



January 13, 2015

Ms. Kelli H. Karczewski
Counsel for Beaumont Independent School District
Karczewski Bradshaw L.L.P.
315 North Church Street
Nacogdoches, Texas 75961

OR2015-00623

Dear Ms. Karczewski:

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# 549831.

The Beaumont Independent School District (the "district"), which you represent, received a request for payments made to a named individual during a specified time period and correspondence between the named individual and certain district employees during a specified time period.¹ The district received a second request from the same requestor for information pertaining to certain invoices. You state the district released the requested payment information to the requestor. You claim the remaining requested 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 samples of information.² Additionally, we have received and considered comments from an attorney for

¹You state, and submit documentation demonstrating, the district sought and received clarification of the first request for information. *See* Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed).

²This letter ruling assumes that the submitted representative samples of information are truly representative of the requested information as a whole. This ruling does not reach, and therefore does not authorize, the withholding of any other requested information to the extent that the other information is substantially different than that submitted to this office. *See* Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

an interested third party. *See* Gov't Code § 552.304 (interested third party may submit comments stating why information should or should not be released).

Initially, the third party asserts the information at issue is excepted from public disclosure under section 552.116 of the Government Code. Section 552.116 excepts from disclosure certain audit working papers. *Id.* § 552.116. This exception protects the interests of governmental bodies such as the district, not the proprietary interests of private parties. *See* Open Records Decision Nos. 592 at 8 (1991) (discussing statutory predecessor), 522 at 4 (1989) (discretionary exceptions in general). In this instance, the district does not raise section 552.116. Therefore, the district may not withhold any of the information at issue under section 552.116.

Next, we note the information in Exhibit D-2 is subject to section 552.022 of the Government Code. Section 552.022(a)(3) provides for the required public disclosure of "information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body" unless it is "made confidential under [the Act] or other law[.]" Gov't Code § 552.022(a)(3). This information is subject to section 552.022(a)(3) and must be released unless it is confidential under the Act or other law. Although you assert this information is excepted from disclosure under section 552.103 of the Government Code, this section 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 section 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived). Therefore, the district may not withhold Exhibit D-2 under section 552.103. The third party raises section 552.101 of the Government Code, which protects information made confidential under law. Accordingly, we will address the applicability of section 552.101 to this information, as well as to the information that is not subject to section 552.022. We will also address your argument under section 552.103 for the information that is not subject to section 552.022.

Section 552.103 of the Government Code provides, in part, the following:

(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 that it seeks to withhold. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date the governmental body received 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, 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.). The governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a). *See Open Records Decision No. 551 at 4 (1990).*

In order to demonstrate that litigation is reasonably anticipated, the governmental body must provide this office “concrete evidence showing that the claim that litigation might ensue is more than mere conjecture.” *Open Records Decision No. 452 at 4 (1986)*. In the context of anticipated litigation in which the governmental body is the prospective plaintiff, the concrete evidence must at least reflect that litigation is “realistically contemplated.” *See Open Records Decision No. 518 at 5 (1989)*; *see also* Attorney General Opinion MW-575 (1982) (finding that investigatory file may be withheld from disclosure if governmental body attorney determines that it should be withheld pursuant to section 552.103 and that litigation is “reasonably likely to result”). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See ORD 452 at 4.*

You contend the information at issue relates to anticipated litigation by the district. You explain the requested information pertains to accounting services provided to the district by the individual named in the first request for information. You state, and provide documentation demonstrating, before the district received the first request, the district's Board of Managers acted to terminate the services of the named individual and authorize the district's legal counsel to “review and consider the possibility of seeking to recover funds from [the named individual] for work not completed[.]” Additionally, you explain the district will file suit against the named individual if it “is unable to recoup the excess funds paid[.]” Based upon your representations and our review, we find the district reasonably anticipated litigation when it received the first request for information and the information at issue relates to the anticipated litigation. However, we note that 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*. Once information has been obtained by all parties to the pending or anticipated litigation, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *Open Records Decision Nos. 349 (1982), 320 (1982)*. Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it may not be withheld on that basis. In this instance, a portion of the information in Exhibit D-1

was provided to the potential opposing party by the district; thus, all parties have already seen the information. Accordingly, we determine this information, which we have marked for release, may not be withheld under section 552.103. With the exception of the information we have marked, we conclude the district may withhold the information in Exhibit D-1 under section 552.103.³ We note the applicability of section 552.103(a) ends when the litigation is concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

We now turn to the third party's argument under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information made confidential by other statutes. Section 501.75(a) of title 22 of the Texas Administrative Code pertains to the accountant-client privilege and provides, in part, the following:

Except by permission of the client or the authorized representatives of the client, a person or any partner, member, officer, shareholder, or employee of a person shall not voluntarily disclose information communicated to him by the client relating to, and in connection with, professional accounting services or professional accounting work rendered to the client by the person. Such information shall be deemed confidential.

22 T.A.C. § 501.75(a). The third party explains he represents the individual named in the request for information, who provided accounting services to the district. The third party contends, to the extent the information at issue consists of information that was communicated to the accountant by the district in connection with professional accounting services or professional accounting work, it is information that is protected by the accountant-client privilege and excepted from disclosure under section 501.75. We note, however, section 501.75 only governs the circumstances under which licensed accountants may disclose information communicated to them by their clients in connection with the accountants' services. *Id.* Section 501.75 does not address the public disclosure of information held by the client or the client's representative. Here, the district is the client with respect to the information at issue. Section 501.75 does not prohibit the district from publicly disclosing the communications at issue. We therefore conclude the district may not withhold this information under section 552.101 of the Government Code on the basis of section 501.75 of title 22 of the Texas Administrative Code. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection).

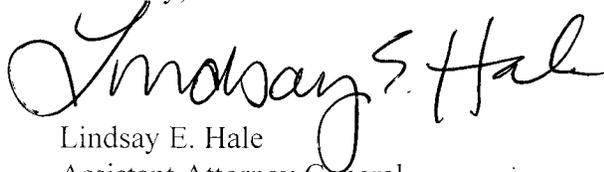
In summary, with the exception of the information we have marked for release, the district may withhold Exhibit D-1 under section 552.103 of the Government Code. The district must release the remaining information.

³As our ruling is dispositive, we need not address the third party's argument against disclosure of this 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink that reads "Lindsay E. Hale". The signature is written in a cursive, flowing style.

Lindsay E. Hale
Assistant Attorney General
Open Records Division

LEH/akg

Ref: ID# 549831

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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(w/o enclosures)