



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 6, 2006

Ms. Kristen A. Zingaro
Alief Independent School District
Henselee, Fowler, Hepworth & Schwartz, L.L.P.
3200 Southwest Freeway, Ste. 2300
Houston, Texas 77027

OR2006-13106

Dear Ms. Zingaro:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 263954.

The Alief Independent School District (the "district"), which you represent, received a request for several categories of information "to the extent this information relates in any way to the [district's] position with respect to a proposed affordable housing project known as Parkwest Apartment Homes." You state that you have released some of the requested information. You also state that some of the requested information does not exist.¹ You claim, however, that the submitted information is excepted from disclosure under sections 552.103, 551.117, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.²

¹The Act does not require a governmental body to release information that did not exist when a request for information was received, create information responsive information, or obtain information that is not held by or on behalf of the city. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

²We note that the some of the information has been redacted. We advise that section 552.301 of the Government Code requires a governmental body to submit responsive information in a manner that permits this office to review the information. *See Gov't Code* § 552.301(e)(1)(D). Therefore, the district risks non-compliance with section 552.301 if it fails to submit responsive information in non-redacted form. Such non-compliance can result in a conclusion from this office that the information at issue must be released. *See id.* §§ 552.006, .301, .302. With respect to future requests for an open records decision, therefore, we advise the district to submit information it seeks to withhold in non-redacted form. *See id.* § 552.3035 (attorney general may not disclose to requestor or public any information submitted to attorney general under section 552.301(e)(1)(D)).

Initially, you inform us that the district asked the requestor for clarification of some of the requested information. *See* Gov't Code § 552.222 (if request for information is unclear, governmental body may ask requestor to clarify request); *see also* Open Records Decision No. 31 (1974) (when presented with broad requests for information rather than for specific records, governmental body may advise requestor of types of information available so that request may be properly narrowed). You inform us that the requestor has not yet responded to this request for clarification; therefore, the district is not required to release any responsive information for which it sought clarification. But if the requestor responds to the clarification request, the district must seek a ruling from this office before withholding any responsive information from the requestor. *See* Open Records Decision No. 663 (1999) (ten business-day deadline tolled while governmental body awaits clarification).

Next, we note that you state that some of the submitted information is not responsive to the instant request. Information that is not responsive to this request need not be released. Moreover, we do not address such information in this ruling.

Now we turn to your arguments for the submitted responsive information. Section 552.103 of the Governmental 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), (c). The 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 on the date the governmental body received the request, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. 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 district must meet both prongs of this test for information to be excepted under 552.103(a).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). In order to establish

that litigation is reasonably anticipated, a governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *Id.* Among other examples, this office has concluded that litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); (2) 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 (3) threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

In this instance, you state that several administrative hearings and re-hearings have been held concerning the housing project known as Parkwest Apartment Homes. Thus, you state that this issue “may eventually result in a civil suit.” However, you do not argue that the district anticipates further administrative hearings or re-hearings. Further, you do not provide this office with any evidence that any person has taken any concrete steps toward litigation. *See* Open Records Decision No. 452. Therefore, the district has not demonstrated the applicability of section 552.103 of the Government Code to the submitted information. *See* Gov’t Code § 552.301(e)(1) (requiring the governmental body to explain the applicability of the raised exception). Accordingly, we conclude that the district may not withhold the submitted information under section 552.103 of the Government Code.

You claim that portions of the submitted information are excepted from disclosure under section 552.117(a)(1) of the Government Code, which 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. Gov’t Code § 552.117(a)(1). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is received. *See* Open Records Decision No. 530 at 5 (1989). In this instance, however, you have not submitted any arguments explaining why this exception is applicable. *See* Gov’t Code § 552.301(e)(1). Therefore, we are unable to determine whether section 552.117(a)(1) is applicable to any of the submitted information, and thus, we find that none of the submitted information may be withheld under section 552.117(a)(1) of the Government Code.

You claim that the submitted e-mail addresses are excepted from public disclosure under section 552.137 of the Government Code. Section 552.137 excepts from disclosure “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 consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov’t Code § 552.137(a)-(c). We note that section 552.137 does not apply to a government employee’s work e-mail address because such an address is not that of the employee as a “member of the public” but is instead the address of the individual as a government employee. Upon review, we find that most of the e-mail addresses contained in the submitted information are of government employees. Accordingly, the district may not withhold these e-mail addresses under section 552.137 of the Government Code. We have,

however, marked the e-mail addresses that the district must withhold under section 552.137 of the Government Code unless the individuals whose e-mail addresses are at issue consented to release of their e-mail addresses.

In summary, unless the individuals whose e-mail addresses are at issue consented to release of their e-mail addresses, the district must withhold the e-mail addresses we have marked under section 552.137 of the Government Code. As you do not raise any other exceptions against disclosure, the remaining information must be released.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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,

A handwritten signature in cursive script that reads "L. Joseph James".

L. Joseph James
Assistant Attorney General
Open Records Division

LJJ/dh

Ref: ID# 263954

Enc. Submitted documents

c: Mr. William M. Bell, Jr.
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(w/o enclosures)