



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

November 3, 2008

Ms. Laura C. Rodriguez  
Walsh, Anderson, Brown, Schulze and Aldridge, P.C.  
P.O. Box 460606  
San Antonio, Texas 78246

OR2008-14997

Dear Ms. Rodriguez:

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# 325655.

The Northside Independent School District (the "district"), which you represent, received a request for twenty-two categories of information pertaining to a specified incident and named district employees. You state the district is redacting some of the responsive information pursuant to the federal Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.<sup>1</sup> You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.108, 552.111, and 552.116 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.<sup>2</sup> We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Section 552.301 prescribes procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(e) states, within fifteen business days of receiving the request, the governmental body must submit to this office (1) written comments stating the reasons why

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<sup>1</sup>Because our office is prohibited from reviewing education records to determine whether appropriate redactions under FERPA have been made, we will not address the applicability of FERPA to any of the submitted information.

<sup>2</sup>We 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.

the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *Id.* § 552.301(e)(1)(A)-(D). The district received the request for information on August 6, 2008. Thus, your deadline to provide this office with a copy of the specific information requested or representative samples was August 27, 2008. The district timely submitted responsive information to this office on August 20 and August 27, 2008. However, the district subsequently submitted a responsive document to this office on September 30, 2008. Consequently, we conclude that the district failed to comply with the requirements of section 552.301 of the Government Code with respect to the information submitted on September 30, 2008.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ); Open Records Decision No. 319 (1982). A compelling reason exists when third-party interests are at stake or when information is confidential by law. Open Records Decision No. 150 (1977). You claim that this document is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. Because the application of section 552.101 can provide a compelling reason for non-disclosure under section 552.302, we will consider your claims for the untimely submitted document.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses information protected by other statutes. Section 552.101 encompasses article 20.02 of the Code of Criminal Procedure. Article 20.02(a) provides that "[t]he proceedings of the grand jury shall be secret." Crim. Proc. Code art. 20.02(a). Article 20.02, however, does not define "proceedings" for purposes of subsection (a). Therefore, we have reviewed case law for guidance, and found that Texas courts have not often addressed the confidentiality of grand jury subpoenas under article 20.02. Nevertheless, the court in *In re Reed* addressed the issue of what constitutes "proceedings" for purposes of article 20.02(a) and stated that although the court was aware of the policy goals behind grand jury secrecy, the trial court did not err in determining the grand jury summonses at issue were not proceedings under article 20.02. *See In re Reed*, 227 S.W.3d 273, 276 (Tex. App.—San Antonio 2007, no pet.). The court further stated that the term "proceedings" could "reasonably be understood as encompassing matters that take place before the grand jury, such as witness testimony and deliberations." *Reed*, 227 S.W.3d at 276. The court also discussed that, unlike federal law, article 20.02 does not expressly make subpoenas confidential. *See Reed*, 227 S.W.3d at 276; Fed. R. Crim. P. 6(e)(6).

Subsequent to the ruling in *Reed*, the 80th Legislature, modeling federal law, added subsection (h) to article 20.02 to address grand jury subpoenas. *See* Crim. Proc. Code art. 20.02; Fed. R. Crim. P. 6(e)(6) (“Records, orders, and subpoenas relating to grand-jury proceedings must be kept under seal to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury.”). Article 20.02(h) states that “[a] subpoena or summons relating to a grand jury proceeding or investigation must be kept secret to the extent and for as long as necessary to prevent the unauthorized disclosure of a matter before the grand jury.” Crim. Proc. Code art. 20.02(h). This provision, however, does not define or explain what factors constitute “necessary to prevent the unauthorized disclosure of a matter before the grand jury.” *Id.* Because subsection (h) is modeled on federal law, we reviewed federal case law for guidance on a definition or explanation of the factors that would constitute “necessary to prevent the unauthorized disclosure of a matter before the grand jury” for the purposes of keeping grand jury subpoenas secret. Our review of federal case law revealed that federal courts have ruled inconsistently on the issue of whether or not grand jury subpoenas must be kept secret. Fed. R. Crim. P. 6(e)(6) advisory committee’s note (stating federal case law has not consistently stated whether or not subpoenas are protected by rule 6(e)). Furthermore, even if we considered article 20.02 to be a confidentiality provision, information withheld under this statute would only be secret “for as long as necessary to prevent the unauthorized disclosure of a matter before the grand jury.” *Id.*

The documents labeled AG-0072 and AG-0073 are a grand jury summons. You inform us that the grand jury proceedings have already concluded. You do not explain how release of the summons at this time would interfere with the effectiveness of the grand jury. Therefore, the district has failed to demonstrate the applicability of article 20.02 to the summons labeled AG-0072 and AG-0073. Accordingly, this document must be released. You inform us that AG-0074 through AG-0129 were supplied to a grand jury representative in response to a grand jury subpoena. You do not make any arguments against the disclosure of these documents. Therefore, AG-0074 through AG-0127 must be released.<sup>3</sup> *See* Gov’t Code § 552.301(e)(1)(A) (providing that governmental body must provide sufficient arguments to establish applicability of claimed exceptions).

Section 552.101 also encompasses section 21.355 of the Education Code, which provides, “[a] document evaluating the performance of a teacher or administrator is confidential.” Educ. Code § 21.355. This office has interpreted this section to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. Open Records Decision No. 643 (1996). This office has determined a teacher

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<sup>3</sup>We note that AG-0074 through AG-0129 contain some information that is protected from public disclosure by exceptions and laws designed to protect the requestor’s client’s privacy. The requestor has a right of access to these documents. *See generally* Gov’t Code § 552.023(b) (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). If the district receives another request for this information from a different requestor who does not have a right of access, it should again seek our decision.

is someone who is required to hold and does hold a certificate or permit required under chapter 21 of the Education Code and is teaching at the time of the evaluation. *Id.*

You claim that the memorandum submitted as AG-0146 is an evaluation. After reviewing the document and your argument, we find that AG-0146 is not an evaluation for the purposes of section 21.355. Accordingly, the document must be released. However, the document labeled AG-0128 and AG-0129 is an evaluation under section 21.355. Therefore, the district must withhold AG-0128 and AG-0129 under section 552.101 in conjunction with section 21.355 of the Education Code. *But see* Educ. Code § 21.352(c) (provides for evaluated teacher to be provided with a written copy of evaluation at the time of the evaluation's completion).

Section 552.101 also encompasses chapter 411 of the Government Code. Chapter 411 authorizes DPS to compile and maintain criminal history record information ("CHRI") from law enforcement agencies throughout the state and to maintain access for authorized persons to federal criminal history records. *See* Gov't Code §§ 411.042, .087. CHRI is defined as "information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions." *Id.* § 411.082(2).

In 2007, the Legislature enacted section 411.0845 of the Government Code, which provides in pertinent part as follows:

(a) [DPS] shall establish an electronic clearinghouse and subscription service to provide criminal history record information to a particular person entitled to receive criminal history record information and updates to a particular record to which the person has subscribed under this subchapter.

(b) On receiving a request for criminal history record information from a person entitled to such information under this subchapter, [DPS] shall provide through the electronic clearinghouse:

(1) the criminal history record information reported to [DPS] or the Federal Bureau of Investigation relating to the individual who is the subject of the request; or

(2) a statement that the individual who is the subject of the request does not have any criminal history record information reported to [DPS] or the Federal Bureau of Investigation.

...

(d) [DPS] shall ensure that the information described by Subsection (b) is provided only to a person otherwise entitled to obtain criminal history record information

under this subchapter. Information collected under this section is confidential and is not subject to disclosure under [the Act].

(e) A person entitled to receive criminal history record information under this section must provide [DPS] with the following information regarding the person who is the subject of the criminal history record information requested:

- (1) the person's full name, date of birth, sex, Texas driver's license number or personal identification certificate number, and social security number;
- (2) a recent electronic digital image photograph of the person and a complete set of the person's fingerprints as required by [DPS]; and
- (3) any other information required by [DPS].

*Id.* § 411.0845(a), (b), (d), (e). Pursuant to section 22.083(a-1) of the Education Code, a school district is authorized to obtain this CHRI from DPS. Educ. Code § 22.083(a-1)(1); *see also* Gov't Code § 411.097. You state that the district obtained the information in AG-0009 through AG-0016 from the DPS clearinghouse pursuant to section 411.0845 of the Government Code. Based on your representations and our review, we find that these documents are confidential under section 411.0845(d) of the Government Code. Therefore, the district must withhold this information under section 552.101 of the Government Code in conjunction with section 411.0845(d).<sup>4</sup>

You claim that section 552.102 of the Government Code is applicable to AG-0130 through AG-0137. Section 552.102(a) excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." *Id.* § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, *writ ref'd n.r.e.*), the court ruled that the test to be applied to information claimed to be protected under section 552.102(a) is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976). In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if it (1) contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person and (2) is not of legitimate concern to the public. 540 S.W.2d at 685. You state that AG-0130 through AG-0137 pertain to allegations of misconduct by a district employee while acting as a public servant. This office has concluded that there is a legitimate public interest in the job performance of a public employee. Open Records Decision Nos. 470 at 4 (1987) (job performance does not generally constitute public employee's private affairs), 444 at 3 (1986) (public has obvious interest in information concerning performance of governmental employees); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee

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<sup>4</sup>As our ruling is dispositive for this information, we need not address your remaining arguments against its disclosure.

privacy is narrow). Thus, the district may not withhold AG-0130 through AG-0137 under section 552.102.

You claim that AG-0001 through AG-0008 and AG-0138 through AG-0145 are excepted from disclosure under section 552.103 of the Government Code. Section 552.103 provides in 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 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 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 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). The 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). This office has concluded litigation was reasonably anticipated when the potential opposing party filed a complaint with the Equal Employment Opportunity Commission (the "EEOC"). *See* Open Records Decision No. 336 (1982).

You inform us that the information responsive to item twelve of the request includes EEOC charges that are currently pending. Based on your arguments and the submitted documentation, we find the district reasonably anticipated litigation involving the charges reflected in the submitted documents on the date it received the request at issue. We also find AG-0001 through AG-0008 and AG-0138 through AG-0145 are related to the anticipated litigation of these charges.

We note, however, that some of the documents you seek to withhold are the actual charges of discrimination filed by the complaining parties. If the opposing party has seen or had access to information that is related to anticipated litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, the district may not withhold the signed charges labeled AG-0003, AG-0004, AG-0139, AG-0142, and AG-0145 under section 552.103. However, because this office has no indication that AG-0001, AG-0002, AG-0005 through AG-0008, AG-0138, AG-0140, AG-0141, AG-0143, and AG-0144 have been obtained by the opposing parties, these documents may be withheld under section 552.103.<sup>5</sup>

The district claims alternatively that AG-0003, AG-0004, AG-0139, AG-0142, and AG-0145 should be withheld under section 552.101 in conjunction with section 2000e-5(b) of title 42 of the United States Code. Section 2000e-5(b) states in relevant part the following:

Whenever a charge is filed by or on behalf of a person claiming to be aggrieved . . . alleging that an employer . . . has engaged in an unlawful employment practice, the [Equal Employment Opportunity Commission (the "EEOC")] shall serve a notice of the charge . . . on such employer . . . , and shall make an investigation thereof . . . . Charges shall not be made public by the [EEOC].

42 U.S.C. § 2000e-5(b). We have previously held that the non-disclosure provisions of section 2000e-5(b) apply only to agents or employees of the EEOC. *See* Open Records Decision Nos. 245 at 2 (1980), 155 (1977), 59 (1974); *Whitaker v. Carney*, 778 F.2d 216 (1985), cert. denied, 479 U.S. 813 (1986) (Title VII proscribes release of information only when held by EEOC or EEOC employees, not when held by employer). In this case, the district is the employer and is not acting as the agent of the EEOC. Therefore, section 2000e-5(b) is not applicable to AG-0003, AG-0004, AG-0139, AG-0142, or AG-0145.

You claim that section 552.108(a)(2) is applicable to some of the remaining information. Section 552.108(a)(2) excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]" Gov't Code § 552.108(a)(2). By its terms, section 552.108 applies only to a law enforcement agency or a prosecutor. You acknowledge that the records at issue are personnel documents maintained by the district for administrative purposes. Accordingly, you have failed to demonstrate that section 552.108 applies. *But see* Open Records Decision

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<sup>5</sup>We note that the applicability of section 552.103 ends once the litigation has been concluded. To the extent that any of these records pertain to concluded litigation, they may not be withheld under section 552.103. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

No. 474 (1987) (predecessor statute to section 552.108(a)(1) may be invoked by a proper custodian when a criminal incident is still under active investigation or prosecution and law enforcement entity represents that release of records will interfere with investigation or prosecution). Accordingly, the district may not withhold AG-0017 through AG-0025 or AG-0046 through AG-0070 under section 552.108(a)(2) of the Government Code.<sup>6</sup>

We note that some of the information you seek to withhold under section 552.108 as well as the charges of discrimination contain information that may be excepted under section 552.117. Section 552.117(a)(1) excepts from disclosure the current and former 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 of the Government Code. Gov't Code § 552.117(a)(1). Whether information is protected by 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). You have not indicated whether the employees whose information we have marked in the remaining documents have timely elected to keep their information confidential. The district may only withhold information under section 552.117 on behalf of current or former employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Accordingly, if the employees timely elected to keep their personal information confidential, the district must withhold the information we have marked under section 552.117(a)(1) of the Government Code. If the employees did not make such an election, the information must be released.

We also note that these documents contain driver's license numbers that are subject to section 552.130. Section 552.130 of the Government Code excepts from disclosure information that relates to "a motor vehicle operator's or driver's license or permit issued by an agency of this state." Gov't Code § 552.130(a)(1). Accordingly, the district must withhold the driver's license numbers under section 552.130.

You assert that AG-0025 through AG-0044 are privileged under the attorney work product privilege. These documents are part of a completed investigation. Section 552.022(a) of the Government Code 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:

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<sup>6</sup>You have redacted student information in these documents under FERPA. Generally, FERPA is not applicable to law enforcement records maintained by the district's police department that were created by the department for a law enforcement purpose. *See* 20 U.S.C. § 1232g(a)(4)(B)(ii); 34 C.F.R. §§ 99.3, .8. However, you inform us that the information was shared with the district and used in the district's performance of administrative functions.

- (1) a completed report, audit, evaluation, or investigation made of, or, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). A completed investigation must be released under section 552.022(a)(1), unless the information is excepted from disclosure under section 552.108 or expressly confidential under "other law." The Texas Supreme Court held "[t]he Texas Rules of Civil Procedure are 'other law' within the meaning of section 552.022." *In re City of Georgetown*, 53 S.W.3d 328, 337 (Tex. 2001). Accordingly, we will address your attorney work product claim under Rule 192.5.

Rule 192.5 defines work product as:

- (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
- (2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX.R.CIV.P. 192.5. A governmental body seeking to withhold information under this exception bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. *See id.*; Open Records Decision No. 677 at 6-8 (2002). In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied that:

- a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

*Nat'l Tank Co. v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204; ORD 677 at 7.

You state that AG-0025 through AG-0044 are typewritten notes created by the district's legal counsel, generated with the intent to advise the district with regard to a termination decision. Section 21.251 of the Education Code provides that a certified educator may challenge a termination decision by seeking an administrative hearing before the Texas Education Agency. *See* Educ. Code § 21.251; *see also* Open Records Decision No. 588 (1991)

(contested case under Administrative Procedures Act constitutes litigation). The district states that at the time of legal counsels' investigation there was no indication that a decision to terminate would not result a challenge in accordance with section 21.251. You state that the documents reflect legal counsels' thoughts and mental impressions regarding what they see as significant and not significant to the district's case should a termination decision be challenged. Upon review of the district's arguments and the information at issue, we find that you have demonstrated that the information at issue was prepared in anticipation of litigation. Therefore, the district may withhold AG-0025 through AG-0044 as attorney work product under Rule 192.5.

In summary, the district must withhold AG-0009 through AG-0016 under section 552.101 in conjunction with section 411.0845 of the Government Code. The district may withhold AG-0001, AG-0002, AG-0005 through AG-0008, AG-0138, AG-0140, AG-0141, AG-0143, and AG-0144 under section 552.103. The district may withhold AG-0025 through AG-0044 under Rule 192.5. If the employees whose information we have marked timely elected to keep their personal information confidential, the district must withhold the marked information under section 552.117(a)(1). The driver's license numbers must be withheld under section 552.130. 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 file suit in 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). If the governmental body does not file suit over 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,



Olivia A. Maceo  
Assistant Attorney General  
Open Records Division

OM/eeg

Ref: ID# 325655

Enc. Submitted documents

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