



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

January 21, 2003

Mr. Robert W. Wilson
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115 East Travis, Suite 618
San Antonio, Texas 78205

OR2003-0418

Dear Mr. Wilson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 175276.

The Alamo Community College District (the "district"), which you represent, received a request for 1) all minutes, documents, and recordings regarding meetings of, and other actions taken by, the district board, building committee, and any subcommittee of the building committee, during the period of November 1, 2001 through August 1, 2002; 2) all documents turned over to the Bexar County District Attorney, Texas Rangers, and/or San Antonio Express-News in response to the request for documents relating to any investigation of two named individuals or any member of the district board; 3) all campaign financial reports filed by persons seeking, maintaining, or gaining office of the district board of trustees for the period January 1, 2001 through August 1, 2002; and 4) all documents relating to communications between the Director of Facilities and any other person regarding the performance of Louis Cruz Architects' contract with the district. You claim that the requested information is excepted from disclosure under the Family Educational Rights and Privacy Act of 1974 ("FERPA"), articles 20.01-20.22 of the Code of Criminal Procedure, Texas Rule of Evidence 503, and Texas Rule of Civil Procedure 192.5, and under sections 552.101, 552.102, 552.103, 552.107, 552.108, 552.114, 552.1175, 552.136, 552.137 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

We note that this office previously addressed some of the information that is requested in this instance in Open Records Letter No. 2002-6215 (2002). Specifically, we ruled in that decision that some information contained in attorney fee bills may be withheld under Texas Rule of Evidence 503, and some information may be withheld under Texas Rule of Civil Procedure 192.5. Further, we ruled that some information contained in expense account records must be withheld under section 552.117, if applicable, and under sections 552.130

and 552.136. You do not inform our office, nor are we aware, of any changes with regard to the law, facts, and circumstances on which that ruling was based. Accordingly, we conclude that the district may rely on our decision in Open Records Letter No. 2002-6215 (2002) as a previous determination in withholding the information that this office ruled was excepted from disclosure. *See* Gov't Code § 552.301(f); *see also* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

Further, the submitted cellular telephone records, expense accounts of another individual, and appointment calendars were the subject of a request for information addressed in Open Records Letter No. 2002-6111 (2002). In that decision, we ruled that some of the information is excepted from disclosure pursuant to FERPA, section 552.117, if applicable, and sections 552.130, 552.136, and 552.137 of the Government Code. Because we are not aware of any changes with regard to the law, facts, and circumstances on which that ruling was based, we conclude that the district may also rely on our decision in Open Records Letter No. 2002-6111 (2002) as a previous determination in withholding the information that this office ruled was excepted from disclosure. *See* Gov't Code § 552.301(f); *see also* Open Records Decision No. 673 (2001).

Next, we note that the documents at issue include the minutes and agendas of public meetings. The minutes, tape recordings, and agendas of a governmental body's public meetings are specifically made public by statute. *See* Gov't Code § 551.022. When a statute expressly makes information public and mandates the release of the information, that information cannot be withheld from disclosure under one of the exceptions in Subchapter C of chapter 552 of the Government Code. Open Records Decision Nos. 451 (1986) (specific statute that affirmatively requires release of information at issue prevails over litigation exception of Public Information Act), 378 (1983), 221 (1979) (board minutes of school district cannot be excepted under statutory predecessor to section 552.103 under any imaginable circumstances), 161 (1977), 146 (1976). Accordingly, the district must release the submitted public meeting agendas and minutes. Gov't Code § 551.022.

We now address your claim under section 552.103 with respect to the submitted information not made expressly public under 551.022, and not encompassed by a previous determination. Section 552.103 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). You claim that the information relates to civil litigation pending when the district received the request for information. Section 552.103 was intended to prevent the use of the Public Information Act as a method of avoiding the rules of discovery in litigation. Attorney General Opinion JM-048 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). A governmental body that raises section 552.103 has the burden of providing relevant facts and documents sufficient to establish the applicability of the exception to the information that it seeks to withhold. To show that the litigation exception is applicable, the district must demonstrate that (1) litigation was pending or reasonably anticipated on the date the county attorney received the requests and (2) the information at issue is related to that litigation. *See* Gov't Code § 552.103(a), (c); *see also* *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).

You indicate that the requestor is employed by a law firm representing the plaintiff in a lawsuit pending against the district. You have provided a copy of the plaintiff's original petition in the lawsuit, styled *Louis Cruz Architects, Inc. v. Alamo Community College District* and filed in the 407th Judicial District Court in Bexar County. The lawsuit involves allegations that the district's selection process of a Project Manager-at-Risk interfered with the plaintiff's contract to design and construct a multi-campus project. We find that the district has established that civil litigation was pending when it received this request for information. Further, we conclude that you have demonstrated that some of the information in Box 2 relates to the pending litigation. Therefore, the district may withhold this information, which we have marked, under section 552.103. We note 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. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing parties in a pending lawsuit is not excepted from disclosure under section 552.103(a), and 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).

However, we note that some of the information for which you claim the litigation exception is subject to section 552.022. Section 552.022(a) enumerates categories of information that are public information and not excepted from required disclosure under chapter 552 of the Government Code unless they are expressly confidential under other law. Some information related to the contract with Louis Cruz Architects, Inc. fits into the subsection (3) category for "information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body." Section 552.103, which serves to protect a governmental body's position in litigation, and section 552.108, which protects law enforcement interests, are discretionary exceptions and do not make information confidential for purposes of section 552.022(a)(3). *See* Open Records Decision Nos. 586 (1991) (governmental body may waive section 552.108), 551 (1990) (section 552.103 does not itself make information confidential), 522 at 4 (1989) (discretionary exceptions in general). Therefore, the information subject to section 552.022(a)(3) must be released. In addition, some of the information in the board meeting packets consists of completed financial and other reports. Section 552.022(a)(1) of the Government Code provides that this information is not excepted from required disclosure under the Public Information Act, except as provided by section 552.108, or unless the information is expressly confidential under other law. Therefore, the completed reports may not be withheld under section 552.103. *See* Open Records Decision No. 551.

However, because section 552.022(a)(1) provides that a completed report may be withheld under section 552.108, we now address your section 552.108 argument for these reports contained in the board meeting information, as well as for the remaining information, which consists of other board meeting documents, campaign finance reports and the information contained on discs in Exhibit 8. *See* Gov't Code § 552.022(a)(1).

You contend that information turned over in response to grand jury summonses is excepted from disclosure under section 552.108 because it relates to a pending criminal prosecution. Section 552.108 states that "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if release of the information would interfere with the detection, investigation, or prosecution of crime." Gov't Code § 552.108(a)(1). The district is neither a law enforcement agency nor a prosecutor. However, this exception may be asserted by a custodian of records on behalf of another governmental body which is a law enforcement agency or prosecutor. *See, e.g.*, Open Records Decision Nos. 474 (1987), 372 (1983) (where incident involving allegedly criminal conduct is still under active investigation or prosecution, section 552.108 may be invoked by any proper custodian of information which relates to incident).

The district has submitted a letter from a prosecutor from the Bexar County District Attorney's Office (the "district attorney") who advises that the office is conducting a criminal investigation involving the district and various employees and board members, and that two present and one former district board members are under felony indictment pending in Bexar

County. The prosecutor argues that release of documents turned over to the grand jury in connection with the pending criminal investigation would be detrimental to the investigation. Based on these representations and our review of the information, we find that release of the requested campaign finance reports would interfere with the detection, investigation, and prosecution of crime. Thus, we conclude that the district may withhold these reports under section 552.108(a)(1) of the Government Code.

The remaining information for which you assert section 552.108 consists of documents that the requestor specifically names as being turned over to the district attorney and Texas Rangers, and is information turned over pursuant to grand jury subpoena. This office has concluded that grand juries are not governmental bodies that are subject to chapter 552 of the Government Code, so that records that are within the actual or constructive possession of a grand jury are not subject to disclosure under chapter 552. *See Gov't Code § 552.003; Open Records Decision No. 513 (1988).* In addition, article 20.02(a) of the Code of Criminal Procedure states that “[t]he proceedings of the grand jury shall be secret.” Thus, information that reveals the proceedings of the grand jury is confidential under article 20.02(a) of the Code of Criminal Procedure and excepted from disclosure under section 552.101 of the Government Code.¹ Based upon these considerations, we conclude that the district must withhold the documents that were turned over pursuant to a grand jury subpoena. We need not address your claim under section 552.108 for this information. However, any of the information that was not turned over pursuant to a grand jury subpoena is not confidential under article 20.02. Furthermore, any such information does not relate to the district attorney’s criminal investigation, and therefore, there has been no demonstration that its release would interfere with the detection, investigation, or prosecution of crime. Consequently, such information may not be withheld under section 552.108.

We also note that the submitted board meeting information includes resumes containing the home addresses and home telephone numbers of applicants for positions with the district. Section 552.117(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See Open Records Decision No. 530 at 5 (1989).* Thus, if any information pertains to a current or former employee or official who elected under section 552.024, prior to the district’s receipt of the request, to keep this information confidential, you must withhold it under section 552.117(1) of the Government Code. You may not withhold such information under section 552.117 for any employee or official who has not made a timely election under section 552.024.

¹ Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses information protected by other statutes.

Finally, the submitted board meeting information contains e-mail addresses that must be withheld under section 552.137 of the Government Code. Section 552.137 requires the district to withhold an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body, unless the member of the public has affirmatively consented to its release. *See* Gov't Code § 552.137(a), (b). You do not inform us that a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. Thus, the e-mail addresses we have marked must be withheld under section 552.137.²

In summary, you may rely on our decisions in Open Records Ruling Nos. 6215 (2002) and 6211 (2002) as previous determinations in withholding the information that this office ruled was excepted from disclosure in those rulings. You may withhold the information we have marked in Box 2 under section 552.103 of the Government Code. You may withhold the submitted campaign finance reports under section 552.108. To the extent that the remaining information was turned over pursuant to grand jury subpoena, it is confidential under article 20.02 of the Code of Criminal Procedure and must be withheld under section 552.101. Home addresses and telephone numbers contained in the board meeting information may be confidential under section 552.117. You must withhold the e-mail addresses we have marked within the information under section 552.137. The remaining information must be released. As we are able to make these determinations, we need not address your remaining arguments.

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 We note that section 552.137 does not apply to a government employee's work e-mail address.

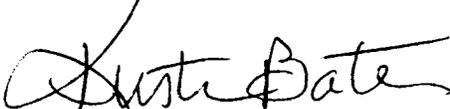
2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things 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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Kristen Bates
Assistant Attorney General
Open Records Division

KAB/seg

Ref: ID# 175276

Enc. Submitted documents

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