



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 22, 2009

Mr. J. Erik Nichols  
Feldman, Rogers, Morris & Grover, L.L.P.  
5718 Westheimer Road, Suite 1200  
Houston, Texas 77057

OR2009-18169

Dear Mr. Nichols:

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# 365107.

The Alief Independent School District (the "district"), which you represent, received two requests from the same requestor for all correspondence sent from or received by the district's superintendent from May 2009 through October 2, 2009. You claim the submitted correspondence is excepted from disclosure under sections 552.103 and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.103 of the Government Code 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 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 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 district must meet both prongs of this test for information to be excepted under 552.103(a). This office has held that "litigation" within the meaning of section 552.103 includes contested cases conducted in a quasi-judicial forum. *See, e.g.*, Open Records Decision Nos. 474 (1987), 368 (1983), 301 (1982). For instance, this office has held that cases conducted under the Texas Administrative Procedure Act, chapter 2001 of the Government Code, constitute "litigation" for purposes of section 552.103. *See, e.g.*, Open Records Decision Nos. 588 (1991) (proceeding of former State Board of Insurance), 301 (1982) (proceeding of Public Utilities Commission).

You state the requestor filed three sworn complaints with the Texas Ethics Commission (the "commission") against three district employees, alleging violations concerning a district tax rollback election. You state two of these complaints were dismissed. You represent, and provide documentation showing, the final complaint was pending with the commission prior to the district's receipt of the requests for information, and that it is still pending. You argue a sworn complaint filed with the commission is "litigation" for purposes of section 552.103. Subchapter E of chapter 571 of the Government Code sets forth the procedures governing commission investigations and hearings. Pursuant to section 571.139(c), the commission only abides by the Texas Administrative Procedure Act when a sworn complaint reaches the final, formal hearing stages of review. Gov't Code § 571.139(c). You do not inform this office the complaint at issue is pending in any formal hearing with the commission. You also do not explain how any other stage of the commission's complaint processing procedure constitutes litigation of a judicial or quasi-judicial nature for purposes of section 552.103. *See* ORD 588; *see generally* Open Records Decision No. 301 (1982) (discussing meaning of "litigation" under predecessor to section 552.103). Thus, we find you failed to demonstrate the pending complaint against the district constitutes pending litigation for purposes of section 552.103.

You additionally claim the district reasonably anticipates litigation by the requestor. 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. *See* Open Records Decision Nos. 555 (1990); 518 at 5 (1989) (litigation must be "realistically contemplated"). This office has also found litigation was reasonable anticipated where the opposing party threatened to sue on several occasions and hired an attorney. *See* Open Records Decision No. 288 (1981). On the other hand, this office has determined 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 generally claim the requestor may initiate litigation against the district if he disagrees with the outcome of an upcoming election. However, you do not provide any concrete evidence showing that, prior to the receipt of the requests, the requestor actually threatened to file a lawsuit against the district or otherwise took any objective steps toward filing suit. Accordingly, you failed to demonstrate the district reasonably anticipates litigation. Therefore, the district may not withhold the submitted information under section 552.103.

You also claim the submitted communications contain e-mail addresses subject to section 552.137 of the Government Code. Section 552.137 excepts from disclosure "an e-mail address of a member of the 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 e-mail addresses we marked do not appear to be specifically excluded by section 552.137(c). Accordingly, the district must withhold the e-mail addresses we marked under section 552.137 of the Government Code, unless the owner of those addresses have affirmatively consented to their disclosure.<sup>1</sup> As your raise no other exceptions to disclosure, 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,

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<sup>1</sup>We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

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,

A handwritten signature in black ink, appearing to read "Bob Davis", with a stylized flourish at the end.

Bob Davis  
Assistant Attorney General  
Open Records Division

RSD/cc

Ref: ID# 365107

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)