



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 19, 2016

Ms. Katie E. Payne
Counsel for the School of Excellence in Education
Walsh, Gallegos, Treviño, Russo & Kyle, P.C.
P.O. Box 460606
San Antonio, Texas 78246

OR2016-27984

Dear Ms. Payne:

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# 639390.

The School of Excellence in Education (the "school"), which you represent, received a request for information related to specified school employees and officials, including name, sex, ethnicity, date of hire, and salary; the exempt pay scale for a specified time period; specified procedures; contracts with a named individual; specified performance evaluations; and a specified audit report. 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 information. 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, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

(2) the name, sex, ethnicity, salary, title, and dates of employment of each employee and officer of a governmental body; [and]

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

Gov't Code § 552.022(a)(1)-(3). The submitted information includes completed reports and evaluations that are subject to section 552.022(a)(1). The school must release the completed reports and evaluations pursuant to section 552.022(a)(1) unless they are excepted from disclosure under section 552.108 of the Government Code or are made confidential under the Act or other law. *See id.* § 552.022(a)(1). The submitted information also contains the name, sex, ethnicity, date of hire, and salary of the specified school employees and officials. This information is subject to section 552.022(a)(2) of the Government Code. Further, the submitted documents contain information in a contract relating to the receipt or expenditure of funds by the school that is subject to section 552.022(a)(3) of the Government Code. Information subject to section 552.022(a)(2) or section 552.022(a)(3) must be released unless it is made confidential under the Act or other law. *See id.* § 552.022(a)(2), (3). You seek to withhold the information subject to section 552.022 under section 552.103 of the Government Code. However, section 552.103 is discretionary in nature 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); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the information subject to section 552.022, which we have marked, may not be withheld under section 552.103 of the Government Code. However, we will consider your argument under section 552.103 against release of the remaining information.

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

(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) of the Government Code. This office has stated a pending complaint with the Equal Employment Opportunity Commission (the "EEOC") indicates litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982).

You claim the information at issue is protected by section 552.103 of the Government Code. You state, and provide documentation demonstrating, prior to the school's receipt of the instant request, the requestor filed a complaint of discrimination against the school with the EEOC, and the EEOC issued a notice of complainant's right to sue within a 90-day period. You state the 90-day period to file suit had not run on the date the school received the instant request for information. Based on your arguments and our review of the submitted information, we find the school reasonably anticipated litigation on the date the request was received. You also state, and we agree, the information at issue pertains to the anticipated litigation. Based on your representations and our review, we find the school may withhold the information not subject to section 552.022 of the Government Code, which we have marked, under section 552.103 of the Government Code.

However, once the information has been obtained by all parties to the 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.

In summary, the school must release the information we marked pursuant to section 552.022 of the Government Code. The school may withhold the remaining information, which we marked, 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.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, appearing to read "Claire V. Morris Sloan". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/som

Ref: ID# 639390

Enc. Submitted documents

c: Requestor
(w/o enclosures)