



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 20, 2019

Ms. Sarah W. Langlois
Counsel for the Harris County Department of Education
Karczewski Bradshaw Spalding Nichols Lamp Langlois
3700 Buffalo Speedway, Suite 560
Houston, Texas 77098

OR2019-36217

Dear Ms. Langlois:

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# 803135.

The Harris County Department of Education (the "department"), which you represent, received a request for six categories of records and communications involving named individuals during a specified time period. You state the department does not maintain information responsive to portions of the request.¹ 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 representative sample of information.²

Initially, we note some of the submitted information may be subject to section 552.022 of the Government Code, which provides in pertinent part:

¹ The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990).

² We 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) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

...

(15) information regarded as open to the public under an agency's policies[.]

Gov't Code § 552.022(a)(15). The submitted information includes a job description, which is generally open to the public as part of a job posting, subject to section 552.022(a)(15). *Id.* If the department regards the submitted job description, which we marked, as open to the public, then this information is subject to section 552.022(a)(15). 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). Accordingly, to the extent the department considers the marked job description open to the public, the department may not withhold this information under section 552.103 of the Government Code. In that instance, as you raise no further exceptions to disclosure of the information at issue, the department must release the job description pursuant to section 552.022(a)(15) of the Government Code. In either event, we will consider your argument under section 552.103 for the remaining information not subject to section 552.022 of the Government Code.

Section 552.103 of the Government Code provides 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). A 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 (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); *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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You assert litigation against the department is currently pending because prior to the department's receipt of this request, the requestor filed an internal grievance with the department. You explain grievances filed with the department are "litigation" in that the department follows administrative procedures in handling such disputes. You explain that under the department's grievance policy, the grievant proceeds through a three-level process wherein hearing officers hear the complaint at Level One and Level Two, and the department's board of trustees hears the grievance if the grievant appeals to Level Three. You state the grievant is allowed to be represented by counsel, present favorable evidence to the department, and present witnesses to testify on the grievant's behalf. Based on your representations, we find you have demonstrated the department's administrative procedures for grievances are conducted in a quasi-judicial forum, and thus, constitute litigation for purposes of section 552.103. Furthermore, we find the department was a party to pending litigation on the date it received the request for information and the information at issue relates to the pending litigation. Accordingly, the department may withhold the information not subject to section 552.022 of the Government Code under section 552.103 of the Government Code.

Generally, however, once information has been obtained by all parties to the 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 parties in the pending litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, to the extent the department considers the marked job description open to the public, the department must release it pursuant to section 552.022(a)(15) of the Government Code and may withhold the remaining information under section 552.103 of the Government Code. To the extent the department does not consider the marked job description open to the public, the department may withhold the submitted 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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink that reads "D. Michelle Case". The signature is written in a cursive style with a long horizontal flourish at the end.

Michelle Case
Assistant Attorney General
Open Records Division

MC/be

Ref: ID# 803135

Enc. Submitted documents

c: Requestor
(w/o enclosures)