



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 23, 2004

Ms. JoAnn S. Wright
Walsh, Anderson, Brown, Schulze & Aldridge, P.C.
P.O. Box 168046
Irving, Texas 75016-8046

OR2004-2202

Dear Ms. Wright:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 197944.

The Mansfield Independent School District (the "district"), which you represent, received a request for eight categories of information regarding the redrawing of attendance zones in the district, to include the following: 1) minutes of the November 17, 2003 meeting of the district board of trustees; 2) the tape recording of a closed session of the board of trustees during the course of the November 17 meeting; 3) copies of district checks written to board members since January 1, 2001; 4) copies of e-mails to board members "through [the district's] computer system" for November 17 and 18, 2003; 5) videotapes from the November 17 meeting; 6) correspondence from the district board or administration to the district athletic department on or before November 17, 2003 regarding student athletic reassignments within the district; 7) the posted notice of the November 17 meeting, with the posting date and posting location; 8) "Administrative instructions, decisions, reasoning, or other documents which explain the restricting of the public's availability to the Citizen's Advisory Board Committee for Mansfield High School boundaries meetings;" and 9) "Copies of postings pursuant to the Open Meetings Act requirements for Citizens Advisory Committee meetings which were held every Tuesday from June 24, 2003 through the last meeting of the Committee in 2003." You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 of the Government Code 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. You seek to withhold the requested board minutes and tape recording of the closed session of the board under section 552.101 in conjunction with section 551.104 of the Government Code. Section 551.104(c) of the Government Code provides that “[t]he certified agenda or tape of a closed meeting is available for public inspection and copying only under a court order issued under Subsection (b)(3).” Gov’t Code § 551.104(c). Such information cannot be released to a member of the public in response to an open records request.¹ *See* Open Records Decision No. 495 (1988). We agree that the requested information pertaining to a certified agenda and tape recording of an executive session of the district board of trustees must be withheld pursuant to section 552.101 of the Government Code in conjunction with section 551.104(c) of the Government Code.

We next address your claimed exceptions to disclosure with respect to the submitted information. We note that some of the information you seek to withhold consists of notices and agendas of public meetings of the district board of trustees. Furthermore, the submitted documents include minutes of meetings of the district’s High School Attendance Zone Committees, although you do not indicate whether these committee meetings are open to the public. The minutes, tape recordings, and agendas of a governmental body’s public meetings are specifically made public under the Open Meetings Act, chapter 551 of the Government Code. *See* Gov’t Code §§ 551.022 (minutes and tape recordings of open meeting are public records and shall be available for public inspection and copying upon request), 551.043 (notice of meeting of governmental body must be posted in a place readily accessible to general public at least 72 hours before scheduled time of meeting), 551.051 (school district required to post notice of meeting at a place convenient to the public in central administrative office of district); *see also* Gov’t Code § 552.022(a)(15) (information regarded as open to the public is not excepted from disclosure under Public Information Act unless expressly confidential by law). Information made public by statute may not be withheld from the public under any of the Public Information Act’s exceptions to public disclosure. *See, e.g.,* Open Records Decision Nos. 544 (1990), 378 (1983), 161 (1977), 146 (1976). Accordingly, agendas and minutes of public meetings of the district must be released in accordance with the Open Meetings Act. *See* Gov’t Code § 551.022. With respect to agendas and minutes pertaining to meetings of the district’s High School Attendance Zone Committees, we determine that, if such meetings are public, the district must release the agendas and minutes of the meetings in accordance with the Open Meetings Act. In the event the meetings of the High School Attendance Zone Committees are not public meetings, however, the following

¹ As you acknowledge, the district is not required to submit the certified agenda or tape recording of a closed meeting to this office for review. *See* Open Records Decision No. 495 at 4 (1988) (attorney general lacks authority to review certified agendas or tapes of executive sessions to determine whether a governmental body may withhold such information from disclosure under statutory predecessor to section 552.101 of the Government Code).

discussion of your claimed exceptions to disclosure shall apply to the agendas and minutes relating to those meetings.

The documents at issue also include information that is subject to section 552.022 of the Government Code. Section 552.022(a)(3) provides that “information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body” is public, unless it is expressly confidential under other law. *See* Gov’t Code § 552.022(a)(3). The submitted documents include copies of checks relating to the expenditure of public funds by the district that are subject to section 552.022(a)(3) of the Government Code. This information, which we have marked, must be released unless it is confidential under other law. While you contend that this information is excepted under section 552.103 of the Government Code, we note that section 552.103 is a discretionary exception to disclosure that protects the governmental body’s interests and is therefore not other law that makes information expressly confidential for purposes of section 552.022(a). *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Thus, the district may not withhold the copies of checks at issue pursuant to section 552.103 of the Government Code.

We note, however, that the checks contain information that is excepted from disclosure under section 552.136 of the Government Code, which provides in relevant part:

(a) In this section, “access device” means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

(1) obtain money, goods, services, or another thing of value; or

(2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov’t Code § 552.136. The district must withhold the account number information that we have marked on the checks at issue pursuant to section 552.136 of the Government Code.

We next address your claim under section 552.103 with respect to the remainder of the submitted information. Section 552.103 of the Government Code 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 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 was pending or reasonably anticipated on the date the governmental body received the request for information, 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). A governmental body 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.² Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records

²In 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).

Decision No. 361 (1983). Based on your representations and our review of the submitted information, we find you have established that the district reasonably anticipated litigation concerning the attendance zone boundaries for district schools on the date the district received the present request. We determine that the remainder of the submitted information relates to that anticipated litigation. Thus, we agree that the remaining submitted information is generally excepted from disclosure under section 552.103 of the Government Code. Based on this finding, we do not reach your other claimed exceptions to disclosure for the remaining information.

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. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing parties 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 or is no longer anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, tape recordings and certified agendas pertaining to closed sessions of the district board of trustees are excepted from disclosure under section 552.101 of the Government Code in conjunction with 551.104(c) of the Government Code and need not be released. We have marked notice and agenda information relating to public meetings of the district board of trustees that must be released pursuant to the Open Meetings Act. If the meetings of the district High School Attendance Zone Committees are open to the public, minutes and agenda information relating to such meetings must be released pursuant to the Open Meetings Act. Otherwise, such information is excepted from disclosure at this time under section 552.103 of the Government Code and may be withheld. Copies of checks included in the submitted documents are public pursuant to section 552.022(a)(3) of the Government Code; with the exception of account number information that must be withheld under section 552.136 of the Government Code, the district must release the checks to the requestor. The remainder of the submitted information may be withheld at this time under section 552.103 of the Government Code.

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 Dep't of Pub. 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,



David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 197944

Enc: Submitted documents

c: Mr. James L. Bearden
Jim Bearden & Associates, P.L.L.C.
1140 West Main Street
Arlington, Texas 76013
(w/o enclosures)