government Code, demanding payment of \$789,328.79, representing sums owed to the requestor's client by the pool and its members. After reviewing your argument and all of the submitted information, we conclude that litigation is reasonably anticipated in this instance. We also find that the submitted information is related to the anticipated litigation for the purposes of section 552.103 of the Government Code. Consequently, the school district may withhold the remaining requested information under section 552.103 of the Government Code.

Generally, 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. 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 it must be disclosed. Further, 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).

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

¹ In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

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).

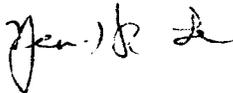
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

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,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/DBF/seg

Ref.: ID# 149306

Enc.: Marked documents

cc: Mr. Peter Franklin, III
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