



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 23, 2009

Mr. Paul L. Myers  
Strasburger & Price, L.L.P.  
2801 Network Boulevard, Suite 600  
Frisco, Texas 75034

OR2009-13430

Dear Mr. Myers:

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# 356181.

The Rockwall Independent School District (the "district"), which you represent, received a request for the requestor's records, statements made by a named individual, and the résumés and qualifications of individuals hired to teach social studies at a specified school. You claim the submitted résumés are excepted from disclosure under section 552.103 of the Government Code. You represent the district has made the requestor's records available to him. You have not submitted the requested statements made by a named individual. Therefore to the extent the statements exist, they must be released. *See* Gov't Code §§ 552.006, .301, .302; Open Records Decision No. 664 (2000) (concluding that section 552.221(a) requires that information not excepted from disclosure must be released as soon as possible under the circumstances). *But see Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. App.—San Antonio 1978, writ dismissed) (the Act does not require a governmental body to release information that did not exist when a request for information was received or to create responsive information). We have considered the exception you claim and reviewed the submitted résumés. We have also received and considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we address the requestor's claim that the district's request for a decision from this office was untimely. Pursuant to section 552.301(b), a governmental body must ask for a

decision from this office and state the exceptions that apply within ten business days of receiving the written request. Gov't Code § 552.301(b). The written request for information was e-mailed to the district at 7:18 p.m. on June 30, 2009. Because the request for information was received after 5 p.m. on June 30, the district did not receive it until July 1, 2009 for purposes of the Act. Accordingly, the first business day after the district received the request for information was July 2, 2009. The district also represents its offices were closed on July 3, 2009. Therefore the tenth business day following the district's receipt of this request for information was July 16, 2009. The district's request for a decision to this office was postmarked on July 15, 2009. Accordingly, we find the district timely requested a ruling from this office, and we address its claimed exception to disclosure accordingly.

Section 552.103 of the Government Code provides in pertinent 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 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, 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).

To establish that 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). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *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. *See* Open Records Decision No. 555 (1990); *see also*

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).

You state, and provide documentation, that the requestor filed a complaint with the Equal Employment Opportunity Commission (“EEOC”) against the district. Although this office has ruled that a pending EEOC complaint indicates a substantial likelihood of potential litigation, the complaint reflects it was not filed until after the district received the request for information. *See* Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982). Pursuant to section 552.103(c), the governmental body must assert the facts and circumstances at the time the request for information is received to demonstrate the applicability of section 552.103. Gov’t Code § 552.103(c). At the time the request was received, you assert the requestor had threatened to file a complaint with the EEOC and to file suit against the district. However, a person’s threat to sue without any further action is not sufficient to establish reasonably anticipated litigation. *See* ORD 331. You do not provide any additional arguments showing that prior to the receipt of the request, this individual had taken any concrete steps toward initiating litigation. *See id.* Consequently, after reviewing your arguments, we find you have not established the district reasonably anticipated litigation when it received the request for information. Accordingly, the district may not withhold the submitted résumés under section 552.103 of the Government Code.

Some of the information contained in the résumés may be subject to section 552.117(a)(1) of the Government Code.<sup>1</sup> This section excepts from public disclosure the present 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 timely request that such information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). The district may only withhold information under section 552.117(a)(1) on behalf of officials or 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 whose information we marked timely elected to keep their home address and home telephone number confidential pursuant to section 552.024, the district must withhold this information under section 552.117(a)(1). However, if the employees at issue did not timely elect under section 552.024, this information must be released.

Some of the remaining information may also be subject to section 552.137 of the Government Code, which excepts from disclosure “an e-mail address of a member of the

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<sup>1</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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). The submitted e-mail addresses do not appear to be a type excluded by subsection (c). Accordingly, unless the owners of the e-mail addresses we marked have consented to their release, the district must withhold the e-mail addresses we marked under section 552.137.

In summary, if the employees whose information we marked timely elected to keep their home address and home telephone number confidential pursuant to section 552.024, the district must withhold this information under section 552.117(a)(1) of the Government Code. The district must also withhold the e-mail addresses we marked under section 552.137 of the Government Code unless the owners of the e-mail addresses have consented to their e-mail address's release. The remaining information must be released.

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](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, toll free, at (888) 672-6787.

Sincerely,



Bob Davis  
Assistant Attorney General  
Open Records Division

RSD/cc

Ref: ID# 356181

Enc: Submitted documents

cc: Requestor  
(w/o enclosures)