



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 28, 2009

Ms. Christine Badillo
Walsh, Anderson, Brown, Aldridge, & Gallegos, P.C.
Attorney for Belton Independent School District
P.O. Box 2156
Austin, Texas 78768

OR2009-05603

Dear Ms. Badillo:

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# 341151.

The Belton Independent School District (the "district"), which you represent, received a request for (1) a copy of the district's contract with a particular law firm regarding their legal services, (2) six categories of information concerning Belton High School (the "school") for the last four years, (3) documents reflecting the employment of security personnel at the school for the last three years, (4) documents reflecting the school class size of each foreign language, government, history, and English class, and (5) documents reflecting the training of students at the school regarding violence, alcohol, drugs, or sex abuse prevention for the last three years. You state some of the requested information has been withheld or redacted pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.¹ You claim the submitted information is excepted from

¹The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office FERPA does not permit state and local educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act. The DOE has determined FERPA

disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

First, we note some of the information was created after the district's receipt of the request for information. The Public Information Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986). Thus, the information we marked is not responsive to the request and this decision does not address it.

Next, we note some of the submitted information is made expressly public under section 552.022 of the Government Code, which provides, in relevant part, as follows:

(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:

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;

...

(15) information regarded as open to the public under an agency's policies[.]

Gov't Code § 552.022(a)(3), (15). The submitted documents contain information in accounts, vouchers, and contracts relating to the receipt or expenditure of public funds that is subject to section 552.022(a)(3). The submitted information also contains a job description, which is usually open to the public as part of a job posting. If the district regards the submitted job description as open to the public, then the district may withhold this information, which we have marked subject to subsection 552.022(a)(15), along with the remaining information we have marked subject to subsection 552.022(a)(3), only to the extent they are made confidential under other law. Although you argue this information is excepted from disclosure under section 552.103 of the Government Code, this section is a discretionary exception and, as such, is not other law for purposes of section 552.022. *See id.* § 552.007; *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 Gov't Code § 552.103);

determinations must be made by the educational authority in possession of the education records. We have posted a copy of the letter from the DOE to this office on the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

see also Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 473 (1987) (governmental body may waive section 552.103). Therefore, the information we have marked as subject to subsection 552.022(a)(3) may not be withheld under section 552.103. The submitted job description, which we have marked, may not be withheld under section 552.103 pursuant to section 552.022(a)(15) if it is regarded by the district as open to the public. However, some of the information subject to section 552.022 is also subject to section 552.136 of the Government Code.² This section is other law for purposes of section 552.022, and we will address whether it applies to the information subject to section 552.022.

One of the documents subject to section 552.022(a)(3) contains a credit card number excepted from disclosure under section 552.136 of the Government Code. Section 552.136 states “[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(b). Accordingly, the district must withhold this credit card number, which we have marked, under section 552.136 of the Government Code. The remaining information subject to section 552.022(a)(3) must be released.

Next, we address your claim under section 552.103 of the Government Code for the information not subject to section 552.022. Section 552.103 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.

Gov’t Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing (1) litigation was pending or

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

reasonably anticipated on the date the governmental body received the request for information, 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You state and provide documentation showing that prior to the district's receipt of this request, a lawsuit styled *Jordan, et. al. v. Belton Indep. Sch. Dist., et. al.*, Civil Action No. A08CA121-LY, was filed and is currently pending in the United States District Court for the Western District of Texas, Austin Division. Therefore, we conclude the district was a party to pending litigation when the district received the present request. You also explain how the information at issue is related to the pending lawsuit and provide documentation showing the present request for information mirrors the requestor's request for discovery in the pending lawsuit. Based on your representations, the submitted documentation, and our review of the information at issue, we find the information is related to the pending litigation for purposes of section 552.103. Therefore, the district may withhold the remaining information under section 552.103 of the Government Code.

We note once the information has been obtained by all parties to the pending litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information either obtained from or provided to the opposing parties in the pending 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. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, with the exception of the information subject to section 552.022 of the Government Code, the district may withhold the submitted information under section 552.103 of the Government Code. In one document subject to section 552.022(a)(3), the district must withhold the credit card number we have marked under section 552.136 of the Government Code. The remaining information must be released.

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

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public

information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,

A handwritten signature in black ink, appearing to read 'Emily Sitton', written in a cursive style.

Emily Sitton
Assistant Attorney General
Open Records Division

EBS/rl

Ref: ID# 341151

Enc. Submitted documents

c: Requestor
(w/o enclosures)