



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 24, 2011

Mr. Roger D. Hepworth
The Fowler Law Firm, P.C.
For Judson Independent School District
919 Congress Avenue, Suite 900
Austin, Texas 78701

ATTORNEY GENERAL OF TEXAS

OR2011-02751

Dear Mr. Hepworth:

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# 410034.

The Judson Independent School District (the "district"), which you represent, received a request for any and all information related to a former district employee.¹ You claim that the submitted information is excepted from disclosure pursuant to sections 552.101, 552.103, 552.107, and 552.111 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note it appears you have redacted a portion of the submitted information pursuant to the federal Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code. The United States Department of

¹We note the requestor excluded social security numbers and driver's license numbers from the request. Thus, any such numbers are not responsive to the present request for information. This ruling does not address the public availability of any information that is not responsive to the request, and the district is not required to release that information in response to the request.

²Although you also raise section 552.101 of the Government Code in conjunction with the Federal 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). Accordingly, we will consider your attorney-client and attorney work product privilege claims under sections 552.107 and 552.111 of the Government Code, respectively. *See* Open Records Decision Nos. 677 (2002), 676 at 6.

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.³ The DOE has determined that FERPA determinations must be made by the educational authority in possession of the education records. However, we will consider your arguments against disclosure of the submitted information.

Next, we note the submitted information contains completed evaluations subject to section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) provides for required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[,]" unless the information is expressly confidential under "other law" or excepted from disclosure under section 552.108 of the Government Code. Govt Code § 552.022(a)(1). Although you seek to withhold this information under section 552.103 of the Government Code, this section 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 439, 475-76 (Tex. App.—Dallas, 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 is not "other law" that makes information confidential for the purposes of section 552.022. Therefore, the district may not withhold the completed evaluations, which we have marked, under section 552.103. As no other exceptions to disclosure have been claimed for this information, the completed evaluations must be released. We will, however, address the district's argument under section 552.103, as well as the district's remaining arguments, for the information not subject to section 552.022

You claim the remaining information not subject to section 552.022 is excepted from disclosure under 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

³A copy of this letter may be found on the attorney general's website at <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

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 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). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). See ORD 551 at 4.

You state, and provide documentation showing, the district received the request for information after a lawsuit was filed against it in the United States District Court for the Western District of Texas under Cause No. SA10CA0942. We, therefore, agree that litigation involving the district was pending on the date the district received the request. You also explain that the submitted information relates to the defense of the lawsuit at issue. Based on your representations and our review, we agree the remaining information at issue relates to pending litigation for purposes of section 552.103. Accordingly, the district may generally withhold the remaining information under section 552.103 of the Government Code.

You indicate that some of the submitted information may be produced to the opposing parties through discovery. We note that once 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. Open Records Decision Nos. 349 (1982), 320 (1982). 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, the district must release the completed evaluations we have marked under section 552.022(a)(1) of the Government Code. The district may withhold the remaining information under section 552.103 of the Government Code.⁴

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.

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

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

Sincerely,



Debbie K. Lee
Assistant Attorney General
Open Records Division

DKL/dls

Ref: ID# 410034

Enc. Submitted documents

c: Requestor
(w/o enclosures)