



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 21, 2010

Ms. Kelly J. Shook
Schwartz & Eichelbaum
Wardell Mehl and Hansen, P.C.
4201 West Parmer Lane, Suite A-100
Austin, Texas 78727

OR2010-00995

Dear Ms. Shook:

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# 367681.

The Mission Consolidated Independent School District (the "district"), which you represent, received a request for information relating to a specified incident involving two named individuals, including any investigative or disciplinary records. You state that some of the requested information has been released. You seek to withhold the submitted information under sections 552.026, 552.101, 552.103, 552.108, 552.117, and 552.135 of the Government Code and the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.¹ We have considered your arguments and reviewed the information you submitted.

Initially, we address your statement that information relating to students and employees of the district has been redacted from the submitted documents pursuant to FERPA and section 552.117 of the Government Code. Section 552.301 of the Government Code prescribes procedures that a governmental body must follow in asking this office to determine whether requested information is excepted from public disclosure, unless the information is the subject of a previous determination. *See Gov't Code §§ 552.006, .301(a), .302; Open Records Decision No. 673 (2001) (previous determinations).*

¹Although you claim section 552.1175 of the Government Code for information relating to employees of the district, we note that the relevant exception in this instance is section 552.117.

Among other things, a governmental body must submit to this office either the specific information that it seeks to withhold or representative samples if the information is voluminous. *See* Gov't Code § 552.301(e)(1)(D).

Although this office recently issued Open Records Decision No. 684 (2009), which is a previous determination authorizing all governmental bodies to withhold ten categories of information without the necessity of requesting an attorney general decision, the district's redactions do not appear to encompass any information that the district is authorized to withhold under Open Records Decision No. 684. We note, however, that pursuant to section 552.024(c) of the Government Code, and without the necessity of requesting a decision under section 552.301, a governmental body may redact the home address and telephone number, social security number, and family member information of a current or former official or employee who chooses not to allow public access to that information. *See* Gov't Code. § 552.024(c). Additionally, Open Records Decision No. 670 (2001) authorizes all governmental bodies covered by the Act to withhold the home addresses and telephone numbers, personal cellular phone and pager numbers, social security numbers, and family member information of peace officers, as defined by article 2.12 of the Code of Criminal Procedure, without the necessity of requesting a decision as to whether the information is excepted from disclosure under section 552.117(a)(2) of the Government Code. *See* ORD 670 at 6. We also note that section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. We are not aware of any other authority that permits the district to withhold information relating to its employees without requesting a decision by this office under the Act.

As we are able to discern the nature of some of the information that has been redacted from the submitted documents, we will determine whether any of that information is excepted from disclosure. Otherwise, except for information relating to a student that the district is authorized to withhold under FERPA, personal information relating to an employee that may be redacted pursuant to section 552.024(c), information relating to a peace officer that may be withheld pursuant to ORD 670 and section 552.117(a)(2), or a social security number that may be redacted under section 552.147(b), the district must release the information that has been redacted from the submitted documents. *See* Gov't Code § 552.302. If the district believes that any such information is confidential and may not lawfully be released, it must challenge this ruling in court pursuant to section 552.324 of the Government Code.

We next note that the submitted information includes education records. The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that 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.² Consequently, state and local educational authorities that receive a request for education records from a member of the public under the Act must not submit education records to this office in unredacted form, that is, in a form in which “personally identifiable” information is disclosed. *See* 34 C.F.R. § 99.3 (defining “personally identifiable information”). You have submitted, among other things, unredacted education records for our review. Because our office is prohibited from reviewing the submitted education records to determine the applicability of FERPA, we will not address FERPA with respect to those records. *See* 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.3. Such determinations under FERPA must be made by the educational authority in possession of the education record.³ However, we will address the district’s exceptions to disclosure under the Act.⁴

Section 552.101 of the Government Code exempts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This exception encompasses information that other statutes make confidential. Section 58.007 of the Family Code provides in part:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

(1) if maintained on paper or microfilm, kept separate from adult files and records;

(2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and

(3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapters B, D, and E.

...

²A copy of this letter may be found on the attorney general’s website at <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

³In the future, if the district does obtain consent to submit unredacted education records and seeks a ruling from this office on the proper redaction of those education records in compliance with FERPA, we will rule accordingly.

⁴We note that section 552.026 of the Government Code is not an exception to disclosure; this section incorporates FERPA into the Act.

(e) Law enforcement records and files concerning a child may be inspected or copied by a juvenile justice agency as that term is defined by Section 58.101, a criminal justice agency as that term is defined by Section 411.082, Government Code, the child, and the child's parent or guardian.

...

(j) Before a child or a child's parent or guardian may inspect or copy a record or file concerning the child under Subsection (e), the custodian of the record or file shall redact:

(1) any personally identifiable information about a juvenile suspect, offender, victim, or witness who is not the child; and

(2) any information that is excepted from required disclosure under Chapter 552, Government Code, or other law.

Fam. Code § 58.007(c), (e), (j). Section 58.007(c) is applicable to records of juvenile conduct that occurred on or after September 1, 1997. *See* Act of June 2, 1997, 75th Leg., R.S., ch. 1086, §§ 20, 55(a), 1997 Tex. Gen. Laws 4179, 4187, 4199; Open Records Decision No. 644 (1996). The juvenile must have been at least 10 years old and less than 17 years of age when the conduct occurred. *See* Fam. Code § 51.02(2) (defining "child" for purposes of Fam. Code tit. 3). Section 58.007(c) is not applicable to information that relates to a juvenile as a complainant, victim, witness, or other involved party and not as a suspect or offender. We find that two of the submitted documents constitute juvenile law enforcement records, so as to fall within the scope of section 58.007(c). *See id.* § 51.03(a)-(b) (defining "delinquent conduct" and "conduct indicating need for supervision" for purposes of Fam. Code tit. 3). In this instance, however, the requestor is an attorney for the juvenile involved. Thus, because the requestor has a right to inspect juvenile law enforcement records concerning his client pursuant to section 58.007(e), the documents in question may not be withheld from this requestor under section 552.101 of the Government Code on the basis of section 58.007(c) of the Family Code. Section 58.007(j) provides, however, that information subject to any other exception to disclosure under the Act or other law must be redacted. *See id.* § 58.007(j)(2). Accordingly, we will address your other arguments against disclosure of the juvenile law enforcement records and the rest of the information at issue.

Section 552.101 also encompasses the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. Medical records are confidential under section 159.002 of the MPA, which provides in part:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is

confidential and privileged and may not be disclosed except as provided by this chapter.

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(a)-(c). Although you contend that the MPA is applicable in this instance, we find that none of the submitted information consists of either “[a] communication between a physician and a patient” or “[a] record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician[.]” *Id.* § 159.002(a)-(b). We therefore conclude that none of the submitted information at issue falls within the scope of section 159.002 of the MPA, and the district may not withhold any of the information on that basis.

You also raise section 552.101 in conjunction with the Americans with Disabilities Act of 1990 (the “ADA”). *See* 42 U.S.C. §§ 12101 *et seq.* Title I of the ADA provides that information about the medical conditions and medical histories of applicants or employees must be (1) collected and maintained on separate forms, (2) kept in separate medical files, and (3) treated as a confidential medical record. Information obtained in the course of a “fitness for duty examination,” conducted to determine whether an employee is still able to perform the essential functions of his or her job, is to be treated as a confidential medical record as well. *See* 29 C.F.R. § 1630.14(c); *see also* Open Records Decision No. 641 (1996). Furthermore, the federal Equal Employment Opportunity Commission (the “EEOC”) has determined that medical information for the purposes of the ADA includes “specific information about an individual’s disability and related functional limitations, as well as general statements that an individual has a disability or that an ADA reasonable accommodation has been provided for a particular individual.” *See* Letter from Ellen J. Vargyas, Legal Counsel, EEOC, to Barry Kearney, Associate General Counsel, National Labor Relations Board, 3 (Oct. 1, 1997). Having considered your arguments, we find that you have not demonstrated that any of the submitted information is confidential under the ADA. We therefore conclude that the district may not withhold any of the submitted information on that basis under section 552.101 of the Government Code.

Section 552.101 also encompasses common-law privacy, which protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Common-law privacy

encompasses the specific types of information that are held to be intimate or embarrassing in *Industrial Foundation*. See *id.* at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has determined that other types of information also are private under section 552.101. See generally Open Records Decision No. 659 at 4-5 (1999) (summarizing information attorney general has held to be private). We have marked medical information that is intimate or embarrassing and not a matter of legitimate public interest. The district must withhold that information under section 552.101 of the Government Code in conjunction with common-law privacy.

Turning to your other exceptions, section 552.103 of the Government Code 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). A governmental body that claims section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. See *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. See Open Records Decision No. 551 at 4 (1990).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. See Open Records Decision No. 452 at 4 (1986). To establish that litigation is reasonably anticipated, a governmental body must provide this office with "concrete

evidence showing that the claim that litigation may ensue is more than mere conjecture.”⁵ *Id.* You state that the submitted information is related to a grievance that has been filed with the district. You contend that, “because a grievance has been initiated, litigation is reasonably anticipated.” You have not demonstrated, however, that the district’s grievance process constitutes “litigation” for the purposes of section 552.103. *See* Open Records Decision No. 588 (1991) (discussing factors considered by attorney general in determining whether administrative procedure not subject to Administrative Procedure Act, Gov’t Code ch. 2001, constituted litigation for purposes of statutory predecessor to Gov’t Code § 552.103). We therefore conclude that the district may not withhold any of the submitted information under section 552.103 of the Government Code.

Section 552.108 of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). A governmental body must reasonably explain how and why section 552.108 is applicable to the information at issue. *See id.* § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). We understand that the submitted information is related to an internal investigation that was conducted at one of the district’s schools. You also inform us that the Mission Police Department (the “department”) conducted a criminal investigation of the incident to which the submitted information pertains. We note that when a non-law enforcement agency, such as the district, has custody of information that would otherwise qualify for exception under section 552.108 as information relating to the pending case of a law enforcement agency, the custodian of the records may withhold the information if it provides this office with a demonstration that the information relates to the pending case and a representation from the law enforcement agency that it wishes to have the information withheld. *See* Open Records Decision No. 474 at 4-5 (1987). In this instance, you inform us that the department has closed its criminal case, and you have not provided this office with any representation from a law enforcement agency that the submitted information should be withheld from disclosure. We therefore conclude that the district may not withhold any of the submitted information under section 552.108 of the Government Code.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code. *See* Gov’t Code §§ 552.024(a), .117(a)(1). As previously noted, section 552.024(c) of the Government Code

⁵Among other examples, this office has concluded that litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission (“EEOC”), *see* Open Records Decision No. 336 (1982); (2) 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 (3) threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

authorizes a governmental body to redact the types of information protected by section 552.117(a)(1), without asking this office for a decision, for a current or former official or employee who chooses not to allow public access to those types of information. You inform us that the district has redacted certain personal information relating to an employee who elected not to allow public access to that information. We find that the district has properly withheld some of the redacted information that relates to the employee pursuant to section 552.024(c). We have marked other information relating to the employee and protected by section 552.117(a)(1) that must also be withheld. We also find, however, that the district has redacted information relating to the employee that does not fall within the scope of section 552.117(a)(1) and may not be withheld on the basis of section 552.024(c). We have marked that information, which the district must release.

Lastly, section 552.135 of the Government Code provides in part:

(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.

Id. § 552.135(a)-(c). You indicate that the submitted information identifies individuals who provided information relating to an alleged assault, which is a criminal offense under section 22.01 of the Penal Code and thus a violation of law under section 552.135(a). We note that section 552.135 protects an informer's identity, but does not protect witness information or statements. We find that the submitted information identifies the individual who reported the alleged assault to the proper law enforcement authority. You do not indicate that any of the exceptions in subsection 552.135(c) are applicable in this instance. We therefore conclude that the district must withhold the information that identifies the informer, which we have marked, under section 552.135. As the district has not

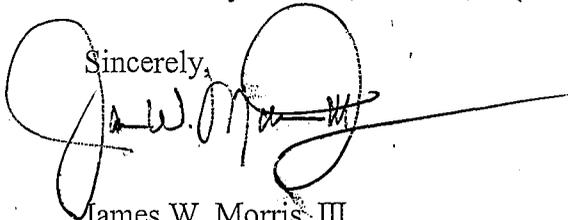
demonstrated that this exception is applicable to any of the remaining information at issue, the district may not withhold any other information under section 552.135.

In summary: (1) the district must withhold the medical information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy; (2) the district must withhold the information we have marked under section 552.117 of the Government Code; and (3) the district must withhold the information we have marked under section 552.135 of the Government Code. Except for any other information that the district is authorized to withhold under sections 552.024(c), 552.117(a)(2), and 552.147 of the Government Code, the rest of the submitted information must be released. This ruling does not address the applicability of FERPA to the submitted information. Should the district determine that all or portions of the submitted information consist of "education records" that must be withheld under FERPA, the district must dispose of that information in accordance with FERPA, rather than the Act.

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_or1.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, toll free, at (888) 672-6787.

Sincerely,



James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/cc

Ref: ID# 367681

Enc: Submitted documents

c: Requestor
(w/o enclosures)