



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 6, 2010

Ms. Leslie McCollom  
Counsel for Lancaster Independent School District  
O'Hanlon, McCollom & Demerath  
808 West Avenue  
Austin, Texas 78701

OR2010-06559

Dear Ms. McCollom:

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# 378462.

The Lancaster Independent School District (the "district") received a request for copies of signed yearly evaluations and signed job descriptions of all district police officers during a specified time period. You claim that the submitted information is excepted from disclosure under section 552.103 of the Government Code.<sup>1</sup> We have considered the exception you claim and reviewed the submitted information.

Initially, we note the submitted employee evaluations are subject to section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) provides for the required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108." Gov't Code § 552.022(a)(1). Pursuant to section 552.022(a)(1), a completed evaluation is expressly public unless it is either excepted under 552.108 of the Government Code or is expressly confidential under other law.<sup>2</sup> Although you raise section 552.103 of the Government Code, section 552.103 is a discretionary exception to 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 (discretionary exceptions generally), 663 (1999) (governmental body may waive section 552.103). As such,

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<sup>1</sup>Although you also initially raised section 552.101 of the Government Code as an exception to disclosure of the requested information, you have provided no arguments regarding the applicability of this section. Since you have not submitted arguments concerning this exception, we assume that you no longer urge it. *See* Gov't Code §§ 552.301(b), (e), .302.

<sup>2</sup>The district does not raise section 552.108 as an exception to disclosure of this information.

section 552.103 is not “other law” that makes information confidential for the purposes of section 552.022. Therefore, the district may not withhold the information subject to section 552.022, which we have marked, under section 552.103 of the Government Code. We will, however, address your argument under section 552.103 for the remaining responsive information, which is not subject to section 552.022.

Next, we note section 552.117 of the Government Code may apply to a portion of the evaluations.<sup>3</sup> Section 552.117(a)(2) excepts from disclosure the home address, home telephone number, social security number, and the family member information of a peace officer, as defined by article 2.12 of the Code of Criminal Procedure, regardless of whether the officer requested confidentiality under section 552.024 or section 552.1175 of the Government Code. *See* Gov’t Code § 552.117(a)(2). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. In this instance, the information we have marked concerns an officer who may no longer be employed by the district’s police department, and it is unclear whether this individual is currently a licensed peace officer as defined by article 2.12 of the Code of Criminal Procedure. Therefore, to the extent the individual whose information is at issue is a licensed peace officer as defined by article 2.12, the district must withhold the personal information we have marked under section 552.117(a)(2) of the Government Code.

If the individual at issue is not a licensed peace officer, then her personal information may be excepted under section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) excepts from disclosure the 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 a particular piece of 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). The district may only withhold information under section 552.117(a)(1) if the individual at issue elected confidentiality under section 552.024 prior to the date on which the request for this information was made. Therefore, if the individual at issue timely elected to keep her personal information confidential, the district must withhold the information we have marked under section 552.117(a)(1). Otherwise, this information may not be withheld under section 552.117.

We now turn to your argument under section 552.103 of the Government Code for the information not subject to section 552.022. Section 552.103 provides in relevant 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

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<sup>3</sup>Unlike other exceptions to disclosure under the Act, this office will raise section 552.117 on behalf of a governmental body, as this exception is mandatory and may not be waived. *See* Gov’t Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

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 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). 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.* This office has found that a pending complaint filed with the Equal Employment Opportunity Commission (the "EEOC") indicates that litigation is reasonably anticipated. *See, e.g.*, Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982).

You state, and provide documentation showing, prior to the district's receipt of the instant request, the requestor filed a discrimination claim against the district with the EEOC. You also state the submitted job descriptions, which were signed by district police officers, are related to the requestor's claim of discrimination. Based on your representations and our review, we find the district reasonably anticipated litigation on the date this request was received, and the information at issue is related to the anticipated litigation. Therefore, we conclude the district generally may withhold the submitted signed job descriptions under section 552.103 of the Government Code.

We note, however, that once the information has been obtained by all parties to the pending litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). In this instance, the requestor has already seen the job description he signed. Therefore, as the opposing party has already seen or had access to this information, which we have marked, it may not be withheld under section 552.103 of the Government Code. However, the district may withhold the remaining information not

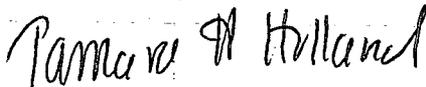
subject to section 552.022, which we have marked, under section 552.103. We also note that the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

In summary, to the extent the information we have marked pertains to a licensed peace officer as defined by article 2.12, the district must withhold this information under section 552.117(a)(2) of the Government Code. If the individual whose information is at issue is not a licensed peace officer, the district must withhold the marked personal information under section 552.117(a)(1) of the Government Code, provided that she timely elected to keep her personal information confidential. The district may withhold the information we have marked under section 552.103 of the Government Code. 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,



Tamara H. Holland  
Assistant Attorney General  
Open Records Division

THH/jb

Ref: ID# 378462

Enc. Submitted documents

c: Requestor  
(w/o enclosures)