



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 24, 2009

Ms. LeAnne Lundy
Feldman, Rogers, Morris & Grover, L.L.P.
5718 Westheimer Road, Suite 1200
Houston, Texas 77057

OR2009-08690

Dear Ms. Lundy:

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# 346874.

The Galveston Independent School District (the "district"), which you represent, received a request for the salaries, including stipends, and years of experience in education and administration regarding four named district employees, as well as the letter given to individuals affected by the district's reduction in force efforts. You state the district has no information responsive to the request for the letter regarding reduction in force efforts.¹ You claim the submitted salary and experience information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note a portion of the submitted information does not pertain to salaries or years of experience in education and administration, as specified in the request. Thus, this information, which we have marked, is not responsive to the request. This decision does not address the public availability of the non-responsive information, and that information need not be released.

You claim the submitted responsive information is protected under section 552.101 of the Government Code, which excepts from disclosure "information considered to be confidential

¹The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. However, you have not directed our attention to any law, nor are we aware of any law, that makes any of the submitted information confidential. *See, e.g.*, Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). Therefore, the district may not withhold any of the submitted information under section 552.101 of the Government Code.

We note a portion of the submitted information is subject to section 552.022(a)(2) of the Government Code, which provides:

the following categories of information are public information and not excepted from required disclosure under [the Act] unless they are expressly confidential under other law:

...

(2) the name, sex, ethnicity, salary, title, and dates of employment of each employee and officer of a governmental body[.]

Gov’t Code § 552.022(a)(2). The submitted information includes salary information of district employees. This information must be released under section 552.022(a)(2), unless the information is expressly confidential under other law. Section 552.103 of the Government Code is a discretionary exception to public disclosure that protects a governmental body’s interests and may be waived. *See id.* § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 665 at 2 n 5 (2000) (discretionary exceptions generally). As such, section 552.103 is not “other law” that makes information confidential for purposes of section 552.022. Therefore, the district may not withhold the submitted salary information, which we have marked, under section 552.103. As you have claimed no other exceptions to disclosure for this information, it must be released. However, we will address your claim under section 552.103 for the remaining responsive information, which is not subject to section 552.022.

Section 552.103 of the Government Code provides:

(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 the section 552.103 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 of the receipt of the request for information and (2) the information at issue is related to the pending or anticipated 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 section 552.103.

To establish 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). In the context of anticipated litigation by a governmental body, the concrete evidence must at least reflect that litigation is "realistically contemplated." See Open Records Decision No. 518 at 5 (1989); see also Attorney General Opinion MW-575 (1982) (finding that investigatory file may be withheld from disclosure if governmental body attorney determines that it should be withheld pursuant to section 552.103 and that litigation is "reasonably likely to result"). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. See ORD 452 at 4.

This office has long held that for the purposes of section 552.103, "litigation" includes "contested cases" conducted in a quasi-judicial forum. See Open Records Decision Nos. 474 (1987), 368 (1983), 336 (1982), 301 (1982). Likewise, "contested cases" conducted under the Texas Administrative Procedure Act, chapter 2001 of the Government Code, constitute "litigation" for purposes of section 552.103. See Open Records Decision Nos. 588 (1991) (concerning former State Board of Insurance proceeding), 301 (1982) (concerning hearing before Public Utilities Commission). In determining whether an administrative proceeding is conducted in a quasi-judicial forum, this office has focused on the following factors: (1) whether the dispute is, for all practical purposes, litigated in an administrative proceeding where (a) discovery takes place, (b) evidence is heard, (c) factual questions are resolved, and (d) a record is made; and (2) whether the proceeding is an adjudicative forum of first jurisdiction, *i.e.*, whether judicial review of the proceeding in district court is an appellate review and not the forum for resolving a controversy on the basis of evidence. See Open Records Decision No. 588 (1991).

You state the requestor filed an internal grievance with the district. You explain internal complaints filed with the district are "litigation" in that the district follows administrative procedures in handling such disputes. You further state the district's policy includes a three-level process wherein hearing officers hear the complaint at Levels I and II and the district's board of trustees hears the grievance if the grievant appeals to Level III. You explain during these hearings the grievant is allowed to be represented by counsel, present favorable

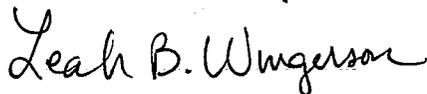
evidence, and present witnesses to "testify" on his behalf. You state the grievant must complete the district's internal grievance process before he can appeal to the Texas Education Agency, and eventually a court of competent jurisdiction. Based on your representations, we find you have demonstrated the district's administrative procedures for disputes are conducted in a quasi-judicial forum, and thus, constitute litigation for purposes of section 552.103. You state, and provide documentation showing, the requestor filed his grievance with the district prior the district's receipt of the request for information. Thus, we determine the district was involved in pending litigation at the time it received the instant request for information. You state the remaining information directly relates to the pending litigation because the information pertains to the subject that is the basis of the litigation. Based on your representations and our review, we find the remaining information is related to the litigation for the purposes of section 552.103. We, therefore, conclude the district may withhold the remaining information under section 552.103 of the Government Code.

We note, however, once the information at issue has been obtained by all parties to the 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). Thus, any information at issue that has either been obtained from or provided to all opposing parties in the litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/dls

Ref: ID# 346874

Enc. Submitted documents

c: Requestor
(w/o enclosures)