



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 22, 2013

Ms. Ellen H. Spalding  
Counsel for the Eanes Independent School District  
Rogers, Morris & Grover, L.L.P.  
5718 Westheimer Road, Suite 1200  
Houston, Texas 77057

OR2013-06480

Dear Ms. Spalding:

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# 484689 (EISD request #3434).

The Eanes Independent School District (the "district"), which you represent, received a request for information related to "vending machines, either sodas, candies or sandwiches[.]" You claim the requested information is excepted from disclosure under sections 552.103 and 552.128 of the Government Code. You also indicate release of the requested information may implicate the interests of third parties. Accordingly, the district notified the third parties of the request for information and of each company's right to submit arguments stating why its information should not be released.<sup>1</sup> See Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We have received comments from Accent. We have considered the claimed exceptions and reviewed the submitted

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<sup>1</sup>You inform us the interested parties are Accent Food Services, L.L.C. ("Accent"); Big Red/7up of Austin; Coca-Cola Refreshments; and Fit Choice, L.L.C.

representative sample of information.<sup>2</sup> We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, you acknowledge, and we agree, the district did not raise section 552.128 of the Government Code in compliance with section 552.301(b) of the Government Code. Generally, a governmental body's failure to comply with section 552.301 results in the waiver of the claimed exceptions. *See generally id.* § 552.302. However, section 552.128 of the Government Code can provide a compelling reason to overcome the presumption of openness and cannot be waived. Therefore, we will consider whether the submitted information is excepted from disclosure under section 552.128. We will also consider the timely-raised exception to disclosure.

Next, we note some of the submitted information is subject to section 552.022 of the Government Code. This section provides, in pertinent part:

(a) 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:

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

*Id.* § 552.022(a)(3). The submitted information includes a completed contract subject to section 552.022(a)(3). The completed contract, which we have marked, must be released unless it is made confidential by the Act or other law. *See id.* Although you raise section 552.103 of the Government Code for this information, section 552.103 is a discretionary exception to disclosure 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 section 552.103); Open Records Decision Nos. 665 at 2 n.5 (discretionary exceptions generally), 663 (1999) (governmental body may waive section 552.103). As such, section 552.103 does not make information confidential for the purposes of section 552.022. Therefore, none of the information subject to section 552.022(a)(3) may be withheld under section 552.103 of the Government Code.

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<sup>2</sup>We 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 those submitted to this office.

Because third party interests can provide a compelling reason to withhold information, we will consider whether any of the information at issue is confidential on that basis. We also will address the district's arguments regarding the information not subject to section 552.022(a)(3).

We next note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, only Accent has submitted comments to this office explaining why its submitted information should not be released. Therefore, we have no basis to conclude that the remaining third parties have a protected proprietary interest in the submitted information. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Thus, the district may not withhold any portion of the submitted information based upon the proprietary interests of the remaining third parties.

We next address your section 552.103 of the Government Code claim for the remaining 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 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 governmental body has the burden of providing relevant facts and documents to show 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, 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 governmental body must meet both prongs of this test for information to be exempted under section 552.103(a).

This office has long held that "litigation," for purposes of section 552.103, 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 inform us the requestor has filed multiple parent grievances with the district. You state complaints filed with the district are "litigation" in that the district follows administrative procedures in handling such disputes. You explain under the district's parent grievance policy, the grievant proceeds through a three-level process wherein hearing officers hear the complaint at level one and level two, and the district's board of trustees hears the grievance if the grievant appeals to level three. You state the grievant is allowed to be represented by counsel, present favorable evidence to the district, and present witnesses to testify on the grievant's behalf. Based on your representations, we find you have demonstrated the district's administrative procedures for parent grievances are conducted in a quasi-judicial forum, and thus, constitute litigation for purposes of section 552.103. You state, and submit information confirming, the requestor filed his grievances with the district prior to the district's receipt of the request for information.

However, the requestor argues he has no more grievances pending with the district since March 5, 2013, and therefore litigation is no longer pending. We note the district states it received the request on February 4, 2013. A requestor's right of access to information must be construed at the time the request is made. Open Records Decision No. 530 (1989). Thus, we determine the district was a party to pending litigation at the time it received the instant request for information. Upon review, we also find the information at issue is related to the pending litigation. Accordingly, the district may withhold the remaining information not subject to section 552.022 under section 552.103 of the Government Code.<sup>3</sup>

We note, however, 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. 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).

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<sup>3</sup>As our ruling under section 552.103 is dispositive for this information, we need not address the remaining arguments against disclosure.

In summary, the district must release the completed contract, which we have marked, pursuant to section 552.022(a)(3) of the Government Code. The district may withhold the remaining information 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](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,



Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/dls

Ref: ID# 484689

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Accent Food Services, L.L.C.  
c/o Mr. Allen Halbrook  
Sneed, Vine & Perry, P.C.  
900 Congress Avenue, Suite 300  
Austin, Texas 78701  
(w/o enclosures)

Mr. Oscar Cedillo  
Cold Drink Manager  
Big Red/7up of Austin  
2120 Grand Avenue Parkway, Suite 200  
Austin, Texas 78728  
(w/o enclosures)

Coca-Cola Refreshments  
Attn: District Sales Manager  
3012 Industrial Terrace  
Austin, Texas 78758  
(w/o enclosures)

Fit Choice, L.L.C.  
Attn: Andy & Amy McKinney  
7 Meadow Way  
Round Rock, Texas 78664-9609  
(w/o enclosures)