



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 12, 2017

Mr. Harry F. Wright, Jr.
School Attorney
Bryan Independent School District
101 North Texas Avenue
Bryan, Texas 77803

OR2017-20872

Dear Mr. Wright:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. This request was originally received by the Open Records Division ("ORD") of this office and assigned ID# 675447. Preparation of the ruling has been assigned to the Opinion Committee.

The Bryan Independent School District ("District") received a public information request for records concerning gifts over a specified amount relating to, and FedEx services used by, a named individual as well as information relating to contracts regarding a specified entity, and any and all documents related to the benefits plan administration process. You claim the information submitted in Exhibits G, J, K, and L is excepted from disclosure under various provisions of chapter 552 of the Government Code as well as section 21.355 of the Education Code. Additionally, you state release of the submitted information may implicate the proprietary interests of TCG Group Holdings, U.S. Employee Benefits Services Group, and First Financial Administrators, Inc. Accordingly, you state and provide documentation showing you notified these third parties of the request and of their right to submit arguments to this office. *See* TEX. GOV'T CODE § 552.305(d); *see also* Tex. Att'y Gen. ORD-542 (1990) at 3 (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have considered the exceptions you claim and reviewed the submitted information submitted in Exhibits G, J, K, and L.

You tell us that some of the information was the subject of previous requests for information, as a result of which this office issued Open Records Letter Nos. 2016-28411 (2016) and 2017-00064 (2017). We also note there is a lawsuit pending against the Office of the Attorney General that pertains to portions of the previously ruled-upon information. *See Wallis v. Paxton*, No. D-1-GN-17-000115 (345th Dist. Ct., Travis Cty., Tex. Jan. 11, 2017). Accordingly, with regard to the information at issue in this lawsuit, we will allow the trial court to resolve the issue of whether the information at issue in the pending litigation must be released to the public. With regard to information in the current request that is identical to information previously ruled upon by this office and that is not at issue in the aforementioned lawsuit, we conclude, as you have not indicated the law, facts, and circumstances on which the prior rulings were based have changed, the District must continue to rely on those rulings as previous determinations and withhold or release the previously ruled-upon information in accordance with those rulings. *See Tex. Att’y Gen. ORD-673 (2001) at 6–7* (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely the same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). We will address your arguments against disclosure of the remaining submitted information, which is not subject to previous determinations.

We note the submitted information in Exhibit L contains an agenda of a public meeting of the District. The final agendas of a governmental body’s public meetings are specifically made public under provisions of the Open Meetings Act, chapter 551 of the Government Code. *See TEX. GOV’T CODE* §§ 551.022 (minutes of open meeting “are public records and shall be available for public inspection and copying” upon request), .041 (governmental body shall give written notice of date, hour, place, and subject of each meeting), .043 (notice of meeting of governmental body must be posted in place readily accessible to general public for at least 72 hours before scheduled time of meeting). Although the city seeks to withhold this information under section 552.103 of the Government Code, the exceptions to disclosure found in the Act generally do not apply to information other statutes make public.¹ *See Tex. Att’y Gen. ORD-623 (1994) at 3, ORD-525 (1989) at 3*. Accordingly, any final agenda must be released pursuant to section 551.022 of the Government Code.

In addition, some of the submitted information in Exhibit G is subject to section 552.022 of the Government Code, which provides in pertinent 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:

¹As our ruling is dispositive, we need not address your remaining arguments for this information.

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

...

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

TEX. GOV'T CODE § 552.022(a)(1), (3). We note portions of the submitted information in Exhibit G consist of documents relating to a completed evaluation, which is subject to subsection 552.022(a)(1). Additionally, the submitted information in Exhibit K consists of information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body, and thus, is subject to subsection 552.022(a)(3). The District must release the information subject to subsection 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or expressly made confidential under the Act or other law as provided by section 552.101. *See id.* § 552.022(a)(1). The District may withhold information subject to subsection 552.022(a)(3) only to the extent this information is confidential under the Act or other law. You raise section 552.103 for the information at issue. However, section 552.103 does not make information confidential under the Act. *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); *see also* Tex. Att'y Gen. ORD-665 (2000) at 2 n.5 (discretionary exceptions generally). Accordingly, the District may not withhold the information subject to subsections 552.022(a)(1) and 552.022(a)(3) of the Government Code under section 552.103 of the Government Code. The District must release the information in Exhibit K.

With respect to the evaluation in Exhibit G, section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” TEX. GOV'T CODE § 552.101. Section 552.101 encompasses section 21.355 of the Education Code, which provides that “[a] document evaluating the performance of a teacher or administrator is confidential.” *See* TEX. EDUC. CODE § 21.355(a). This office has interpreted section 21.355 to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or an administrator of a school district. In Open Records Decision No. 643, we determined an “administrator” for purposes of section 21.355 means a person who is required to and does in fact hold an administrator’s certificate under subchapter B of chapter 21 of the Education Code and is performing the functions as an administrator, as that term is commonly defined, at the time of the evaluation. *See* Tex. Att'y Gen. ORD-643 (1996) at 4. You inform us the administrator at issue held the appropriate certification at the time of the evaluation and was functioning as an administrator at the time of the evaluation. Based on

your representations and our review, we agree the information at issue constitutes an evaluation as contemplated by section 21.355. Therefore, the District must withhold the evaluation in Exhibit G under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.

Section 552.103 of the Government Code 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.

TEX. GOV'T CODE § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show the subsection 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing (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 that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding [mand. denied]); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Tex. Att'y Gen. ORD-551 (1990) at 4. A governmental body must meet both prongs of this test for information to be excepted under subsection 552.103(a).

The question whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Tex. Att'y Gen. ORD-452 (1986) at 4. To establish litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *Id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, an attorney for a potential opposing party making a demand for payment and asserting an intent to sue if such payments are not made. *See* Tex. Att'y Gen. ORD-555 (1990) at 3, ORD-346 (1982) at 2. In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party threatened to sue on several occasions and hired an attorney. *See*

Tex. Att’y Gen. ORD-288 (1981) at 2. However, an individual publicly threatening to bring suit against a governmental body but who does not actually take objective steps toward filing suit is not concrete evidence that litigation is reasonably anticipated. *See* Tex. Att’y Gen. ORD-331 (1982) at 1–2. In Open Records Decision No. 638, this office stated a governmental body has met its burden of showing litigation is reasonably anticipated by representing it received a notice-of-claim letter that is in compliance with the Texas Tort Claims Act, chapter 101 of the Civil Practice and Remedies Code. *See* Tex. Att’y Gen. ORD-638 (1996) at 4–5. If that representation is not made, the receipt of a claim letter is a factor we will consider in determining, from the totality of the circumstances presented, whether the governmental body has established litigation is reasonably anticipated.

You inform us and provide documentation showing prior to the receipt of the instant request, a lawsuit styled *Wallis v. Paxton*, No. D-1-GN-17-000115, was filed and is currently pending against the District in the 345th Judicial District, Travis County, Texas. Based upon your representations and our review, we find litigation was pending when the District received the present request. The District further states and provides documentation showing prior to the District’s receipt of the instant request, it learned through a news article that civil litigation has been filed in which the District anticipated being a party. You state the civil matter referred to was a Petition for Authorization to Conduct Rule 202 Depositions, which was filed in a court in Jefferson County on June 13, 2017. You state that the information you seek to withhold relates to the subject of the Rule 202 deposition. Based on your representations and our review of the submitted information, we conclude that the District reasonably anticipated litigation on the date the request was received. Further, we agree that the information at issue related to the pending and anticipated litigation for purposes of section 552.103 of the Government Code. Therefore, the District may withhold the remaining information in Exhibits G and L under subsection 552.103(a) of the Government Code.²

However, once the information has been obtained by all parties to the pending litigation, no subsection 552.103(a) interest exists with respect to this information. Tex. Att’y Gen. ORD-349 (1982) at 2. We also note that the applicability of subsection 552.103(a) ends once the litigation has concluded. Tex. Att’y Gen. Op. No. MW-575 (1982) at 1; Tex. Att’y Gen. ORD-350 (1982) at 3.

An interested third party is allowed ten business days after the date of its receipt of the governmental body’s notice under subsection 552.305(d) to submit its reasons, if any, as to why requested information relating to it should be withheld from disclosure. *See* TEX. GOV’T CODE § 552.305(d)(2)(B). As of the date of this letter, none of the third parties have submitted to this office any reasons explaining why the requested information should not be released. Accordingly, we have no basis for concluding the submitted information

²Again, with respect to this information, as our ruling is dispositive, we do not address your remaining arguments.

constitutes proprietary information of these third parties, and the District may not withhold any portion of it on that basis. *See* Tex. Att'y Gen. ORD-661 (1999) at 5-6 (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, release of the requested information would cause that party substantial competitive harm), ORD-552 (1990) at 5 (party must establish prima facie case that information is trade secret).

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,



Charlotte M. Harper
Assistant Attorney General
Opinion Committee

CMH/eb

Ref: ID# 675447

Enc. Submitted documents

c: Requestor
(w/o enclosures)