



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 11, 2008

Mr. Dennis J. Eichelbaum
Schwartz & Eichelbaum, P.C.
7400 Gaylord Parkway, Suite 200
Frisco, Texas 75034

OR2008-04895

Dear Mr. Eichelbaum:

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# 307165.

The Jim Ned Consolidated Independent School District (the "district") received a request for a specified employee's personnel file and five categories of information concerning a specified incident. You indicate that the district is withholding some information in its entirety, and you state that the district is redacting some of the submitted information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232(a).¹ You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.104, 552.114, 552.117, 552.130, 552.136, and 552.147 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information.³

¹We note that our office is prohibited from reviewing the education records to determine whether appropriate redactions under FERPA have been made; therefore, we will not address the applicability of FERPA to any of the submitted information.

²You inform us that some of the submitted information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2008-00742(2008). However, we note that section 552.103 was not raised in the previous request for a decision. Therefore, as the facts and circumstances have changed since the issuance of Open Records Letter No. 2008-00742, the district may no longer rely on that ruling as a previous determination with regard to the instant request.

³We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decisions 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.

Initially, we note that a portion of the submitted information includes notices and minutes of meetings of the district's board of directors. Notices and minutes of a governmental body's public meetings are specifically made public under provisions of the Open Meetings Act, chapter 551 of the Government Code. See Gov't Code §§ 551.022 (minutes and tape recordings of open meeting are public records and shall be available for public inspection and copying on request to governmental body's chief administrative officer or officer's designee), 551.041 (governmental body shall give written notice of date, hour, place, and subject of each meeting), 551.043 (notice of meeting of governmental body must be posted in place readily accessible to general public for at least 72 hours before scheduled time of meeting). As a general rule, the exceptions to disclosure found in the Act do not apply to information that other statutes make public. See Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Therefore, the district must also release the meeting notices and minutes that we have marked.

Next, we note that portions of the remaining submitted information are subject to section 552.022 of the Government Code. Section 552.022 provides in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, 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;
- (2) the name, sex, ethnicity, salary, title, and dates of employment of every employee and officer of a governmental body;
- (3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(1)-(3). The submitted information includes completed evaluations of a teacher, salary information of a district employee, and employment contracts. Section 552.022 makes this information expressly public unless it is confidential under other law. The district raises section 552.103 for this information, but this is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. See *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 665 at 2 n. 5 (2000) (discretionary exceptions generally). As such, section 552.103 does not qualify as "other law" that makes information confidential for the purposes of section 552.022. Therefore, the district may not withhold the information at issue under section 552.103 of the Government Code. You also claim that the information subject to section 552.022(a)(1) is excepted from disclosure under section 552.101 of the Government Code. As this section constitutes other law for purposes of

section 552.022(a)(1), we will consider this argument for the information subject to section 552.022 of the Government Code.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information made confidential by statute. Section 21.355 of the Education Code provides that "[a] document evaluating the performance of a teacher or administrator is confidential." Educ. Code § 21.355. This section applies to any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. *See* Open Records Decision No. 643 (1996). In Open Records Decision No. 643, we determined that for purposes of section 21.355, the word "teacher" means a person who is required to and does in fact hold a teaching certificate under subchapter B of chapter 21 of the Education Code or a school district teaching permit under section 21.055 and who is engaged in the process of teaching, as that term is commonly defined, at the time of the evaluation. *See id.* at 4. We note that some of the submitted information relates to a teacher who held the appropriate teaching certificate and evaluates the individual's performance as a teacher. Based on our review of the information at issue, we conclude that some of the information at issue consists of teacher evaluations for the purposes of section 21.355. Therefore, the district must withhold the evaluations we have marked under section 552.101 of the Government Code in conjunction with section 21.355. We will now address your arguments for the information not subject to section 552.022.

Section 552.103 of the Government Code, the litigation exception, provides in relevant part 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.

Gov't Code § 552.103(a), (c). The district has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in this particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date that the request for information is received, 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 section 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). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *Id.* 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. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”). In Open Records Decision No. 638 (1996), this office stated that, when a governmental body receives a notice of claim letter, it can meet its burden of showing that litigation is reasonably anticipated by representing that the notice of claim letter is in compliance with the requirements of the Texas Tort Claims Act (the “TTCA”), Civil Practice & Remedies Code, chapter 101, or an applicable municipal ordinance. If a governmental body does not make this representation, the claim letter is a factor that this office will consider in determining whether a governmental body has established that litigation is reasonably anticipated based on the totality of the circumstances. 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. *See* Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

In this instance, you inform us that the requestor mailed “a notice letter threatening litigation, seeking limitations of coverage, [and] warning the [district] that a settlement offer was being prepared[.] Upon review of your arguments and the remaining submitted information, we conclude that you have established that the district reasonably anticipated litigation when it received the request for information. Further, you state, and we agree, that the remaining submitted information relates to the anticipated litigation. Accordingly, the district may withhold the remaining submitted information under section 552.103 of the Government Code.⁴

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. We also note that the applicability of section 552.103(a) ends once the litigation has concluded or is

⁴As our ruling is dispositive, we do not address your remaining arguments against disclosure.

no longer anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

In summary, the district must release the meeting notices and minutes that we have marked in conjunction with sections 551.022 and 551.041 of the Government Code. The district must withhold the submitted evaluations of a teacher under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. The district must also release the salary information and the contracts, which we have marked, under sections 552.022(a)(2) and 552.022(a)(3) of the Government Code. The district 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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 challenge 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 Office of the Attorney General 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. 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,



Jonathan Miles
Assistant Attorney General
Open Records Division

JM/jh

Ref: ID# 307165

Enc. Submitted documents

c: Mr. Daniel Christensen
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(w/o enclosures)