



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 4, 2014

Mr. Albert E. Tovar
Gale, Wilson & Sánchez, P.L.L.C.
115 East Travis, 19th Floor
San Antonio, Texas 78205

OR2014-02164

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# 513871 (G, W & S File No. 5617).

The Carrizo Springs Consolidated Independent School District (the "district"), which you represent, received a request for information pertaining to a named individual, the district's education operational manual, and all disciplinary education program referrals for the last three years. The district states it is withholding social security numbers pursuant to section 552.147 of the Government Code. *See* Gov't Code § 552.147(b) (governmental body may redact living person's social security number from public release without necessity of requesting decision from this office under the Act). The district also states it has provided some of the requested information to the requestor, but claims the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.107, 552.108, 552.111, 552.114, 552.117, 552.135, and 552.137 of the Government Code. We have considered the claimed exceptions and reviewed the submitted representative sample of information.¹

Initially, you inform us the district asked the requestor to clarify some of the information requested. *See* Gov't Code § 552.222 (if request for information is unclear, governmental

¹We assume 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 those records contain substantially different types of information than that submitted to this office.

body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (if governmental entity, acting in good faith, requests clarification of unclear or over-broad request, ten-day period to request attorney general ruling is measured from date request is clarified). You state the district received clarification of a portion of the request. However, for the portion of the requested information for which the district sought, but has not received, clarification, we find the district is not required to release information in response to this portion of the request. But if the requestor responds to the clarification request, the district must seek a ruling from this office before withholding any responsive information from the requestor. *See Gov't Code* § 552.222; *City of Dallas*, 304 S.W.3d at 387.

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.

We must next address the applicability of section 552.007 of the Government Code to the requested information. Section 552.007 provides, if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law. *See Gov't Code* 552.007; Open Records Decision Nos. 518 at 3 (1989), 400 at 2 (1983). You inform us the district has released pages 233 through 292 of the submitted documents to the requestor. Therefore, pursuant to section 552.007 the district may not now withhold

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>.

this information unless its release is expressly prohibited by law. Although you assert these pages are now excepted from disclosure under sections 552.103 and 552.108 of the Government Code, these exceptions are discretionary and do not constitute law that makes information confidential or expressly prohibits its release for purposes of section 552.007. *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 Nos. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived), 177 (1977) (statutory predecessor to section 552.108 subject to waiver); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Accordingly, the district may not withhold the previously-released information under section 552.103 or 552.108 but, instead, must release it to the requestor.

We also note some of the submitted information is subject to section 552.022(a)(15) of the Government Code, which provides the following:

Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

...

(15) information regarded as open to the public under an agency's policies[.]

Gov't Code § 552.022(a)(15). Pages 372 through 475 of the submitted documents consist of district policies that are published on the district's website. Thus, we find the district regards those policies as open to the public. Therefore, the district must release the policies pursuant to section 552.022(a)(15), unless the policies are expressly confidential under other law. You assert this information is excepted from release under section 552.103 of the Government Code. However, section 552.103 is discretionary 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. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Accordingly, the district may not withhold the information subject to section 552.022 under section 552.103 but, instead, must release this information to the requestor.

Section 552.108(a) of the Government Code excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime[.]" Gov't Code § 552.108(a)(1). Generally, a governmental body claiming section 552.108 must reasonably explain how and why the

release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). The information at issue consists of administrative records. We note section 552.108 is generally not applicable to purely administrative records that do not involve the investigation or prosecution of crime. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320 (Tex. App.—Austin 2002, no pet.). You indicate the release of pages 191 through 232 and pages 294 through 370 would interfere with a criminal investigation being conducted by the district's police department. Based on your representation, we conclude the release of this information would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Therefore, the district may withhold pages 191 through 232 and pages 294 through 370 under section 552.108(a)(1) of the Government Code.³

You assert the remaining information at issue is excepted from disclosure under section 552.103 of the Government Code, which provides in 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 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 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, orig. proceeding); *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 from disclosure under section 552.103(a).

³As our ruling is dispositive, we do not address your other arguments to withhold this information.

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 remaining information at issue is protected by section 552.103 of the Government Code because litigation against the district is currently pending or is reasonably anticipated. 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 state a Level II FNG grievance pertaining to the requestor's clients was pending with the district on the date the district received the request for information. Thus, you assert on the date the district received the request for information, litigation against the district was pending. You also assert the remaining information is related to that pending litigation. Based on your representations and our review, we find the information at issue is related to

litigation that was pending against the district on the date the district received the request for information. Therefore, we agree the district may withhold the remaining information under section 552.103.⁴

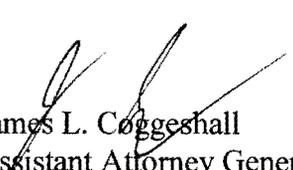
We note, however, once the information has been obtained by all parties to the anticipated litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

To conclude, the district must release pages 233 through 292 to the requestor. The district must also release pages 372 through 475 under section 552.022(a)(15) of the Government Code. The district may withhold pages 191 through 232 and pages 294 through 370 under section 552.108(a)(1) of the Government Code. The district may withhold the remaining information under section 552.103 of the Government Code. This ruling does not address the applicability of FERPA to the submitted information. Should the district determine that all or portions of the submitted information consist of "education records" that must be withheld under FERPA, the district must dispose of that information in accordance with FERPA, rather than the Act.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,


James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/tch

⁴As our ruling is dispositive, we do not address your other arguments to withhold this information.

Ref: ID# 513871

Enc. Submitted documents

c: Requestor
(w/o enclosures)