



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

March 10, 2004

Ms. Nan P. Hundere
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P.O. Box 460606
San Antonio, Texas 78246-0606

OR2004-1803

Dear Ms. Hundere:

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# 197487.

The Judson Independent School District (the "district"), which you represent, received two requests from the same requestor for information related to an incident involving a district employee and a student. You state that some responsive information has been released to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.026, 552.101, 552.102, 552.103, 552.114, and 552.135 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We begin by noting that one of the documents that you have submitted as responsive to the December 8th request was created after the date the district received that request for information. Such information is not responsive to the December 8th request and this ruling will not address that information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Section 21.355 of the Education Code provides, "A document evaluating the performance of a teacher or administrator is confidential." This office interpreted this section to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or

administrator. Open Records Decision No. 643 (1996). In that opinion, this office determined that an administrator is someone who is required to hold and does hold a certificate required under chapter 21 of the Education Code and is serving as an administrator at the time of the evaluation. *Id.* Similarly, a teacher is someone who is required to hold and does hold a certificate or permit required under chapter 21 of the Education Code and is teaching at the time of his or her evaluation. *See id.*

After careful consideration of your arguments and our review of the submitted information, it appears that the submitted information, which includes a written reprimand, relates to allegations of misconduct on the part of an employee of the district and does not concern evaluations as that term is commonly understood. You argue that the Commissioner of Education has ruled that written reprimands are evaluations for the purposes of section 21.355. *Tave v. Dallas Indep. Sch. Dist.*, Dkt. No. 067-R2-501 (Comm's Educ. 2001). However, we disagree with the Commissioner's ruling in *Tave*. Thus, we find that the submitted information is not confidential under section 21.355 and is not excepted from disclosure under section 552.101 on that basis.

You next contend that some of the submitted information is confidential under the 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); *see also* 34 C.F.R. § 99.3 (defining personally identifiable information). FERPA is incorporated into chapter 552 of the Government Code by section 552.026, which provides as follows:

This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

Gov't Code § 552.026. "Education records" under FERPA are those records that contain information directly related to a student and that are maintained by an educational agency or institution or by a person acting for such agency or institution. *See* 20 U.S.C. § 1232g(a)(4)(A).

Section 552.114(a) of the Government Code excepts from disclosure "information in a student record at an educational institution funded wholly or partly by state revenue." This office generally has treated "student record" information under section 552.114(a) as the equivalent of "education record" information that is protected by FERPA. *See* Open Records Decision No. 634 at 5 (1995). In Open Records Decision No. 634 (1995), this office concluded that: (1) an educational agency or institution may withhold from disclosure

information that is protected by FERPA and excepted from disclosure by sections 552.026 and 552.101 of the Government Code without the necessity of requesting an attorney general decision as to those exceptions to disclosure, and (2) an educational agency or institution that is state-funded may withhold from disclosure information that is excepted from disclosure by section 552.114 of the Government Code 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 to disclosure. *See* Open Records Decision No. 634 at 6-8 (1995). However, since in this instance you have requested our decision on the public availability of these portions of the submitted information under sections 552.026 and 552.114 of the Government Code, as well as under FERPA, we will address your claims.

You inform us that the submitted documents contain information relating to students. Generally, FERPA requires that information be withheld from the public only to the extent reasonable and necessary to avoid personally identifying a particular student. *See* Open Records Decision Nos. 332 at 3 (1982), 206 at 2 (1978). We have marked the information that is confidential under FERPA. The district must not release the marked information unless it has authority under FERPA to do so.

Section 552.102 of the Government Code excepts from public 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). This exception is applicable to information that relates to public officials and employees. *See* Open Records Decision No. 327 at 2 (1982) (anything relating to employee's employment and its terms constitutes information relevant to person's employment relationship and is part of employee's personnel file). The privacy test under section 552.102(a) is the same as the test of common-law privacy under section 552.101 of the Government Code.¹ *See* *Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.). Information must be withheld from the public under section 552.101 or 552.102 in conjunction with common-law privacy when the information is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) of no legitimate public interest. *See* *Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The common-law right to privacy encompasses the specific types of information that the Texas Supreme Court held to be intimate or embarrassing in *Industrial Foundation*. *See* 540 S.W.2d at 683 (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). This office has since concluded that other types of information also are private under section 552.101. *See* Open Records Decision No. 659 at 4-5 (1999) (summarizing information attorney general has determined to be private).

¹Section 552.101 also encompasses the doctrine of common-law privacy.

You contend that portions of the submitted information are excepted from disclosure under section 552.102. You assert that public disclosure of these documents would constitute an invasion of the employee's personal privacy. We note, however, that the public has a legitimate interest in information concerning the workplace conduct and performance of public employees. *See* Open Records Decision No. 423 (1984). Having reviewed the documents at issue, we conclude that you have not demonstrated that any responsive information contained in these documents is excepted from disclosure under section 552.102. *See* Open Records Decision Nos. 542 at 5 (1990) (information regarding public employee's qualifications is of legitimate concern to public), 470 at 4 (1987) (public employee's job performance does not generally constitute private affairs), 444 at 4 (1986) (public employee's personnel file information will generally be available to public regardless of whether it is highly intimate or embarrassing), 405 at 2 (1983) (manner in which public employee performed his or her job cannot be said to be of minimal public interest), 329 at 2 (1982) (information relating to complaints against public employees and discipline resulting therefrom not protected under statutory predecessor to section 552.101), 208 at 2 (1978) (information relating to complaint against public employee and disposition of complaint not protected under common-law privacy); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). Thus, the district may not withhold any portion of the submitted information under section 552.102 of the Government Code.

You next claim that the information that you have submitted as responsive to the January 26th request is excepted from disclosure pursuant to section 552.103 of the Government Code. Section 552.103 provides in part:

(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). The district maintains the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold from disclosure. In order to meet this burden, the district must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request and (2) that the information at issue is related to that litigation. *See*

University of Tex. Law Sch. v. Texas Legal Found., 958 S.W.2d 479 (Tex. App.– Austin 1997, no pet.); *see also Heard v. Houston Post Co.*, 684 S.W.2d 210 (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 elements of this test in order for information to be excepted from disclosure under section 552.103. *See id.*

In demonstrating that litigation is reasonably anticipated, the district must furnish concrete evidence that litigation is realistically contemplated and is more than mere conjecture. *See* Open Records Decision No. 518 at 5 (1989). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, 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.² *See* Open Records Decision No. 555 (1990); *see also* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). Conversely, 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. *See* Open Records Decision No. 331 (1982). Whether litigation is reasonably anticipated must be determined on case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986).

You state, and provide us with documentation showing, that the district has received correspondence from an attorney threatening litigation and threatening to file charges with the district attorney. Based upon your representation and our review, we find you have established that the district reasonably anticipates litigation regarding this matter. We also find that the information submitted as responsive to the January 26th request is related to the anticipated litigation. Accordingly, we have marked the information that the district may withhold under section 552.103 of the Government Code.³

Lastly, we address your claim under section 552.135 of the Government Code. This exception provides as follows:

² In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

³ We note, however, that 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 all opposing parties in litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded or is no longer anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

(a) "Informer" means a student or former student or an employee or former employee of a school district who has furnished a report of another person's or persons' possible violation of criminal, civil, or regulatory law to the school district or the proper regulatory enforcement authority.

(b) An informer's name or information that would substantially reveal the identity of an informer is excepted from [required public disclosure].

(c) Subsection (b) does not apply:

(1) if the informer is a student or former student, and the student or former student, or the legal guardian, or spouse of the student or former student consents to disclosure of the student's or former student's name; or

(2) if the informer is an employee or former employee who consents to disclosure of the employee's or former employee's name; or

(3) if the informer planned, initiated, or participated in the possible violation.

(d) Information excepted under Subsection (b) may be made available to a law enforcement agency or prosecutor for official purposes of the agency or prosecutor upon proper request made in compliance with applicable law and procedure.

(e) This section does not infringe on or impair the confidentiality of information considered to be confidential by law, whether it be constitutional, statutory, or by judicial decision, including information excepted from the requirements of Section 552.021.

Gov't Code § 552.135. Because the legislature specifically limited the protection of section 552.135 to the identity of a person who reports a possible violation of "law," a school district that seeks to withhold information under section 552.135 must clearly identify to this office the specific civil, criminal, or regulatory law that is alleged to have been violated. *See also* Gov't Code § 552.301(e)(1)(A). You have not demonstrated that any of the remaining responsive information relates to the identity of a person who reported a violation of a civil, criminal, or regulatory law. Thus, you have not shown that any of that information is excepted from disclosure under section 552.135.

In summary, we have marked the information that is confidential under FERPA. The district must not release the marked information unless it has authority under FERPA to do so. The district may withhold the information submitted as responsive to the January 26th request

under section 552.103 of the Government Code. The remaining submitted information must be released to the requestor.

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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/jh

Ref: ID# 197487
Enc. Submitted documents

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