



ATTORNEY GENERAL OF TEXAS
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June 11, 2013

Mr. Albert E. Tovar
Counsel for Carrizo Springs Consolidated Independent School District
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115 East Travis, 19th Floor
San Antonio, Texas 78205

OR2013-09807

Dear Mr. Tovar:

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# 489834 (GW&S File No. 5539).

The Carrizo Springs Consolidated Independent School District (the "district"), which you represent, received a request for multiple categories of information related to a named individual, including the individual's personnel file, information related to a specified investigation, any grievances filed on named individual, and any evaluations of the named individual. You state you will withhold social security numbers pursuant to section 552.147(b) of the Government Code.¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.108, 552.111, 552.114, 552.117, 552.135, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of the submitted information, which we have marked, is not responsive to the request for information because it was created after the district received the request for information. This ruling does not address the public availability of any

¹Section 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 an attorney general decision under the Act. *See* Gov't Code § 552.147(b).

information that is not responsive to the request, and the district is not required to release that information in response to the request.

Next, we note 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.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 assert FERPA applies to portions of the responsive information. We note you have submitted redacted and unredacted education records for our review. Because our office is prohibited from reviewing these records to determine whether appropriate redactions under FERPA have been or should be made, we will not address the applicability of FERPA to any of the submitted records. *See* 20 U.S.C. § 1232g(a)(1)(A). Such determinations under FERPA must be made by the educational authority in possession of the education records. Likewise, we do not address your arguments 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 the same analysis applies under section 552.114 of the Government Code and FERPA). However, we will consider your remaining arguments against disclosure of the submitted information.

Next, we note the submitted information includes a completed evaluation and an executed contract. These documents, which we have marked, are subject to section 552.022 of the Government Code. Section 552.022(a)(1) of the Government Code 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 made confidential under this chapter or other law or is excepted from disclosure under section 552.108 of the Government Code. Gov't Code § 552.022(a)(1). Section 552.022(a)(3) of the Government Code provides for required public disclosure of "information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body," unless the information is expressly confidential under the Act or other law. *See id.* § 552.022(a)(3). The district must release the completed evaluation pursuant to subsection 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or is made confidential under the Act or other law. *See id.* § 552.022(a)(1). We note you do not raise section 552.108 for the information subject to section 552.022(a)(1). Further, the

²A 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>.

district must release the executed contract relating to the expenditure of public funds pursuant to section 552.022(a)(3) unless it is made confidential under the Act or other law. *See id.* § 552.022(a)(3). Although you raise section 552.103 of the Government Code for the information subject to section 552.022, this section is a discretionary exception to disclosure and does not make information confidential under the Act. *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 Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 (1999) (governmental body may waive section 552.103). Therefore, none of the information subject to section 552.022 may be withheld under section 552.103 of the Government Code. We note the completed evaluation is subject to section 552.101 of the Government Code, and you also raise sections 552.102 and 552.117 of the Government Code for the information subject to section 552.022. As sections 552.101, 552.102, and 552.117 make information confidential under the Act, we will consider the applicability of these sections to the information subject to section 552.022. We will also address your arguments against disclosure of the information not subject to section 552.022.

Next, we will address your arguments under section 552.103 of the Government Code for the information not subject to section 552.022. Section 552.103 of the Government Code 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). A governmental body has the burden of providing relevant facts and documents to show section 552.103(a) is applicable 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 information at issue 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). *See* ORD 551.

This office has long held "litigation," for purposes of section 552.103, includes "contested cases" conducted in a quasi-judicial forum. *See* Open Records Decision Nos. 474 (1987), 368 (1983), 336 (1982), 301 (1982). In determining whether an administrative proceeding is conducted in a quasi-judicial forum, some of the factors this office considers are whether the administrative proceeding provides for discovery, evidence to be heard, factual questions to be resolved, the making of a record, and whether the proceeding is an adjudicative forum of first jurisdiction with appellate review of the resulting decision without a re-adjudication of fact questions. *See* Open Records Decision No. 588 (1991).

To establish litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *See* Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim 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. *See* Open Records Decision No. 555 (1990); *see also* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, or when an individual threatened to sue on several occasions and hired an attorney. *See* Open Records Decision Nos. 346 (1982), 288 (1981). On the other hand, this office has determined 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 that 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).

You claim the information not subject to section 552.022 is protected by section 552.103 of the Government Code because litigation against the district is currently pending or is reasonably anticipated. You state portions of the information subject to section 552.022 relates to two grievances pertaining to the requestor's client that were pending with the district on the date it received the request for information. You state complaints filed with the district are "litigation" in that the district follows administrative procedures in handling such disputes. You state, and have provided documentation showing, the grievant proceeds through a three-level process wherein hearing officers hear the complaint at level one and level two, and the district's board of trustees hears the grievance if the grievant appeals to level three. You state the grievant is allowed to be represented by counsel, present favorable evidence to the district, and present witnesses to testify on the grievant's behalf. Based on your representations, we find you have demonstrated the district's administrative procedures

for grievances are conducted in a quasi-judicial forum, and thus, constitute litigation for purposes of section 552.103.

You further state prior to the district's receipt of the instant request for information, the named individual threatened litigation in response to comments made at a meeting of the district's board of trustees regarding allegations against him, and then hired an attorney. Additionally, you state included with the request for information, the requestor included a letter confirming his representation of the named individual. Thus, you state on the date the district received the request for information, the district reasonably anticipated litigation to which the district would be a party. You also state the information at issue is related to the anticipated litigation. Based on your representations and our review, we find the information at issue is related to litigation that was pending or reasonably anticipated by the district on the date the district received the request for information. Therefore, the district may withhold the information not subject to section 552.022 of the Government Code under section 552.103 of the Government Code.³

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to all parties to the pending or anticipated litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded or is no longer anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

Next we will address the claimed exceptions to disclosure of the remaining information. 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. Section 552.101 of the Government Code encompasses information protected by section 21.355 of the Education Code, which provides in relevant part, "[a] document evaluating the performance of a teacher or administrator is confidential." Educ. Code § 21.355(a). This office has interpreted section 21.355 to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. *See* Open Records Decision No. 643 (1996). In Open Records Decision No. 643, we determined an "administrator" for purposes of section 21.355 means a person who is required to, and does in fact, hold an administrator's certificate under subchapter B of chapter 21 of the Education Code, and is performing the functions as an administrator, as that term is commonly defined, at the time of the evaluation. *See id* at 4.

³As our ruling is dispositive, we need not address your remaining arguments against disclosure of the information at issue.

Upon review, we find the information we have marked consists of a confidential evaluation of an administrator by the district. The submitted information reflects the administrator at issue was certified as an administrator by the State Board of Educator Certification and was acting as an administrator at the time the evaluation was prepared. Accordingly, the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.⁴

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). We understand you to assert the privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101 of the Government Code. Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. Section 552.101 of the Government Code encompasses common-law privacy, which protects information if it (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 *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref’d n.r.e.), the court of appeals ruled the privacy test under section 552.102(a) is the same as the *Industrial Foundation* privacy test. However, the Texas Supreme Court has expressly disagreed with *Hubert’s* interpretation of section 552.102(a) and held the privacy standard under section 552.102(a) differs from the *Industrial Foundation* test under section 552.101. *See Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). The Supreme Court also considered the applicability of section 552.102(a) and held it excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *See id.* at 348. Upon review, we find none of the remaining information is subject to section 552.102(a) of the Government Code, and none of the remaining information may be withheld on this basis.

You raise section 552.117 of the Government Code for the remaining information. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, 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). Upon review, we find none of the remaining information consists of the home address, home telephone number, emergency contact information, social security number, or family member information of an individual to whom section 552.117 applies. Accordingly, the district may not withhold any of the remaining information under section 552.117 of the Government Code.

⁴As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

In summary, with the exception of the information subject to section 552.022 of the Government Code, the district may withhold the responsive information under section 552.103 of the Government Code. The district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. The remaining responsive 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, 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,



Kathleen J. Santos
Assistant Attorney General
Open Records Division

KJS/som

Ref: ID# 489834

Enc. Submitted documents

c: Requestor
(w/o enclosures)