



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 23, 2007

Mr. S. Anthony Safi
Mounce, Green, Myers, Safi, Paxon & Galatzan
P.O. Box 1977
El Paso, Texas 79901-1977

OR2007-11015

Dear Mr. Safi:

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# 287814.

The El Paso Independent School District (the "district"), which you represent, received a request for information pertaining to a specified incident. You claim that the requested information is excepted from disclosure under sections 552.103 and 552.135 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that some of the submitted information was created after the request for information was received by the district. This information, which we have marked, is not responsive to the present request. See Open Records Decision No. 452 at 3 (1986) (governmental body not required to disclose information that did not exist at the time request was received). This ruling does not address the public availability of information that is not responsive to the request, and the district need not release such information in response to the request. See *Econ. Opportunities Dev. Corp v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed).

Section 552.103 of the Government Code provides in relevant part 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 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). 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 that the governmental body received the request for information, 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). A governmental body must meet both prongs of this test for information to be excepted under section 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). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* 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. 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).

The requestor states in a letter to the district that he will seek a hearing to challenge the district's decision not to rescind his resignation and that he has hired an attorney to represent him. You state that the district anticipates litigation to be brought pursuant to section 7.057 of the Education Code. The Administrative Code specifically applies the Administrative Procedure Act to actions brought pursuant to section 7.057 of the Education Code. Accordingly, we find that a hearing under section 7.057 of the Education Code constitutes litigation for purposes of section 552.103. *See* Open Records Decision Nos. 588 (1991) (concluding that contested case under Administrative Procedure Act, Gov't Code ch. 2001, qualifies as litigation under statutory predecessor), 301 (1982) (concluding that litigation

includes a contested case before an administrative agency). Based upon your representations and our review of the submitted documents, we conclude that litigation was reasonably anticipated on the date that the district received the request for information and that the submitted information relates to the litigation. Therefore, the district generally may withhold the submitted information under section 552.103 of the Government Code.¹

However, once information has been obtained by all parties to the anticipated litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to the information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). In this instance, we note that the opposing party has seen some of the information at issue. Thus, the 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). Further, the applicability of section 552.103(a) ends once the litigation has concluded or is no longer anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982). Accordingly, the district may withhold the submitted information under section 552.103, except as we have marked for release.²

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

¹As our ruling is dispositive, we need not address your argument under section 552.135.

²Because the records being released contain information relating to the requestor that would be excepted from disclosure to the general public to protect the requestor's privacy, the district must request another ruling from our office if it receives a future request for this information from individuals other than this requestor or his authorized representative. *See* Gov't Code § 552.023 (governmental body may not deny access to person to whom information relates or person's agent on grounds that information is considered confidential by privacy principles).

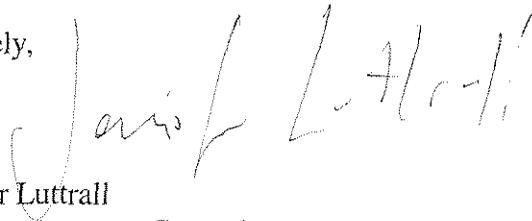
will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to 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,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JLU/eeg

Ref: ID# 287814

Enc. Submitted documents

c: Mr. Jimmy G. Snyder
6208 Bluff Trail Lane
El Paso, Texas 79912
(w/o enclosures)