



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 11, 2017

Mr. Joseph E. Hoffer
Counsel for Village Tech Schools
Schulman, Lopez, Hoffer & Adelstein, LLP
517 Soledad Street
San Antonio, Texas 78205-1508

OR2017-07594

Dear Mr. Hoffer:

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# 652709.

Village Tech Schools (the "school"), which you represent, received a request for two named employees' personnel files. You claim the submitted information is excepted from disclosure under sections 552.102 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the submitted information contains job descriptions, which are usually open to the public as part of a job posting. Section 552.022(a)(15) of the Government Code provides for the required disclosure of "information regarded as open to the public under an agency's policies," unless it is made confidential under the Act or other law. *See* Gov't Code § 552.022(a)(15). If the school regards the submitted job descriptions as open to the public, then that information is subject to section 552.022(a)(15). Although you argue this information is excepted from disclosure under section 552.103 of the Government Code, this section is a discretionary exception and does not make information confidential under the Act. *See id.* § 552.007; *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 Nos. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the submitted job descriptions, which we have marked, may not be withheld under

section 552.103 pursuant to section 552.022(a)(15) if they are regarded by the school as open to the public.

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).*

To establish litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *Open Records Decision No. 452 at 4 (1986).* Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.¹ *See Open Records*

¹In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see Open Records Decision No. 346 (1982)*; and threatened to sue on several occasions and hired an attorney, *see Open Records Decision No. 288 (1981)*.

Decision No. 555 (1990); *see also* Open Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact a potential opposing party has hired an attorney who makes a request for information does not establish litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983).

You claim the remaining information is excepted from disclosure under section 552.103 because the school reasonably anticipated litigation related to actions of the two named employees in their official capacities as employees at the time of the request. You state, and the submitted documentation reflects, the requestor is an attorney who represents an individual regarding a specified incident involving the actions of the named employees. The submitted documentation also reflects the requestor directs the school to preserve all evidence pertaining to the specified incident, including communications, documents, and electronically stored information. Based on these representations and our review of the information at issue, we find the school reasonably anticipated litigation on the date the request was received. We also find that the information at issue is related to the anticipated litigation. We therefore conclude the school may withhold the remaining information under section 552.103 of the Government Code.

We note once the information at issue has been obtained by all parties to the anticipated litigation through discovery or otherwise, a section 552.103(a) interest no longer exists as to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to all other parties in the litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. The applicability of section 552.103(a) also ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the school must release the job descriptions we marked pursuant to section 552.022(a)(15) of the Government Code if they are regarded by the school as open to the public. The school 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.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 'KH', is written above the typed name.

Kieran Hillis
Assistant Attorney General
Open Records Division

KH/sb

Ref: ID# 652709

Enc. Submitted documents

c: Requestor
(w/o enclosures)