



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

December 12, 2003

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

OR2003-8963

Dear Ms. Martin:

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# 192616.

The Richardson Independent School District (the "district") received thirty-five requests from the same requestor for correspondence and phone records involving six named individuals and the requestor for specified dates.¹ You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.107, 552.117, 552.130, and 552.136 of the Government Code, and under the federal Family Educational Rights and Privacy Act of 1974 ("FERPA"), section 1232g of Title 20 of the United States Code.² We have considered the exceptions you claim and reviewed the submitted representative sample of information.³

¹Twenty-one of the requests were received by the district on September 18, 2003, and the remaining nineteen were received on September 19th.

²As you did not submit to this office written comments stating the reasons why section 552.111 would allow the information to be withheld, we find that you have waived this exception. *See* Gov't Code §§ 552.301, .302.

³We assume that the 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

We first note that you state that much of the currently requested information is the subject of previous rulings issued by this office. *See* Open Records Letter Nos. 2003-7530A (2003), 2003-7930 (2003), 2003-7931 (2003), 2003-8006 (2003), 2003-8258 (2003), 2003-8510 (2003), and 2003-8667 (2003). You do not indicate that the law, facts, or circumstances existing at the time of the issuance of these rulings have changed. Thus, it appears that the four criteria for a "previous determination" established by this office in Open Records Decision No. 673 (2001) have been met in this situation. Therefore, the district may rely on Open Records Letter Nos. 2003-7530A, 2003-7930, 2003-7931, 2003-8006, 2003-8258, 2003-8510, and 2003-8667 as previous determinations for the information at issue here that was also considered in Open Records Letter Nos. 2003-7530A, 2003-7930, 2003-7931, 2003-8006, 2003-8258, 2003-8510, and 2003-8667. *See* Open Records Decision No. 673 (2001) (previous determination exists where requested information is precisely same information addressed in prior attorney general ruling, ruling is addressed to same governmental body, ruling concludes that information is or is not excepted from disclosure, and law, facts, and circumstances on which ruling was based have not changed).

We also note that you have redacted student information from some of the submitted records as authorized by Open Records Decision No. 634 (1995). In that decision, this office concluded that (1) an educational agency or institution may withhold from public disclosure information that is protected by FERPA and excepted from required public disclosure by sections 552.026 and 552.101⁴ of the Government Code 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. Since it appears that the district has made a determination that specific information comprises "student records," the district must comply with the FERPA guidelines for the student information that you have redacted.

Next, we observe that a portion of the remaining submitted information constitutes information that is subject to section 552.022 of the Government Code. Section 552.022(a) enumerates categories of information that are public information and not excepted from required disclosure under chapter 552 of the Government Code, unless they are expressly confidential under other law. *See* Gov't Code §§ 552.022(a)(3) ("information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body"), .022(a)(13) ("a policy statement or interpretation that has been adopted or issued by an agency"). The information subject to section 552.022 must therefore be

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

⁴Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and encompasses information protected by other statutes.

released unless the information is expressly made confidential under other law. Section 552.103 of the Government Code is a discretionary exception that does not constitute "other law" that makes information confidential for purposes of section 552.022. *See Dallas Area Rapid Transit*, 4 S.W.3d 469; Open Records Decision No. 542 (1990). Accordingly, we conclude that the district may not withhold any portion of the information subject to section 552.022 under section 552.103 of the Government Code. However, since the district also claims that this information is excepted from disclosure under sections 552.101, 552.114, 552.117, 552.136, and FERPA, we will address those arguments.

Section 552.114 of the Government Code excepts from disclosure student records at an educational institution funded completely or in part by state revenue. This office generally applies the same analysis under section 552.114 and FERPA.⁵ Open Records Decision No. 539 (1990). 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" means 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. *Id.* § 1232g(a)(4)(A). Section 552.026 of the Government Code provides that "information contained in education records of an educational agency or institution" may only be released under the Act in accordance with FERPA.

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). Such information includes information that directly identifies a student as well as information that, if released, would allow the student's identity to be easily traced. *See* Open Records Decision No. 224 (1979) (finding student's handwritten comments protected under FERPA because they make identity of student easily traceable through handwriting, style of expression, or particular incidents related). Thus, to the extent that the information subject to section 552.022 consists of or contains student identifying information, it must be withheld pursuant to section 552.114 and FERPA.

A portion of the information subject to the purview of section 552.022 may be excepted from disclosure under section 552.117 of the Government Code. Section 552.117(a)(1) 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. Whether a particular piece of information is protected by section 552.117(a)(1) must be determined

⁵Section 552.101 of the Government Code also incorporates confidentiality provisions such as FERPA into the Act.

at the time the request for it is made. See Open Records Decision No. 530 at 5 (1989). Therefore, the district may only withhold information under section 552.117(a)(1) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. For those employees who timely elected to keep their personal information confidential, the district must withhold the employees' home addresses and telephone numbers, social security numbers, and any information that reveals whether these employees have family members. The district may not withhold this information under section 552.117(a)(1) for those employees who did not make a timely election to keep the information confidential.

Section 552.136 of the Government Code states that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136. We have marked the types of information contained in the records subject to section 552.022 that the district must withhold under section 552.136.

We turn now to your arguments regarding section 552.103 of the Government Code for 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). 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 that the district reasonably anticipated litigation relating to the grievances on the date the district received the requests 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 this instance, we note that many of the submitted documents have been obtained from or provided to the opposing party. Accordingly, we conclude that the district may not withhold these documents under section 552.103 of the Government Code. As you do not claim any other exceptions for these documents, the district must release them to the requestor.

To summarize, we conclude (1) the district may rely on Open Records Letter Nos. 2003-7530A, 2003-7930, 2003-7931, 2003-8006, 2003-8258, 2003-8510, and 2003-8667 as previous determinations for the information at issue here that was also considered in those

prior rulings; (2) the district must release the information that we have marked under section 552.022, except for information which must be withheld under sections 552.114, 552.117, 552.136, and FERPA; and (3) to the extent it has not been obtained from or provided to the opposing party in the anticipated litigation, the remaining submitted information may be withheld under section 552.103 of the Government Code. As our ruling is dispositive, we do not address your remaining arguments.⁶

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

⁶Some of the documents marked for release contain or consist of confidential information that is not subject to release to the general public. See Gov't Code § 552.352. However, the requestor in this instance has a special right of access to the information. Gov't Code § 552.023. Because some of the information is confidential with respect to the general public, if the district receives a future request for this information from an individual other than the requestor or his authorized representative, the district should again seek our decision.

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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/jh

Ref: ID# 192616

Enc. Submitted documents

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(w/o enclosures)