



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 6, 2003

Ms. Mia M. Martin
General Counsel
Richardson Independent School District
400 South Greenville Avenue
Richardson, Texas 75081-4198

OR2003-8006

Dear Ms. Martin:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 190692.

The Richardson Independent School District (the "district") received two requests for the following information: (1) all documents, materials and /or information relating to records of all S.E.M.'s activities related to a named individual and (2) all documents, materials and/or information relating to the personnel file of a named individual. You state that the district has previously provided the requestor with information responsive to item one of the request, and that the requestor has been notified of this fact pursuant to section 552.232 of the Government Code. *See* Gov't Code 552.232 (governmental body shall certify to requestor that copies of all or part of requested information, as applicable, were previously furnished to requestor). Thus, we need not address that portion of the request in this ruling. *See* Gov't Code 552.301. You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, and 552.117 of the Government Code. We have reviewed the representative sample of information you have submitted and considered the exceptions you claim.¹

¹ 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 those records contain substantially different types of information than that submitted to this office.

We first note that some of the requested information is subject to section 552.022 of the Government Code. Section 552.022 provides that:

the following categories of information are public information and not excepted from required disclosure under this chapter 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). In this instance, the requested information includes a completed evaluation made of, for, or by the district. The district must release the completed evaluation pursuant to section 552.022(a)(1), unless it is excepted from disclosure under section 552.108 or is expressly confidential under other law. Although you argue that the information at issue is excepted under section 552.103 of the Government Code, section 552.103 is a discretionary exception and is not "other law" for the purposes of section 552.022. *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). Thus, the district may not withhold the completed evaluation under section 552.103. However, since the district also claims mandatory exceptions under sections 552.101, 552.102, and 552.117 of the Government Code for this information, we will address your arguments under these provisions.

You claim that the completed evaluation is excepted from disclosure pursuant to section 552.101 in conjunction with section 21.355 of the Education Code.² Section 21.355 provides that "[a] document evaluating the performance of a teacher or administrator is confidential." Educ. Code § 21.355. However, the evaluation in this case does not relate to the performance of a certified "teacher" or an "administrator," as these terms are commonly defined. *See Open Records Decision No. 643 (1996)*. Accordingly, we conclude that the district cannot withhold the completed evaluation pursuant to section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.

You also claim that sections 552.101 and 552.102 except the non-educator evaluations from disclosure. For information to be protected from public disclosure by the common-law right of privacy under section 552.101, the information must meet certain criteria. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if: (1) the information contains highly intimate or embarrassing

² Section 552.101 of the Government Code excepts from disclosure "information made confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information another statute makes confidential.

facts the release of which would be highly objectionable to a reasonable person; and (2) the information is not of legitimate concern to the public. *Id.* at 685. Section 552.102 excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Gov’t Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App. Austin 1983, writ ref’d n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101. *See Indus. Found.*, 540 S.W.2d at 683-85. Accordingly, we will consider your section 552.101 and section 552.102 claims together.

Having reviewed the non-educator evaluations, we conclude that none of the information they contain is protected by common-law privacy. *See Open Records Decision Nos. 470 (1987) (public employee’s job performance does not generally constitute his private affairs), 455 (1987) (public employee’s job performance or abilities generally not protected by privacy), 444 at 4 (1986) (public will frequently have legitimate interest in personnel file information relating to public employees, and thus even highly intimate or embarrassing information generally will be open to public), 405 at 2-3 (1983) (public has interest in manner in which public employee performs his job), 400 at 5 (1983) (information protected only if release would lead to clearly unwarranted invasion of employee’s privacy); see also Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow).* Consequently, none of the evaluations may be withheld under section 552.101 or section 552.102 of the Government Code in conjunction with common-law privacy.

However, the completed evaluation contains a social security number that may be confidential pursuant to section 552.117. Section 552.117 of the Government Code excepts from disclosure social security numbers for employees of a governmental body who request that this information be kept confidential under section 552.024. *See Gov’t Code § 552.117(a)(1).*³ The district states that the employee in question elected to deny access to her information. Whether a social security number 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).* Accordingly, the district must withhold the social security number found in the completed evaluation pursuant to section 552.117(a)(1) if the employee with whom it is associated elected prior to the district’s receipt of this request to keep it confidential. Otherwise, the district may not withhold the social security number under section 552.117(a)(1) of the Government Code.

³ In Senate Bill 1388, which became effective on June 20, 2003, the Seventy-eighth Legislature recently amended section 552.117 of the Government Code by adding “(a)” to the relevant language of this provision. *See Act of May 30, 2003, 78th Leg., R.S., ch. 947, 2003 Tex. Sess. Law Serv. 2822 (Vernon) (to be codified as an amendment to Gov’t Code sec. 552.117).*

In the event that this social security number is not excepted from disclosure under section 552.117(a)(1), it may be confidential under federal law. Section 552.101 encompasses amendments to the Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), that make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994). You state that the district maintains employee social security numbers pursuant to section 120.1(a)(1) of title 38 of the Texas Administrative Code. However, we have been unable to locate any such provision of law. Therefore, we have no basis for concluding that the social security number at issue is confidential under section 405(c)(2)(C)(viii)(I) and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing the social security number, you should ensure that such information is not obtained or maintained by the district pursuant to any provision of law, enacted on or after October 1, 1990. With the possible exception of the social security number, the completed evaluation must be released to the requestor.

We now address your section 552.103 of the Government Code claim with regard to the remaining submitted information. Section 552.103, known as the litigation exception, 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.

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 on the date that the governmental body receives the request for information 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, 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).

To secure the protection of section 552.103(a), a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation to which the governmental body is a party. Open Records Decision No. 588 at 1 (1991). The mere chance of litigation will not trigger section 552.103(a). Open Records Decision No. 452 (1986), and authorities cited therein. To demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include 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. Open Records Decision No. 555 (1990); *see* 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. Open Records Decision No. 638 at 3 (1996). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

In this case, you explain that the requested information relates to grievances the requestor has filed against the district and its employees. You summarize the facts that led to the filing of the grievances and describe the district's written and oral exchanges with the requestor regarding the grievances. Based on your representations and our review of the submitted information, we find that the totality of the circumstances demonstrates the district reasonably anticipated litigation relating to the grievances on the date the district received the request for information. We also find that the district has adequately demonstrated that the remaining submitted information is related to the anticipated litigation for purposes of section 552.103. Accordingly, we conclude that the district may withhold the remaining submitted information pursuant to 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 party in the anticipated 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, the district must withhold the social security number contained within the completed evaluation pursuant to section 552.117 of the Government Code if the employee with whom it is associated elected prior to the district's receipt of this request to keep it confidential. Nevertheless, this social security number may be confidential under federal law

if it was obtained or maintained by the district pursuant to a law enacted on or after October 1, 1990. The remaining information may be excepted from disclosure 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).

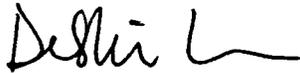
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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,

A handwritten signature in black ink, appearing to read "Debbie K. Lee". The signature is fluid and cursive, with a long horizontal stroke at the end.

Debbie K. Lee
Assistant Attorney General
Open Records Division

DKL/seg

Ref: ID# 190692

Enc. Submitted documents

c: Mr. J. Umoren
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(w/o enclosures)