



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

November 6, 2015

Mr. Christopher B. Gilbert
Counsel for Spring Branch Independent School District
Thompson & Horton, L.L.P.
3200 Southwest Freeway, Suite 2000
Houston, Texas 77027

OR2015-23445

Dear Mr. Gilbert:

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# 586394.

The Spring Branch Independent School District (the "district"), which you represent, received a request for (1) all communications sent or received by named individuals during a specified period of time relating to the petition by residents of Thornwood Sections II and III ("Thornwood") for annexation by the district and (2) all electronic communications sent or received by a named individual during a specified period of time. You claim the submitted information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code.¹ We have received comments from the attorney representing Thornwood and from the requestor. *See* Gov't Code § 552.304 (permitting interested third party to submit to attorney general reasons why requested information should or should not be released). We have considered the submitted arguments and reviewed the submitted representative sample of information.²

Section 552.103 of the Government Code provides in relevant part as follows:

¹Although you raise section 552.101 of the Government Code, you have not submitted arguments in support of this exception; therefore, we assume you have withdrawn this exception. *See* Gov't Code §§ 552.301, .302.

²We 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 that those records contain substantially different types of information than that submitted to this office.

(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 governmental body 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.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a).

For purposes of section 552.103, "litigation" includes contested cases conducted in a quasi-judicial forum. Open Records Decision Nos. 588 at 2 (1991), 474 at 6 (1987) (disciplinary action before Texas State Board of Pharmacy), 368 at 2 (1983) (administrative hearing before Commissioner of Insurance), 301 at 1-2 (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, e.g.*, ORD 588 at 7 (State Board of Insurance proceeding), 301 at 2 (hearing before Public Utilities Commission). Factors this office considers in determining whether an administrative proceeding is conducted in a quasi-judicial forum include 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* ORD 588 at 3-4.

You inform us, prior to the receipt of the instant request, the district's school board conducted a detachment and annexation hearing pursuant to section 13.051 of the Education Code to determine if Thornwood's petition would be accepted. You state, during these types of hearings, the school board hears testimony and evidence from the parties, resolves any factual questions that are raised, and makes a record. You further inform us the proceeding is an adjudicative forum of first jurisdiction and any appeal to the Texas Commissioner of

Education (the “commissioner”) under section 7.057 of the Education Code is based on the record created before the school board. Therefore, based on the district’s representations and our review of the relevant law, we determine a hearing under chapter 13 of the Education Code constitutes litigation for purposes of section 552.103.

While you inform us the district’s school board rendered its decision before the receipt of the instant request, you also state the petitioner’s deadline to appeal the decision to the commissioner had not expired at the time the district received the request. Further, you explain, prior to the receipt of the instant request, the petitioner had expressed his intention to appeal the decision. Based on your representations and our review, we find the district was a party to pending litigation at the time it received the instant request. Furthermore, we agree the submitted information is related to the pending litigation. Accordingly, the district may withhold the submitted information under section 552.103 of the Government Code.³

However, once the information has been obtained by all parties to the pending litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

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,



Joseph Keeney
Assistant Attorney General
Open Records Division

JDK/dls

³As our ruling is dispositive, we need not address your remaining argument against disclosure.

Ref: ID# 586394

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Richard D. Melton
Richard D. Melton, P.L.L.C.
14781 Memorial Drive, #563
Houston, Texas 77079
(w/o enclosures)