



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 8, 2012

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

OR2012-01989

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# 445565.

The Weslaco Independent School District (the "district"), which you represent, received a request for information regarding a named person, a specified grant, and the district's interim superintendent, including a final report prepared for the district and billing statements for legal fees for attorneys involved in an investigation of the named employee. The request specifically excludes descriptions of activity from the requested billing statements and instead seeks only the dollar amount billed to the district. The requestor is the named employee's attorney. You state some information has been or will be made available to the requestor. You claim the requested information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the district has not submitted the requested report as required by section 552.301(e) of the Government Code. *See* Gov't Code § 552.301(e) (governmental body required to submit copy of the specific information requested or representative sample by fifteenth business day after date of receiving request). Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption that the information at issue is public and

must be released, unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302. You state the district's outside counsel delivered the report to the district but the district is currently unable to locate the report. While 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 new information in response to a request, here the district informs us the report does exist. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.— San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

You assert sections 552.103 and 552.107 of the Government Code as exceptions to disclosure of the report. However, because the district failed to submit the report for our review, the district has waived discretionary exceptions to disclosure. *See 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 Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 522 (1989) (discretionary exceptions in general). Accordingly, we have no basis for finding the report excepted from public disclosure under section 552.103 or 552.107 and it may not be withheld on that basis.

Next, we note the information submitted in exhibit A-2 is subject to section 552.022(a)(16) of the Government Code, which provides in relevant part:

Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

...

(16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege[.]

Gov't Code § 552.022(a)(16). Exhibit A-2 consists of attorney fee bills which must be released pursuant to section 552.022(a)(16) unless they are made confidential by the Act or other law. *See id.* Although you assert exhibit A-2 is excepted from disclosure under section 552.103 of the Government Code, that exception is discretionary and does not make information confidential under the Act. *See 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 a confidentiality provision for purposes of section 552.022(a)(1) of the Government Code. Therefore, the district may not withhold exhibit A-2 on the basis of section 552.103 of the Government Code. As you raise

no further exceptions to disclosure of exhibit A-2, it must be released to the requestor. However, we will consider your claim under section 552.103 for exhibit A-1, which is not subject to section 552.022.

Section 552.103 of the Government Code 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 an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information at issue. 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, orig. proceeding); *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 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).* In determining whether an administrative proceeding is conducted in a quasi-judicial forum, some of the factors this office considers are whether the administrative proceeding provides for discovery, evidence to be heard, factual questions to be resolved, the making of a record, and whether the proceeding is an adjudicative forum of first jurisdiction with appellate review of the resulting decision without a re-adjudication of fact questions. *See Open Records Decision No. 588 (1991).*

You contend the remaining information is related to a grievance the named employee filed with the district. You explain the grievance will consist of a "Level III" hearing before the district's board of trustees (the "board"). You state a Level III hearing is similar to a bench

trial. You state the grievant is allowed to have representation, present his case, and offer witnesses and other evidence at the hearing before the board. You also state the board hears a response from the district and, acting as the fact finder, is allowed to question the parties and witnesses. You explain a record of the proceeding made by audio or audio/video recording or a court reporter is required. 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 are 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, we find you have demonstrated the district's grievance process is conducted in a quasi-judicial forum and therefore constitutes litigation for purposes of section 552.103 of the Government Code. You inform us, and the request reflects, simultaneously with the submission of the request for information, the requestor filed a grievance requesting a Level III hearing. Based on your representation and our review, we find the district was a party to pending litigation on the date of its receipt of the request. We also find the remaining information is related to the pending litigation. We therefore conclude the district may withhold exhibit A-1 under section 552.103 of the Government Code.

In reaching this conclusion with respect to the remaining information, we assume the named employee, as the opposing party in the pending litigation, has not seen or had access to any of the information at issue. 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). 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).

In summary, the district must release exhibit A-2 to the requestor pursuant to section 552.022(a)(16) of the Government Code. The district may withhold exhibit A-1 under section 552.103 of the Government Code.

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 black ink that reads "Jessica Marsh". The signature is written in a cursive, flowing style.

Jessica Marsh
Assistant Attorney General
Open Records Division

JM/em

Ref: ID# 445565

Enc. Submitted documents

c: Requestor
(w/o enclosures)