



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 27, 2011

Mr. Humberto Aguilera
Escamilla, Poneck, & Cruz, L.L.P.
For the San Antonio Independent School District
P.O. Box 200
San Antonio, Texas 78291-0200

OR2011-05722

Dear Mr. Aguilera:

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# 415552.

The South San Antonio Independent School District (the "district"), which you represent, received a request for the "employment and administrative file" of a named individual and for the "administrative file of [the district's] investigation" of a specified matter. You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We begin by noting that some of the submitted documents are not responsive to the instant request for information, as they were created or obtained after the date that the district received the request. This ruling does not address the public availability of any information that is not responsive to the request, and the district need not release that information in response to this request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision No. 452 at 3 (1986) (governmental body not required to disclose information that did not exist at time request was received).

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") 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.¹ 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 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 have been made, we will not address the applicability of FERPA to any of the submitted records, other than to note parents have a right of access to their own child's education records and that their right of access prevails over a claim under section 552.103 of the Government Code. *See* 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.3; Open Records Decision No. 431 (1985) (information subject to right of access under FERPA may not be withheld pursuant to statutory predecessor to Gov't Code § 552.103). Such determinations under FERPA must be made by the educational authority in possession of the education records.² However, we will consider your arguments against disclosure of the responsive information.

You assert that some of the responsive information is the subject of three previous requests for information, in response to which this office issued Open Records Letter No. 2008-04876 (2008). In that ruling, we determined that the district must withhold portions of the information at issue under section 552.101 of the Government Code in conjunction with various confidentiality statutes and common-law privacy, as well as sections 552.117, 552.130, and 552.137 of the Government Code, and that the district must release the remaining information at issue. The law regarding some of the information at issue in that ruling has changed. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). Specifically, section 552.102 of the Government Code is now applicable to some of the

¹A 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>.

²In the future, if the district does obtain parental or an adult student's 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.

information subject to that ruling.³ See *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010). Accordingly, the district may not continue to rely on Open Records Letter No. 2008-04876 as a previous determination with respect to the information we have marked that is subject to section 552.102. However, in regard to the remaining information at issue, we have no indication that there has been any change in the law, facts, and circumstances on which the remaining determinations in the prior ruling were based; therefore, the district must continue to rely on Open Records Letter No. 2008-04876 as a previous determination for the remaining information at issue and withhold or release that information in accordance with the prior ruling. See ORD 673. To the extent the requested information is not encompassed by the previous ruling, we will address the submitted arguments.

Section 552.102(a) of the Government Code excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Gov’t Code § 552.102(a). The Texas Supreme Court recently held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts*, 2010 WL 4910163. Having carefully reviewed the information at issue, we have marked a representative sample of the information that must be withheld under section 552.102(a) of the Government Code.

We note that section 552.022 of the Government Code is applicable to some of the submitted information, a completed report sent to the Texas Education Agency and several court-filed documents. Section 552.022(a)(1) provides for the required public disclosure of “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108.”⁴ Gov’t Code § 552.022(a)(1). Section 552.022(a)(17) provides for required public disclosure of “information that is also contained in a public court record,” unless the information is expressly confidential under other law. *Id.* § 552.022(a)(17). You assert that this information is excepted from disclosure by section 552.103 of the Government Code. However, section 552.103 is a discretionary exception to disclosure that protects only the 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 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(a). Therefore, the information subject to section 552.022, which we have marked, may not be withheld under section 552.103 of the Government Code.

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions.

⁴We note the district does not claim section 552.108 of the Government Code as an exception to disclosure.

However, the completed report contains information that is subject to section 552.117 of the Government Code, which does constitute other law for purposes of section 552.022.⁵

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 current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). The district may only withhold information under section 552.117(a)(1) if the individual at issue elected confidentiality under section 552.024 prior to the date on which the request for this information was made. Therefore, the district must withhold the information we have marked in the completed report pursuant to section 552.117(a)(1) if the employee concerned timely elected to keep the marked information confidential under section 552.024. If the employee whose information is at issue did not make a timely request for confidentiality, the information at issue may not be withheld under section 552.117.⁶

We next address your argument under section 552.103 against disclosure of the remaining information that is not subject to section 552.022. Section 552.103 of the Government Code provides, in relevant 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.

⁵The Office of the Attorney General will raise a mandatory exception like section 552.117 on behalf of a governmental body. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

⁶Regardless of the applicability of section 552.117, 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.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception applies in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the requested information is related to that litigation. *See 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 parts of this test for information to be excepted under section 552.103(a). *See* ORD 551 at 4.

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.” *Id.* This office has concluded that a governmental body’s receipt of a claim that it represents to be in compliance with the notice requirements of the Texas Tort Claims Act (the “TTCA”), chapter 101 of the Civil Practice and Remedies Code, is sufficient to establish that litigation is reasonably anticipated. If this representation is not made, then the receipt of the claim letter is a factor that we will consider in determining, from the totality of the circumstances presented, whether the governmental body has established that litigation is reasonably anticipated. *See* Open Records Decision No. 638 at 4 (1996).

You assert that the district reasonably anticipates litigation pertaining to the remaining information. You provide documentation showing that prior to receiving this request for information, the district received a notice of claim and demand letter from the requestor, an attorney representing the family of the child victim, stating that the district was negligent in hiring, retaining, and supervising its employee. The requestor seeks damages on behalf of his clients, and indicates he plans to file suit in federal court. You do not affirmatively represent to this office the requestor has made a claim against the district that is in compliance with the TTCA. However, after reviewing the submitted documentation and your arguments, we conclude, based on the totality of the circumstances, that the district reasonably anticipated litigation when it received the request for information. We also find that the remaining information is related to the anticipated litigation for purposes of section 552.103(a). We therefore conclude that the remaining information may generally be withheld under section 552.103.

We note, however, once the information at issue has been obtained by all parties to the anticipated litigation through discovery or otherwise, a section 552.103(a) interest no longer exists as to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). The submitted information includes some documents that the requestor either provided to the district or has otherwise already seen. Information that has either been obtained from or provided to all other parties in the litigation is not excepted from disclosure under

section 552.103(a), and it must be disclosed. Furthermore, the applicability of section 552.103(a) ends once the litigation has been concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

To summarize: We do not address the applicability of FERPA to any of the submitted records, other than to note parents have a right of access to their own child's education records and that their right of access prevails over a claim under section 552.103 of the Government Code. Except for the information we have marked that is subject to section 552.102, the district must continue to rely on Open Records Letter No. 2008-04876 as a previous determination for the remaining information at issue and withhold or release that information in accordance with the prior ruling. To the extent the submitted information is not encompassed by the previous ruling, we conclude as follows: (1) we have marked a representative sample of the information that must be withheld under section 552.102(a) of the Government Code; (2) the district must release the documents we have marked under section 552.022 of the Government Code, but in doing so, the district must withhold the information we have marked under section 552.117(a)(1) of the Government Code, provided the individual at issue elected confidentiality under section 552.024 prior to the date on which the request for this information was made; and (3) with the exception of the information the requestor has already seen, the district may withhold the remaining information under section 552.103 of the Government Code.

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

Sincerely,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/dls

Ref: ID# 415552

Enc. Submitted documents

c: Requestor
(w/o enclosures)