



ATTORNEY GENERAL OF TEXAS
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April 22, 2013

Mr. Jaime J. Munoz
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P.O. Box 47
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OR2013-06520

Dear Mr. Munoz:

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# 484648.

The La Joya Independent School District (the "district"), which you represent, received a request for nine categories of information regarding a specified incident involving a student. You inform us the district does not have information responsive to categories three and five of the request.¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.

Initially, we note we have marked portions of the submitted information that are not responsive to the instant request because they consist of the request and a document created after the request was received. This ruling does not address the public availability of non-responsive information, and the district is not required to release non-responsive information in response to this request.

Next, we note you inform us you have withheld responsive evaluations. Although you state the district submitted a representative sample of information, we find the submitted information is not representative of this type of information. Please be advised this open records letter applies only to the type of information you have submitted for our review. Therefore, this letter ruling does not authorize the withholding of any other requested records

¹The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

to the extent those records contain substantially different types of information than that submitted to this office. *See* Gov't Code § 552.302 (where request for attorney general decision does not comply with requirements of section 552.301, information is presumed to be public).

Next, we note you have redacted portions of the submitted information. You state the district has redacted student-identifying information and has withheld the requested video recording pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.² You inform us the district has withheld driver's license and permit information pursuant to section 552.130(c) of the Government Code.³ We understand you have redacted the home address, home telephone number, and social security number of district employees subject to section 552.117(a)(1) of the Government Code pursuant to section 552.024(c) of the Government Code.⁴ We note, pursuant to section 552.301 of the Government Code, a governmental body that seeks to withhold requested information must submit to this office a copy of the information, labeled to indicate which exceptions apply to which parts of the copy, unless the governmental body has received a previous determination for the information at issue. *See id.* § 552.301(a), (e)(1)(D). You do not assert, nor does our review of our records indicate, the

²The 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. The DOE has determined that FERPA 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>. Accordingly, we do not address your claim under section 552.114 of the Government Code. *See* Gov't Code §§ 552.026 (incorporating FERPA into the Act), .114 (excepting from disclosure "student records"): Open Records Decision No. 539 (1990) (determining same analysis applies under section 552.114 and FERPA).

³You state you will redact certain information pursuant to section 552.130 of the Government Code and Open Records Decision No. 684 (2009). Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including Texas driver's license numbers under section 552.130 of the Government Code, without the necessity of requesting an attorney general decision. However, on September 1, 2011, the Texas legislature amended section 552.130 to allow a governmental body to redact the information described in subsections 552.130(a)(1) and (a)(3) without the necessity of seeking a decision from the attorney general. Gov't Code § 552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See id.* § 552.130(d), (e). Thus, the statutory amendments to section 552.130 of the Government Code superseded Open Records Decision No. 684 on September 1, 2011. Therefore, a governmental body may only redact information subject to subsections 552.130(a)(1) and (a)(3) in accordance with section 552.130, not Open Records Decision No. 684.

⁴Section 552.024(c)(2) of the Government Code authorizes a governmental body to redact information protected by section 552.117(a)(1) of the Government Code without the necessity of requesting a decision under the Act if the current or former employee or official to whom the information pertains timely chooses not to allow public access to the information. *See* Gov't Code § 552.024(c)(2). We also note, notwithstanding the applicability of section 552.117 to the submitted information, 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. *Id.* § 552.147(b).

district has been authorized to withhold the employee identification number and dates of birth you have marked, or the evaluations you inform us you have withheld, without seeking a ruling from this office. *Id.* § 552.301(a); Open Records Decision No. 673 (2000). As such, this information must be submitted in a manner that enables this office to determine whether the information comes within the scope of an exception to disclosure. In this instance, because you have not submitted the evaluations for our review, we are unable to discern the nature of these documents. Therefore, the district has failed to comply with section 552.301 in regards to the evaluations, and the evaluations are presumed public under section 552.302. *See* Gov't Code §§ 552.301(e)(1)(D), .302. Therefore, the district must release the evaluations to the requestor. We will, however, address the redacted employee identification number and dates of birth, as we are able to discern the nature of this information.

Next, we note the submitted offense report is subject to section 552.022 of the Government Code. 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,” unless it is excepted by section 552.108 of the Government Code or made confidential under the Act or other law. *Id.* § 552.022(a)(1). The submitted offense report is a completed report made by the district’s police department (the “department”). Pursuant to section 552.022(a)(1) of the Government Code, this report is expressly public unless it is excepted under section 552.108 of the Government Code or is expressly confidential under other law. Section 552.103 of the Government Code is a discretionary exception that protects a governmental body’s interest and does not make information confidential under the Act. *See 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. Consequently, the submitted offense report may not be withheld under section 552.103 of the Government Code. However, because information subject to section 552.022(a)(1) may be excepted under section 552.108 of the Government Code, we will address your argument under this exception. We will also consider your arguments for the submitted information that is not subject to section 552.022.

Section 552.101 of the Government Code excepts 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 other statutes make confidential, such as the ADA. *See* 42 U.S.C. §§ 12101 *et seq.* Title I of the ADA requires information about the medical conditions and medical histories of applicants or employees be (1) collected and maintained on separate forms, (2) kept in separate medical files, and (3) treated as a confidential medical record. 29 C.F.R. § 1630.14(c). An employer’s medical examination or inquiry into the ability of an employee to perform job-related functions is to be treated as a confidential medical record. *Id.*; *see also* Open Records Decision No. 641 (1996). The federal Equal Employment Opportunity Commission (the “EEOC”) has determined medical information for 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). Federal regulations define “disability” for the purposes of the ADA as (1) a physical or mental impairment that substantially limits one or more of the major life activities of the individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment. 29 C.F.R. § 1630.2(g). The regulations further provide that physical or mental impairment means: (1) any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or (2) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. *See id.* § 1630.2(h). We note, however, that a test used to determine the illegal use of drugs is not considered a medical examination for purposes of the ADA. *See id.* § 1630.16(c)(1). Consequently, the results of a random drug test taken in the course of determining an employee’s fitness for duty do not constitute confidential medical information under the ADA. Upon review, we conclude the ADA is applicable to some of the submitted information. Thus, the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the ADA. However, we find you have failed to establish the remaining information is subject to the ADA, and thus, it may not be withheld under section 552.101 on that basis.

Section 552.108(a)(2) of the Government Code excepts from disclosure information concerning an investigation that concluded in a result other than conviction or deferred adjudication. Gov’t Code § 552.108(a)(2). A governmental body claiming section 552.108(a)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. You inform us, and have submitted a letter from the department’s chief of police affirming, the submitted offense report pertains to a case that concluded in a result other than conviction or deferred adjudication. Therefore, we agree section 552.108(a)(2) is applicable to the submitted offense report.

However, section 552.108 does not except from disclosure “basic information about an arrested person, an arrest, or a crime.” *Id.* § 552.108(c). Basic information refers to the information held to be public in *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976); *see also* Open Records Decision No. 127 (1976) (summarizing the types of information considered to be basic information). Thus, with the exception of the basic front page offense and arrest information, you may withhold the submitted offense report from disclosure based on section 552.108(a)(2) of the Government Code.⁵

Section 552.103 of the Government Code provides in part:

⁵As our ruling is dispositive, we need not address your remaining argument against disclosure of this information under section 552.103 of the Government Code, except to note basic information is generally not excepted from public disclosure under section 552.103. Open Records Decision No. 597 (1991).

(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 an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information at issue. 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, orig. proceeding); *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).*

To establish 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." *Open Records Decision No. 452 at 4 (1986).* Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.⁶ *See Open Records Decision No. 555 (1990); see also Open Records Decision No. 518 at 5 (1989)* (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See Open Records Decision No. 331 (1982).* Further, the fact a potential opposing party has hired an attorney who makes a request for information does not establish litigation is reasonably anticipated. *See Open Records Decision No. 361 (1983).*

⁶In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see Open Records Decision No. 336 (1982)*; 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 threatened to sue on several occasions and hired an attorney, *see Open Records Decision No. 288 (1981).*

You generally state the submitted maintenance records are excepted from disclosure under section 552.103. However, you have not demonstrated that any party had taken any concrete steps towards litigation on the date the request was received, and you have not informed us of any litigation which was pending on the date the request was received. *See* ORD 331. Thus, we find you have failed to demonstrate the applicability of section 552.103 to the information at issue. *See* Gov't Code §§ 552.103(c) (governmental body must demonstrate that litigation was pending or reasonably anticipated on or before the date it received request for information), .301(e)(1) (requiring governmental body to explain applicability of raised exception). Accordingly, the district may not withhold the submitted maintenance records under section 552.103 of the Government Code.

Section 552.102 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."⁷ *Id.* § 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 v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). Upon review, we find the district must withhold the birth date of the district employee we have marked under section 552.102 of the Government Code.

The remaining information contains driver's license information. Section 552.130 of the Government Code provides that information relating to a motor vehicle operator's license or driver's license issued by an agency of this state or another state or country is excepted from public release. Gov't Code § 552.130(a)(1). Upon review, we find the district must withhold the driver's license information we have marked in the remaining information under section 552.130 of the Government Code.

In summary, the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the ADA. With the exception of basic information, which must be released, the district may withhold the submitted offense report from disclosure based on section 552.108(a)(2) of the Government Code. The district must withhold the birth date of the district employee we have marked under section 552.102 of the Government Code and the driver's license information we have marked under section 552.130 of the Government Code. The district must release the remaining responsive information.

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.

⁷The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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,


Kathryn R. Mattingly
Assistant Attorney General
Open Records Division

KRM/bhf

Ref: ID# 484648

Enc. Submitted documents

c: Requestor
(w/o enclosures)