



Office of the Attorney General
State of Texas

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OR98-3216

Dear Mr. Johnson and Ms. Whatley:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 120788.

The Fort Worth Independent School District (the "school district"), which you represent, received five requests for a copy of the videotape of an incident that occurred on school district bus #157 on September 15, 1998. In a letter dated October 2, 1998, you contend that the videotape is excepted from disclosure under sections 552.026, 552.101, and 552.114 of the Government Code.

The school district terminated the employment of the bus driver who was driving bus #157 when the incident occurred. An attorney representing the bus driver has requested copies of the September 15 videotape and of several other videotapes of students riding buses. The attorney has also requested copies of student infractions that the bus driver wrote and submitted to the school district, as well as a number of other documents relating to the bus driver's termination, including information relating to meetings about the bus driver, copies of dispatch log-in sheets for calls made by the bus driver, and copies of maintenance

records for the video recorder that was installed on bus #157. In a letter dated October 16, 1998, you contend that the videotapes and student infractions are excepted from disclosure under sections 552.026, 552.101, and 552.114 of the Government Code.

Additionally, the school district received a request from an attorney representing a student for information relating to any type of harassment that has taken place on school district buses and information about efforts to control or monitor behavior on school district buses. In a letter dated November 4, 1998, you first claim that the information responsive to this request and the request from the bus driver's attorney is excepted from disclosure under section 552.103 of the Government Code. Second, you reiterate your arguments under sections 552.026, 552.101, and 552.114 of the Government Code. Third, you ask for guidance in responding to paragraphs (I), (J), and (K) of the request from the student's attorney. Fourth, you contend that documents from the school bus driver's personnel file are excepted from disclosure under section 552.102 of the Government Code. Finally, you contend that certain documents are excepted from disclosure pursuant to section 551.082 of the Government Code. You have submitted a representative sample of the information at issue to the office for review.¹

You claim that the requested videotapes and student infractions are excepted from disclosure under sections 552.026 and 552.114 of the Government Code. In Open Records Decision No. 634 (1995), this office concluded that (1) an educational agency or institution may withhold from public disclosure information that is protected by the Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g, and excepted from required public disclosure by sections 552.026 and 552.101 without the necessity of requesting an attorney general decision as to those exceptions, and (2) an educational agency or institution that is state-funded may withhold from public disclosure information that is excepted from required public disclosure by section 552.114 as a "student record," insofar as the "student record" is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception. In this instance, however, you have submitted records to this office for review.

"Education records" under FERPA are records that

(i) contain information directly related to a student; and

(ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

¹We assume that 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.

20 U.S.C. § 1232g(a)(4)(A). *See also* Open Records Decision Nos. 462 (1987), 447 (1986). The videotapes and student infractions are education records under FERPA. Prior to disclosing education records, FERPA requires educational agencies to delete information from the records to the extent "reasonable and necessary to avoid personally identifying a particular student." Open Records Decision Nos. 332 (1982), 206 (1978). We have marked the information in the student infractions that identifies particular students. The marked information in the student infractions and the videotapes in their entirety² are confidential under FERPA, and therefore, must be withheld from disclosure pursuant to sections 552.026 and 552.114 of the Government Code.³ The school district should release the unmarked portions of the student infractions, as the unmarked portions are not excepted from disclosure.

Next, we will consider your section 552.103 claim. Initially, we note that on November 4, 1998 you invoked section 552.103 with regard to the requests from the bus driver's attorney and the student's attorney, but you failed to raise section 552.103 within ten business days of receiving the request from the bus driver's attorney dated October 5, 1998. Chapter 552 of the Government Code imposes a duty on a governmental body seeking an open records decision pursuant to section 552.301 to submit that request to the attorney general within ten business days after the governmental body's receipt of the request for information. When a request for an open records decision is not made within the time period prescribed by section 552.301, the requested information is presumed to be public. *See* Gov't Code § 552.302. Section 552.103 is a discretionary exception, and the failure to timely raise section 552.103 results in the waiver of its protection. *See* Open Records Decision Nos. 551 (1990) (section 552.103 is discretionary). Consequently, because you did not raise section 552.103 within ten business days of receiving the request from the bus driver's attorney, you have waived the protection of section 552.103 for all documents responsive to that request. Documents responsive to the request from the bus driver's attorney cannot be withheld from any requestor based on section 552.103.

Because you have waived the protection of section 552.103 for information responsive to the request from the bus driver's attorney, the following discussion applies only to information that is responsive to the request from the student's attorney but not also responsive to the request from the bus driver's attorney. Section 552.103(a) of the Government Code excepts from disclosure information relating to litigation to which a

²Questions regarding the possible de-identification of the videotapes under FERPA should be directed to the Family Policy Compliance Office, Department of Education, 400 Maryland Ave., S.W., Washington, D.C. 20202-4605, telephone number (202) 260-3887.

³We note that section 552.007 of the Government Code, which prohibits the selective disclosure of information made public by the Open Records Act, does not apply to information that is confidential by statute. *See* Gov't Code § 552.007; Open Records Decision No. 400 at 2 (1983). Thus, the school district should not publicly disclose information, such as an education record, that is confidential by law, even if the information has previously been disclosed in error.

governmental body is or may be a party. The governmental body has the burden of providing relevant facts and documents to show that section 552.103(a) is applicable in a particular situation. In order to meet this burden, the governmental body must show that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *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 under 552.103(a).

To establish that 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.” Open Records Decision No. 452 at 4 (1986). Having considered your arguments and the circumstances surrounding the incident on bus #157 on September 15, 1998, we find that the school district reasonably anticipates litigation against the student represented by Mr. Bill Lane. We also find that the information that Mr. Lane has requested is related to the reasonably anticipated litigation. Pursuant to section 552.103(a), you may withhold from public disclosure the information responsive to Mr. Lane’s request, but only to the extent that this is not the same information for which have you waived your section 552.103(a) protection as discussed above.

In reaching this conclusion, however, we assume that the opposing party in the litigation has not previously had access to the information at issue; absent special circumstances, once information has been obtained by all parties to the litigation, e.g., through discovery or otherwise, no section 552.103 interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). We also note that the applicability of section 552.103 ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

You ask for guidance about how you should respond to paragraphs (I), (J), and (K) of Mr. Lane’s request. The school district may withhold documents responsive to these paragraphs of the request from disclosure under section 552.103(a), if the responsive documents are not among those for which the school district waived its section 552.103(a) claim as discussed above. We cannot address your concerns about the effects that responding to these requests might have on the school district’s litigation position, as such issues are beyond the proper scope of inquiry for this office. We do, however, note that section 552.005 of the Government Code states that the Open Records Act “does not affect the scope of civil discovery under the Texas Rules of Civil Procedure.” We note also that the Open Records Act requires a governmental body to make a good faith effort to relate a request to information which it holds. Open Records Decision No. 561 (1990).

You claim that information from the bus driver’s personnel file is excepted from disclosure pursuant to section 552.102 of the Government Code. Section 552.102 excepts from disclosure “information in a personnel file, the disclosure of which would constitute

a clearly unwarranted invasion of personal privacy.” Section 552.102 excepts information in personnel files only if it meets the test articulated under section 552.101 of the Government Code for common-law invasion of privacy. *Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.).

For information to be protected from disclosure by the common-law right of privacy the information must be highly intimate or embarrassing such that its release would be highly objectionable to a reasonable person, and the information must not be of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The Texas Supreme Court found the following types of information to be highly intimate and embarrassing: information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. We do not find the material from the bus driver's personnel file to be highly intimate and embarrassing information. Thus, we conclude that section 552.102 does not except this material from disclosure. *See* Open Records Decision Nos. 470 (1987), 467 (1987) (public has legitimate interest in job qualifications and performance of public employees).

Next, you contend that “[t]he documents contained in the first confidential enclosure should also be excepted from disclosure pursuant to Tex. Gov't Code § 551.082.” Section 551.082 of the Government Code, a provision of the Open Meetings Act, states that a school board is not required to deliberate a case involving a complaint against an employee in an open meeting, unless the employee against whom a complaint was filed requests an open hearing. This provision does not make information confidential. We note that the Open Meetings Act specifically makes confidential certified agendas or tapes of executive sessions. Gov't Code § 551.104; Open Records Decision No. 495 (1988). However, the mere fact that information was discussed in executive session does not make it confidential under the Open Records Act. Open Records Decision No. 605 (1992). Having reviewed the documents in the first confidential enclosure, we conclude that they are not deemed confidential by any provision of the Open Meetings Act.

Finally, we note that the submitted documents include information about the bus driver that implicates sections 552.117 and 552.130 of the Government Code. Section 552.117 excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the school district must not publicly disclose the bus driver's home address and telephone number, social security number, or information that reveals whether she has family members if she made a request for confidentiality under section 552.024 prior to the date on which the request for the submitted documents was made. The school district must also withhold her driver's license number and class from

disclosure pursuant to section 552.130, which excepts from disclosure information relating to a motor vehicle operator's or driver's license issued by an agency of this state. Of course, the school district cannot withhold this information about the bus driver from the bus driver or her representative. *See* Gov't Code § 552.023.

To summarize, the school district must withhold the videotapes and the marked portions of the student infractions from disclosure because this material is confidential under FERPA. You have waived the protection of section 552.103 for all documents responsive to the request from the bus driver's attorney. Documents responsive to the request from the bus driver's attorney cannot be withheld from any requestor based on section 552.103. Pursuant to section 552.103(a), the school district may withhold from disclosure the information responsive to Mr. Lane's request, to the extent that such information is not also responsive to the request from the bus driver's attorney. Section 552.102 does not except the material from the bus driver's personnel file from disclosure. The documents in the "first confidential enclosure" are not confidential pursuant to any provision of the Open Meetings Act. The submitted documents contain information that must be withheld from disclosure under section 552.130, and information that is excepted from disclosure under section 552.117, if the bus driver timely elected the protection of section 552.117.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



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Open Records Division

KEH/ch

Ref: ID# 120788

Enclosures: Marked documents

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