



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 17, 2011

Ms. Haley Turner  
Walsh, Anderson, Brown, Gallegos & Green, P.C.  
P.O. Box 2156  
Austin, Texas 78768

OR2011-02467

Dear Ms. Turner:

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# 409351.

The Alice Independent School District (the "district"), which you represent, received a request for thirty-eight categories of information pertaining to: (1) sexual harassment, criminal sexual conduct, and retaliation for reporting criminal sexual conduct; (2) information pertaining to specified complaints and investigations; (3) specified settlement agreements; (4) the personnel file, legal claims, complaints, video recordings, and telephone records pertaining to a named former employee; (5) telephone records pertaining to a named employee; (6) the personnel file and any complaints pertaining to the requestor's client; and (7) specified board meeting minutes, audio recordings, and video recordings. You state the district does not have information responsive to portions of the request. You also state you are withholding certain information related to executive sessions of the district's board in accordance with Open Records Decision No. 684 (2009).<sup>1</sup> We note you have redacted a social security number from the submitted information pursuant to section 552.147(b) of the

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<sup>1</sup>This office issued Open Records Decision No. 684, a previous determination to all governmental bodies, which authorizes the withholding of ten categories of information, including a certified agenda and tape of a closed meeting under section 552.101 of the Government Code in conjunction with section 551.104 of the Government Code, without the necessity of requesting an attorney general decision.

Government Code.<sup>2</sup> You state the district will make some of the requested information available to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, and 552.107 of the Government Code and privileged pursuant to rule 503 of the Texas Rules of Evidence.<sup>3</sup> We have considered your arguments and reviewed the submitted representative sample of information.<sup>4</sup>

Initially, we note portions of the submitted information, which we have marked, are not responsive to the instant request because they were created after the date the request was received. The district need not release nonresponsive information in response to this request, and this ruling will not address that information.

Next, we note that the United States Department of Education Family Policy Compliance Office has informed this office that the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code, does not permit state and local educational authorities to disclose to this office, without parental or an adult student's consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act.<sup>5</sup> 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 state the district has withheld some responsive documents in their entirety pursuant to FERPA. You have also submitted redacted and unredacted education records for our review. Because our office is prohibited from reviewing these education records to determine whether appropriate redactions under FERPA should be made, we will not address the applicability of FERPA to any of the submitted records. Such determinations under FERPA must be

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<sup>2</sup>We 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.

<sup>3</sup>Although you raise section 552.101 of the Government Code in conjunction with Rule 503 of the Texas Rules of Evidence, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).

<sup>4</sup>We assume that the "representative 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 those records contain substantially different types of information than that submitted to this office.

<sup>5</sup>A copy of this letter may be found on the Office of the Attorney General's website at <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

made by the educational authority in possession of the education records.<sup>6</sup> However, we will consider your exceptions against disclosure of the submitted information under the Act.

We note portions of the submitted information are subject to section 552.022 of the Government Code, which provides in relevant part the following:

[T]he 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 [and]

...

(16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege[.]

Gov't Code § 552.022(a)(1), (16). In this instance, Exhibit 6A consists of a completed investigation and Exhibit 9 consists of completed evaluations. Thus, Exhibits 6A and 9 are subject to section 552.022(a)(1). Information subject to section 552.022(a)(1) is expressly public unless it is excepted from disclosure under section 552.108(a)(1) of the Government Code or expressly confidential under other law. *See id.* § 552.022(a)(1). Exhibit 10C consists of attorney fee bills subject to section 552.022(a)(16). Information subject to section 552.022(a)(16) may only be withheld to the extent it is made confidential under other law. *See id.* § 552.022(a)(16). Although you raise sections 552.103 and 552.107 of the Government Code as exceptions to disclosure of this information, these sections are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *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); Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, sections 552.103 and 552.107 are not other law that make information confidential for the purposes of sections 552.022(a)(1) and 552.022(a)(16). Therefore, the district may not withhold Exhibits 6A, 9, or 10C under section 552.103 or section 552.107 of the Government Code. We note you seek to withhold portions of the submitted fee bills in Exhibit 10C under rule 503 of the Texas Rules of Evidence. The Texas Supreme Court has held the Texas Rules of Evidence are other law within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). We will

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<sup>6</sup>In the future, if the district does obtain parental consent to submit unredacted education records and the district seeks a ruling from this office on the proper redaction of those education records in compliance with FERPA, we will rule accordingly.

therefore consider your assertion of the attorney-client privilege under rule 503 of the Texas Rules of Evidence for Exhibit 10C. Additionally, as section 552.101 of the Government Code is other law for purposes of section 552.022, we will consider the applicability of this exception to Exhibits 6A and 9. We will also consider your claims under sections 552.103 and 552.107 for the portions of the submitted information not subject to section 552.022.

Texas Rule of Evidence 503 enacts the attorney-client privilege. Rule 503(b)(1) provides as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if it is not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5).

Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show the communication is confidential by explaining it was not intended to be disclosed to third persons and it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions

to the privilege enumerated in rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You assert portions of the submitted fee bills you have marked in Exhibit 10C reveal privileged attorney-client communications. You have identified most of the parties to these communications as district personnel and district outside counsel and staff. You state the communications at issue were made in furtherance of the rendition of legal services to the district. You also state these communications were intended to be confidential and have not been disclosed to third parties. Based on your representations and our review of the information at issue, we find the district has established the information we have marked is protected by the attorney-client privilege. Thus, the district may withhold the information we have marked in Exhibit 10C pursuant to rule 503 of the Texas Rules of Evidence. However, the remaining information you have marked does not document communications or documents a communication with an individual you have not identified as a privileged party. Accordingly, none of the remaining information in Exhibit 10C may be withheld under rule 503 of the Texas Rules of Evidence.

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. Section 552.101 encompasses information protected by other statutes, such as section 21.355 of the Education Code. Section 21.355 provides “[a] document evaluating the performance of a teacher or administrator is confidential.” Educ. Code § 21.355. In addition, the court has concluded a written reprimand constitutes an evaluation for purposes of section 21.355 because “it reflects the principal’s judgment regarding [a teacher’s] actions, gives corrective direction, and provides for further review.” *North East Indep. Sch. Dist. v. Abbott*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.). This office has 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 also concluded a teacher is someone who is required to hold and does hold a certificate required under chapter 21 of the Education Code and is teaching at the time of his or her evaluation. *Id.*

You represent, and provide documentation showing, the employee whose information is at issue in Exhibit 9 held a teaching certificate under subchapter B of chapter 21 of the Education Code at the time of the evaluations. You represent this individual was teaching at the time of his or her evaluations. Upon review, we agree the information we have marked consists of teacher evaluations for purposes of section 21.355. Thus, the information we have marked in Exhibit 9 must be withheld under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. However, we find that you have not demonstrated that the remaining information in Exhibit 9 constitutes an evaluation of a teacher for purposes of section 21.355, and it may not be withheld under section 552.101 on that basis.

Section 552.101 also encompasses the doctrine of common-law privacy, which excepts from public disclosure private information about an individual if the information (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *Ellen*, 840 S.W.2d at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating the public's interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.*

Thus, if there is an adequate summary of an investigation of alleged sexual harassment, the investigation summary must be released along with the statement of the accused under *Ellen*, but the identities of the victims and witnesses of the alleged sexual harassment must be redacted, and their detailed statements must be withheld from disclosure. *See* Open Records Decision Nos. 393 (1983), 339 (1982). If no adequate summary of the investigation exists, then all of the information relating to the investigation ordinarily must be released, with the exception of information that would identify the victims and witnesses. Because common-law privacy does not protect information about a public employee's alleged misconduct on the job or complaints made about a public employee's job performance, the identity of the individual accused of sexual harassment is not protected from public disclosure. *See* Open Records Decision Nos. 438 (1986), 405 (1983), 230 (1979), 219 (1978).

Exhibits 6A and 10B pertain to an investigation of alleged sexual harassment and include an adequate summary of the investigation and a statement of the person accused of the harassment. The summary and statement of the accused individual are not confidential; however, information within the summary and statement that identifies the victim and witnesses is confidential under common-law privacy and must generally be withheld pursuant to section 552.101 of the Government Code. *See Ellen*, 840 S.W.2d at 525. We note, however, the requestor is an attorney representing the alleged victim in this instance. Section 552.023 of the Government Code gives a person or the person's authorized representative a special right of access to information that is excepted from public disclosure under laws intended to protect that person's privacy interests. *See* Gov't Code § 552.023. Thus, the requestor has a special right of access to her client's information, and the district may not withhold that information from her under section 552.101 in conjunction with

common-law privacy.<sup>7</sup> *See id.*; Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning herself). Accordingly, the district must release the summary and statement of the accused, which we have marked, but must withhold the information that identifies the witnesses, which we have marked, under section 552.101 in conjunction with common-law privacy and the court's holding in *Ellen*. The district must withhold the remaining information in Exhibit 6A and the entirety of Exhibit 10B under section 552.101 in conjunction with common-law privacy and the court's holding in *Ellen*.<sup>8</sup>

We will now address your arguments under section 552.103 of the Government Code for Exhibits 3, 4, 5, 6B, 6C, 7, 10A, and 11, all of which are not subject to section 552.022 of the Government Code. Section 552.103 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 governmental body 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 department 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). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

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<sup>7</sup>We note, however, if the district receives another request for this particular information from a different requestor, the district should again seek a decision from this office before releasing this information.

<sup>8</sup>As our ruling is dispositive for this information, we need not address your remaining arguments against its disclosure.

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 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.* This office has found that a pending complaint filed with the Equal Employment Opportunity Commission (the "EEOC") indicates that litigation is reasonably anticipated. *See, e.g.,* Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982).

You state, and provide documentation showing, that prior to the district's receipt of the instant request, the requestor's client filed a discrimination claim against the district with the EEOC. Based on your representations and our review of the submitted documents, we conclude the district reasonably anticipated litigation on the date it received the present request for information. We further find Exhibits 3, 4, 5, 6B, 6C, 7, 10A, and 11 relate to the anticipated litigation. Accordingly, we conclude section 552.103 is generally applicable to these exhibits.

We note, however, that the district received Exhibits 3 and 4 from the opposing party in the anticipated litigation, and, thus, the opposing party has seen or had access to Exhibits 3 and 4. Further, the opposing party in the anticipated litigation has seen or had access to the information we have marked in Exhibit 5. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* ORD 551 at 4-5. We note that if the opposing party has seen or had access to information relating to litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Because the opposing party has seen or had access to Exhibits 3 and 4 and the information we have marked in Exhibit 5, this information is not protected by section 552.103 and may not be withheld on that basis. However, the district may withhold the remaining information in Exhibit 5 and Exhibits 6B, 6C, 7, 10A, and 11 under section 552.103.<sup>9</sup> We note that the applicability of section 552.103 ends once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the district may withhold the information we have marked in Exhibit 10C pursuant to rule 503 of the Texas Rules of Evidence. The district must withhold the information we have marked in Exhibit 9 under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. The district must release the sexual harassment investigation summary and statement of the accused in Exhibit 6A, which we have marked, but must withhold the information that identifies the witnesses, which we have marked, under section 552.101 of the Government Code in conjunction with common-law privacy and the court's holding in *Ellen*. The district must also withhold the remaining

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<sup>9</sup>As our ruling is dispositive for this information, we need not address your remaining arguments against its disclosure.

information in Exhibit 6A and the entirety of Exhibit 10B under section 552.101 in conjunction with common-law privacy and the court's holding in *Ellen*. With the exception of the information we have marked in Exhibit 5, the district may withhold Exhibits 5, 6B, 6C, 7, 10A, and 11 under section 552.103 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](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, toll free, at (888) 672-6787.

Sincerely,



Jennifer Luttrall  
Assistant Attorney General  
Open Records Division

JL/dls

Ref: ID# 409351

Enc. Submitted documents

c: Requestor  
(w/o enclosures)