



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 19, 2003

Mr. Thomas E. Myers
Brackett & Ellis
100 Main Street
Fort Worth, Texas 76102-3090

OR2003-5806

Dear Mr. Myers:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 186210.

The Carroll Independent School District (the "district"), which you represent, received a request for all documents concerning a named individual's protest of her employment termination. You state that you have provided some of the requested information to the requestor. However, you claim that some of the requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, and 552.107 of the Government Code and Rule 503 of the Texas Rules of Evidence and Rule 192.5 of the Texas Rules of Civil Procedure. We also note that you indicate that you have notified a third party whose information is at issue in the current request pursuant to section 552.305 of the Government Code. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released). We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the applicability of the Open Meetings Act, chapter 551 of the Government Code, to some of the requested information. Section 551.022 expressly provides that "[t]he minutes and tape recordings of an open meeting are public records and shall be available for public inspection and copying on request to the governmental body's chief administrative officer or the officer's designee." Gov't Code § 551.022. Section 551.041 requires a governmental body to give written notice of the date, hour, place, and subject of each meeting held by the governmental body. Gov't Code § 551.041. Additionally, section 551.043 states a governmental body must post such notice in a place readily accessible to the general public at all times for at least 72 hours before the scheduled time

of the meeting. Gov't Code § 551.043. When a statute expressly makes information public and mandates its release, the information generally cannot be withheld from disclosure under one of the exceptions in Subchapter C of chapter 552 of the Government Code. *See* Open Records Decision No. 451 (1986) (specific statute that affirmatively requires release of information at issue prevails over litigation exception of the Act). In this instance, the submitted agendas, minutes, and notices constitute information made expressly public by the Open Meetings Act. *See* Gov't Code §§ 551.022, .041, .043. Therefore, the district must release the submitted agendas, minutes, and notices of the open meetings, which we have marked, except as noted below. *See* Gov't Code §§ 551.022, .043; *see also* Open Records Decision No. 221 (1979) (board minutes of school district cannot be excepted under section 3(a)(3), statutory predecessor to section 552.103, under any imaginable circumstances).

We note that section 551.104(c), a state statute, may be preempted by federal law to the extent it conflicts with that federal law. *See, e.g., Equal Employment Opportunity Comm'n v. City of Orange, Texas*, 905 F. Supp 381, 382 (E.D. Tex. 1995); *see also* Open Records Decision No. 431 (1985) (FERPA prevails in conflict with state law). In this instance, a portion of the minutes you submitted to this office constitutes an "education record" for purposes of the federal Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g. FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information (other than directory information) contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1). "Education records" are defined as those records that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. 20 U.S.C. § 1232g(a)(4)(A).

Information must be withheld from required public disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." *See* Open Records Decision Nos. 332 (1982), 206 (1978). Information that does not *directly* identify a student but would nevertheless make a student's identity easily traceable must be withheld. *See* Open Records Decision No. 224 (1979) (finding student's handwritten comments making identity of student easily traceable through handwriting, style of expression, or particular incidents related in comments protected under FERPA). A portion of the minutes you have submitted contains a list of names of students who participated in a meeting. Because this information relates to students, the minutes are an education record. Thus, we have marked the types of student identifying information that the district must withhold under FERPA.

We next note that section 552.022 of the Government Code is relevant to whether a completed evaluation is subject to public disclosure. Section 552.022 provides in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure under [chapter 552 of the Government Code] unless they are expressly confidential under 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[.]

Gov't Code § 552.022(a)(1). Thus, pursuant to section 552.022(a)(1), completed evaluations are subject to required disclosure under the Public Information Act unless other law expressly makes them confidential or they are excepted from disclosure under section 552.108. You do not raise section 552.108. Furthermore, sections 552.103 and 552.107 of the Government Code are discretionary exceptions to disclosure that protect the governmental body's interests and are therefore not other law that makes information expressly confidential for purposes of section 552.022(a). *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 630 at 4-5 (1994) (governmental body may waive statutory predecessor to section 552.107). Therefore, you may not withhold any of the information that is subject to section 552.022 under sections 552.103 and 552.107.

However, you assert that all of the requested evaluations are confidential under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. Section 552.101 excepts from disclosure information that is considered to be confidential by law, including a statute. As a general rule, statutory confidentiality under section 552.101 requires express language making certain information confidential or stating that information shall not be released to the public. *See Open Records Decision No. 478 at 2 (1987)*. Section 21.355 provides that “[a]ny document evaluating the performance of a teacher or administrator is confidential.” 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. *See Open Records Decision No. 643 at 3 (1996)*. In that decision, this office also determined that the term “administrator” in 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 who is performing the functions of an administrator, as that term is commonly defined, at the time of the evaluation. *See ORD 643 at 4*. Based on your representations, the background material that you provided, and our review of the evaluations, we conclude that they are confidential under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. We have marked these documents for your convenience.

We now turn to your arguments with respect to the information that is not subject to section 552.022. Because your claim regarding section 552.103 is the broadest, we address it first. This section provides:

(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.

The district has the burden of providing relevant facts and documents to show that 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, 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, 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 district must meet both prongs of this test for information to be excepted under 552.103(a).

In this instance, you inform us that the employee whose termination is the subject of the request has requested a hearing before an independent hearing examiner under Chapter 21 of the Education Code. According to section 21.256(e) of the Education Code, hearings requested under section 21.253 “shall be conducted in the same manner as a trial without a jury in a district court of [Texas].” This section also specifically affords the person making the appeal the right to be represented by a representative of his/her own choice, to hear evidence on which the charge is based, to cross-examine each adverse witness, and to present evidence. It also states that the Texas Rules of Civil Evidence apply at the hearing. See Educ. Code § 21.256. Accordingly, we find that a hearing under section 21.253 of the Education Code constitutes litigation for purposes of section 552.103. See Open Records Decision Nos. 588 (1991) (concluding that contested case under Administrative Procedure Act, Gov't Code ch. 2001, qualifies as litigation under statutory predecessor), 301 (1982) (concluding that litigation includes a contested case before an administrative agency). You further inform us that an examiner has been appointed and a hearing date has been set. Therefore, we conclude that litigation was pending on the date that the district received the request. We also conclude upon review of the documents that they relate to the pending litigation. Therefore, the district may withhold most of the remaining submitted information under section 552.103.

We note, however, that it appears that the opposing party has seen some of the information at issue. When the opposing party in the litigation has seen or had access to any of the information in these records, there is no section 552.103(a) interest in withholding that information from the requestor. Open Records Decision Nos. 349 (1982), 320 (1982). You may not withhold any of the submitted documents that have been seen by the opposing party in litigation under section 552.103. You may withhold the remaining submitted information pursuant to section 552.103(a).¹

We now turn to the information that has been seen by the opposing party. You argue that the submitted information consists of privileged attorney-client communications and is excepted under section 552.107 and Rule 503 of the Texas Rules of Evidence. Because section 552.107(1) is the proper section under the Public Information Act (the "Act") for attorney-client privileged information, we will address your claim under that section. See Open Records Decision No. 676 at 8 (2002). Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must

¹ We note that the applicability of section 552.103(a) ends when the litigation is concluded. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein). In this instance, you have not demonstrated, nor are we able to determine, that the information at issue was communicated among privileged parties for the purpose of rendering legal services. You may not withhold the information that has been seen by the opposing party under section 552.107.

Next, you argue that the submitted information is confidential attorney work-product material under rule 192.5 of the Texas Rules of Civil Procedure. In Open Records Decision No. 677, we determined that section 552.111 is the appropriate section under the Act for an assertion of work product when the information at issue is not subject to section 552.022. Open Records Decision No. 677 at 8 (2002). Therefore, we will address your work-product argument under section 552.111. In order to be considered “work product,” the material or mental impression must have been made or developed for trial or in anticipation of litigation by or for a party or a party’s representative. Tex. R. Civ. P. 192.5; Open Records Decision No. 677 at 4. In order for this office to conclude that material or mental impression was made or developed in anticipation of litigation, we must be satisfied that

- a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

See Nat’l Tank Co. v. Brotherton, 851 S.W.2d 193, 207 (Tex. 1993). A “substantial chance” of litigation does not mean a statistical probability, but rather “that litigation is more than merely an abstract possibility or unwarranted fear.” *Id.* at 204. You argue that because the request asks for the information that the district “plans to submit” in the hearing, release of the information would reveal the mental impressions of the attorney. However, because the request encompasses more than the information the district “plans to submit” and you do not specifically indicate which of the submitted documents are responsive to the portion of the request seeking the information the district plans to submit in the hearing, we cannot conclude that releasing any of the information at issue would reveal a mental impression developed in anticipation of litigation.² Further, you do not demonstrate, nor are we able to determine, that the information at issue was otherwise made or developed in anticipation of

² We note that you also raise the work-product privilege on behalf of the opposing party. However, the work-product privilege belongs to the opposing party, and here the opposing party has not asserted any exceptions.

litigation or in preparation for trial. Therefore, you may not withhold the information seen by the opposing party under section 552.111.

We note, however, that some of the information seen by the opposing party contains information protected by section 552.102 of the Government Code. Section 552.102 protects from disclosure most information on a transcript from an institution of higher education maintained in the personnel files of professional public school employees. Gov't Code § 552.102(b). Section 552.102 excepts from disclosure all information from transcripts other than the employee's name, the courses taken, and the degree obtained. Open Records Decision No. 526 (1989). Upon review of the information seen by the opposing party, we conclude that the district must withhold most of the information in the transcripts. The remaining information in the transcript is not confidential under section 552.102(b) and must be released to the requestor. We have marked the information you must release.

In summary, you must release the agendas, minutes, and notices of open meetings that we have marked under 551.022, with the exception of the type of information that we have marked under FERPA. You must withhold the marked evaluations, which are subject to section 552.022, under section 21.355 of the Education Code. You must release the transcript information we have marked under section 552.102 and withhold the rest of the transcripts under section 552.102. You must release the information that we have marked that has been seen by the opposing party in litigation. You may withhold the remaining information under section 552.103 of the Government Code.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records

will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Jennifer E. Berry
Assistant Attorney General
Open Records Division

JEB/lmt

Ref: ID# 186210

Enc: Submitted documents

c: Ms. Amy Morenz
The Southlake Times
801 East Plano Parkway
Plano, Texas 75074
(w/o enclosures)