



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 25, 2011

Mr. Humberto Aguilera
Escamilla, Poneck & Cruz, LLP
P.O. Box 200
San Antonio, Texas 78291-0200

OR2011-04134

Dear Mr. Aguilera:

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# 412346.

The Harlandale Independent School District (the "district"), which you represent, received a request for information relating to a former employee, including documentation supporting the termination of her employment and "any and all files to include her entire personnel file." You state some of the requested information either has been or will be released. You claim the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the information you submitted.

We note some of the submitted information, which we have marked, was created after the date of the district's receipt of the instant request for information. The Act does not require a governmental body to release information that did not exist when it received a request or create responsive information.¹ Therefore, the marked information, which did not exist when the district received the instant request, is not responsive to the request. This decision does not address the public availability of the marked information, which need not be released in response to the request.

We also note the responsive information includes personnel policies that fall within the scope of section 552.022 of the Government Code. Section 552.022(a)(15) provides for required public disclosure of "information regarded as open to the public under an agency's policies[.]" unless the information is expressly confidential under other law. Gov't Code

¹See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

§ 552.022(a)(15). Because the district publishes its personnel policies on its website, we find the submitted personnel policies are regarded as open to the public under the district's policies and are therefore subject to section 552.022(a)(15). Although the district seeks to withhold the personnel policies under section 552.103 of the Government Code, that section 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 Gov't Code § 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(a)(15). Therefore, the district may not withhold the marked personnel policies under section 552.103 of the Government Code and must release those documents pursuant to section 552.022(a)(15) of the Government Code.

Next, we address your claim for the rest of the responsive information under section 552.103. This exception provides in 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 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). A governmental body that claims section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information it seeks to withhold. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See* Open Records Decision No. 551 at 4 (1990).

This office has long held that for 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* ORD 588.

You contend the remaining responsive information is related to a grievance the requestor filed with the district on behalf of his client, the former district employee. You explain the grievance began at Level Four of the district’s grievance procedures because it was filed against the superintendent of schools. You state, or have provided documentation reflecting, that under the district’s grievance procedures, the grievant is allowed to have representation, present her case, and offer witnesses and other evidence in a hearing before the district’s board of trustees. You also state the board hears a response from the district and is allowed to question the parties and witnesses. You explain a record of the proceeding is made by audio or audio/video recording or a court reporter. You note that in the event of an appeal from the board’s decision to the state commissioner of education, the record of the grievance hearing and the evidence presented to the board will be reviewed. *See* Educ. Code 7.057(c) (in appeal against school district, commissioner shall issue decision based on review of record developed at district level under substantial evidence standard of review). Based on your representations and your documentation, we find you have demonstrated the district’s grievance procedure is conducted in a quasi-judicial forum and therefore constitutes litigation for purposes of section 552.103 of the Government Code. You state, and have provided documentation reflecting, the grievance was filed prior to the district’s receipt of the instant request for information. Based on your representation and your documentation, we find the district was a party to pending litigation on the date of its receipt of the instant request. We also find the remaining responsive information is related to the pending litigation. We therefore conclude the district may withhold the responsive information we have marked under section 552.103 of the Government Code. We note the applicability of section 552.103 ends once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We note the opposing party in the pending litigation has already seen or had access to the rest of the responsive information. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* ORD 551 at 4-5. Thus, if the opposing party has seen or had access to information relating to litigation, through discovery or otherwise, 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 any of the remaining information under section 552.103.

Lastly, we note the remaining information includes an e-mail address the district must withhold under section 552.137 of the Government Code.² Section 552.137 provides that “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act],” unless the owner of the e-mail address has affirmatively consented to its public disclosure or the e-mail address falls within the scope of section 552.137(c). Gov’t Code § 552.137(a)-(c). We note section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address a governmental entity maintains for one of its officials or employees. The district must withhold the e-mail address we have marked under section 552.137 of the Government Code unless the owner of the e-mail address has affirmatively consented to its public disclosure.³ Although the remaining information also includes the requestor’s e-mail address, the requestor has a right of access to his own e-mail address under section 552.137(b). Therefore, the district may not withhold the requestor’s e-mail address under section 552.137 and must release that information.

In summary, the district (1) must release the marked personnel policies pursuant to section 552.022(a)(15) of the Government Code; (2) may withhold the information we have marked under section 552.103 of the Government Code; and (3) must withhold the marked e-mail address under section 552.137 of the Government Code unless the owner of the e-mail address has consented to its disclosure. The district must release the rest of the responsive information.⁴

²This office will raise section 552.137 on behalf of a governmental body, as this section is a mandatory exception to disclosure. *See* Gov’t Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

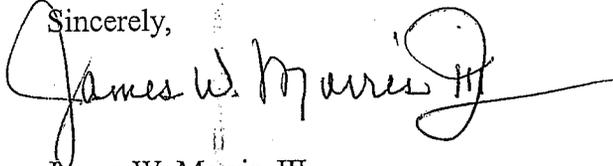
³We note this office issued Open Records Decision No. 684 (2009), a previous determination authorizing all governmental bodies to withhold ten categories of information without the necessity of requesting an attorney general decision, including an e-mail address of a member of the public under section 552.137 of the Government Code. Thus, should the district receive another request for these same records from a person who would not have a right of access to the present requestor’s e-mail address, the district is authorized to withhold the requestor’s e-mail address under section 552.137 without the necessity of requesting an attorney general decision.

⁴In addition to the requestor’s e-mail address, the remaining information includes information relating to the former employee the district might be required to withhold from the public under section 552.117 of the Government Code. *See* Gov’t Code § 552.117(a)(1). Because section 552.117 protects personal privacy, the requestor also has a right of access to the former employee’s private information as her authorized representative. *See id.* § 552.023; Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning herself). We note section 552.024(c) of the Government Code authorizes a governmental body to redact information protected by section 552.117(a)(1) without the necessity of requesting a decision under the Act if the current or former employee to whom the information pertains timely chooses not to allow public access to the information. *See* Gov’t Code § 552.024(c)(2). Thus, should the district receive another request for this same information from a person who would not have a right of access to the former employee’s private information, section 552.024(c) authorizes the district to redact the former employee’s home address, home telephone number, social security number, and family member information to the extent she timely chooses not to allow access to the information.

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

Sincerely,

A handwritten signature in cursive script that reads "James W. Morris III". The signature is written in black ink and is positioned above the typed name.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/em

Ref: ID# 412346

Enc: Submitted documents

c: Requestor
(w/o enclosures)