



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 25, 2012

Ms. Laura Rodriguez McLean
Walsh, Anderson, Brown, Gallegos and Green P.C.
P.O. Box 168046
Irving, Texas 75016

OR2012-01262

Dear Ms. McLean:

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# 443231.

The Forney Independent School District (the "district"), which you represent, received two requests from different requestors for (1) a specified letter from the Texas Education Agency (the "TEA"), (2) the district's response to that TEA letter, and (3) all e-mails to Rutherford, Taylor & Company, P.C., ("Rutherford Taylor") and/or its staff during a specified time period. You state the district has released the letter from the TEA. 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 submitted representative sample of information.¹

You claim the submitted information is excepted under section 552.103 of the Government Code. Section 552.103 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

¹We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

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 district 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, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); ORD 551 at 4. The district must meet both prongs of this test for information to be excepted under section 552.103(a).

You state, and provide documentation showing, that prior to the district's receipt of the requests for information, the district filed a lawsuit against Rutherford Taylor. Based on your representations and our review of the submitted information, we agree litigation was pending on the date the district received the request. Additionally, we find the district has established the submitted information relates to the pending lawsuit for purposes of section 552.103.

We note, however, most of the submitted information consists of e-mail communications between the district and the opposing parties to the pending lawsuit. Thus, the opposing parties have seen or had access to this information. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to that litigation to obtain it through discovery procedures. See ORD 551 at 4-5. Thus, if the opposing parties have seen or had access to information relating to pending 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 the submitted e-mails communicated with the opposing parties under section 552.103. However, the district may withhold its response to the TEA letter and any e-mails not communicated with the opposing parties under section 552.103. We note the applicability of section 552.103(a) ends once the litigation has concluded or is no longer anticipated. See Attorney General Opinion MW-575 (1982); see also Open Records Decision No. 350 (1982).

We note the submitted e-mails contain information subject to section 552.117 of the Government Code.² Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, emergency contact information, 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). 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 individuals concerned elected confidentiality under section 552.024 prior to the date on which the request for this information was made. Therefore, if the employee whose personal information is 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). If the employee did not timely elect to withhold her personal information, the district may not withhold the information at issue under section 552.117(a)(1).

We also note the submitted e-mails contain e-mail addresses that may be excepted under 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). Gov't Code § 552.137(a)-(c). Under section 552.137, a governmental body must withhold the e-mail address of a member of the general public, unless the individual to whom the e-mail address belongs affirmatively consents to its public disclosure. *See id.* § 552.137(b). Section 552.137 is not applicable to an e-mail address provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent. *See id.* § 552.137(c)(1). Because we are unable to discern whether the e-mail addresses we have marked fall within the scope of section 552.137(c), we must rule conditionally. To the extent the marked e-mail addresses belong to members of the public, the district must withhold the e-mail addresses under section 552.137, unless the individuals to whom the e-mail addresses belong affirmatively consent to their release. *See id.* § 552.137(b). However, to the extent the marked e-mail addresses belong to agents of companies with contractual relationships with the district, the e-mail addresses may not be withheld under section 552.137 of the Government Code.

In summary, the district may withhold its response to the TEA letter and any e-mails not communicated with the opposing parties under section 552.103 of the Government Code. To the extent the employee whose personal information is at issue timely elected to keep her personal information confidential, the district must withhold the information we have marked

²The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

under section 552.117(a)(1) of the Government Code. To the extent the marked e-mail addresses belong to members of the public and not agents of companies with contractual relationships with the district, the district must withhold the e-mail addresses under section 552.137 of the Government Code, unless the individuals to whom the e-mail addresses belong affirmatively consent to their 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, 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,



Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/agn

Ref: ID# 443231

Enc. Submitted documents

c: Requestor
(w/o enclosures)