



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 30, 2008

Mr. Jerry Wallace
Blanco, Ordonez, & Wallace, P.C.
5715 Cromo Drive
El Paso, Texas 79912

OR2008-01450

Dear Mr. Wallace:

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# 300771.

The Ysleta Independent School District (the "district"), which you represent, received two requests for numerous categories of information related to the district's School Bond Construction Program. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.116, 552.117, 552.136, and 552.147 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

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)

¹We note that, although you raise section 552.301, based on your arguments, we understand you to raise section 552.103. We also note that, although you raise section 552.101 to withhold account numbers and social security numbers, sections 552.136 and 552.147 are the proper exceptions for these types of information.

²We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

(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.

Next, we must address your obligations under section 552.301 of the Government Code. This section prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(b) requires the governmental body to ask for the attorney general's decision and state the exceptions to disclosure not later than the tenth business day after the date of its receipt of the written request for information. *See* Gov't Code § 552.301(b). While you raised sections 552.103, 552.116, 552.117, and 552.136 within the ten-business-day time period as required by subsection 552.301(b), you did not raise section 552.107 until after the ten-business-day deadline had passed. Therefore, we find that the district has waived its claims under section 552.107 and the requested information may not be withheld under this section. *See* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived); 665 at 2 n.5 (2000) (discretionary exceptions generally). However, we will address your timely raised arguments against disclosure of the requested information.

Further, we note that some of the requested information is subject to section 552.022 of the Government Code. Section 552.022(a) provides in part that

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 Section 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), (a)(3). Some of the requested information consists of completed reports made for or by the district and contracts relating to the expenditure of public funds by the district. The district must release information subject to section 552.022 unless it is excepted from disclosure under section 552.108 of the Government Code, or is expressly made confidential under other law. *See id.* Although, you raise sections 552.103 and 552.116 of the Government Code, they are discretionary exceptions to disclosure that protect the governmental body's interests and are therefore not other laws that make 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). Consequently, the district may not withhold the completed reports and contracts pursuant to sections 552.103 and 552.116 of the Government Code. However, sections 552.117 and 552.136 can provide compelling reasons to withhold information. Accordingly, we will address your arguments under these sections for all of the submitted information.

We now address your argument under section 552.103 of the Government Code for the information that is not subject to section 552.022. Section 552.103 of the Government Code provides in part:

(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 governmental body that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documents sufficient to establish the applicability of this exception to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate that: (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See* Open Records Decision No. 551 at 4 (1990).

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). When the governmental body is the prospective plaintiff in litigation, the evidence of anticipated litigation must at least reflect that litigation involving a specific matter is "realistically contemplated."

You state that the requested information is related to anticipated litigation pertaining to the nonpayment of prevailing wages between the district's electrical contractor and the electrical contractor's employees, as well as the masonry subcontractor and the masonry subcontractor's employees. You also state that the requested information "involve[s] documents associated with the prevailing wage audit, which would be the center piece of the litigation as this is the basis for any dispute between [the district] and the [electrical contractor] and [masonry subcontractor.]" Based upon your representations and our review of the requested information, we find that you have demonstrated that the district reasonably anticipated litigation on the date of its receipt of this request for information. Furthermore, we find that the information is related to the anticipated litigation for purposes of section 552.103(a). Accordingly, we conclude that section 552.103 is generally applicable to the information at issue.

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. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, to the extent that the requested information has either been obtained from or provided to all of the opposing parties, it is not excepted from disclosure under section 552.103(a) and may not be withheld on that basis. However, to the extent that the requested information has not been obtained from or provided to all of the opposing parties, it may be withheld from disclosure under section 552.103(a). Furthermore, the applicability of section 552.103(a) ends once litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No.350 (1982).

Next, we will address your arguments for the information that may not be subject to section 552.103. Section 552.116 of the Government Code provides as follows:

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, a school district, or a joint board operating under Section 22.074, Transportation Code, including any audit relating to the criminal history background check of a public school employee, is excepted from the requirements of Section 552.021. If information in an audit working paper is also maintained in another record, that other record is not excepted from the requirements of Section 552.021 by this section.

(b) In this section:

(1) "Audit" means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, a resolution or other action of a board of trustees of a school district,

including an audit by the district relating to the criminal history background check of a public school employee, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.

(2) "Audit working paper" includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116(b). You state that the requested information consists of audit working papers. You have not demonstrated, however, that any resolution or other action of the district's board of trustees requires the district to conduct an audit. *See* Gov't Code § 552.116(a), (b)(1); *see also* Open Records Decision No. 580 (1990) (addressing statutory predecessor to Gov't Code § 552.116). Thus, having considered your arguments, we find that you have not demonstrated that any of the requested information constitutes audit working papers for the purposes of section 552.116, and we therefore conclude that the district may not withhold any of the remaining information under section 552.116.

Section 552.117(a)(1) of the Government Code exempts from disclosure the current and former home addresses, 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 of the Government Code. Gov't Code § 552.117(a)(1). Whether a particular piece of information is protected under section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Upon review, we find that none of the requested information pertains to current or former employees of the district. Accordingly, we find that the district has failed to demonstrate how any portion of the requested information is subject to section 552.117. Therefore, no portion of the requested information may be withheld on this basis.

Section 552.136 of the Government Code states that "[n]otwithstanding 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. Accordingly, the district must withhold the bank account numbers, which we have marked, under section 552.136.

We note that the remaining information contains personal e-mail addresses that are excepted from disclosure under section 552.137 of the Government Code.³ Section 552.137 provides:

(a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

(c) Subsection (a) does not apply to an e-mail address:

(1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, cover-sheet, printed document, or other document made available to the public.

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Gov't Code § 552.137. Section 552.137 requires a governmental body to withhold an e-mail address of a member of the public that is provided for the purpose of communicating electronically with the governmental body, unless the member of the public has affirmatively consented to its release or the e-mail address is specifically excluded under section 552.137(c). We note that some personal e-mail addresses, which we have marked, may belong to individuals who have a contractual relationship with the district and therefore

³The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

are not protected under section 552.137. However, to the extent that these individuals do not have a contractual relationship with the district, their e-mail addresses must be withheld under section 552.137 unless they have consented to release.

Section 552.147 of the Government Code states that “[t]he social security number of a living person is excepted from” required public disclosure under the Act. Gov’t Code § 552.147. Upon review, we agree that the district may withhold the social security numbers of living persons under section 552.147 of the Government Code.⁴

Finally, we note that some of the requested information may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, we have marked the portions of the submitted information that are subject to section 552.022 and must be released. To the extent that the remaining information has not been obtained from or provided to all of the opposing parties, it may be withheld from disclosure under section 552.103 of the Government Code. To the extent the remaining information was obtained from or provided to all of the opposing parties, it may not be withheld under section 552.103. To the extent that this is the case, the district must withhold the bank account numbers we have marked under section 552.136, as well as the e-mail addresses we have marked under section 552.137 that belong to individuals who do not have a contractual relationship with the district, or have not consented to release. In addition, the district may withhold social security numbers under section 552.147. Any other remaining information must be released in accordance with copyright law.

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 file suit in

⁴Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person’s social security number from public release without the necessity of requesting a decision from this office under the Act.

Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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 challenge 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,



Loan Hong-Turney
Assistant Attorney General
Open Records Division

LH/eeg

Ref: ID# 300771

Enc. Submitted documents

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