



January 7, 2015

Mr. Robert Russo  
Counsel for Harlandale Independent School District  
Walsh, Anderson, Gallegos, Green & Trevino, P.C.  
Post Office Box 460606  
San Antonio, Texas 78246

OR2015-00216

Dear Mr. Russo:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. This request was originally received by the Open Records Division ("ORD") of this office and assigned ID# 549139. Preparation of the ruling has been assigned to the Opinion Committee of this office.

You state that on October 9, 2014, the Harlandale Independent School District (the "District"), which you represent, received a request for twelve categories of information pertaining to all students currently enrolled in the District. You claim the requested information is excepted from disclosure under sections 552.104 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the United States Department of Education Family Policy Compliance Office has informed this office the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code, 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.<sup>1</sup> See 20 U.S.C. § 1232g(b). Consequently, state and local educational authorities that receive a request for

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<sup>1</sup> A copy of this letter may be found on the Office of the Attorney General's website at <http://www.texasattorneygeneral.gov/open/20060725usdoe.pdf>.

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”). In this instance, you state the requested information consists of “student information contained in student education records,” some of which is subject to FERPA. Because our office is prohibited from reviewing these records to determine whether appropriate redactions under FERPA have been made, we will not address the applicability of FERPA. *See* 20 U.S.C. § 1232g(a)(1)(A) (no funds shall be made available to educational agency that prevents parents of students, who have been in attendance at school, review of student’s education records); 34 C.F.R. § 99.3. Because the educational authority in possession of the educational records is now responsible for determining the applicability of FERPA, we will only consider the claimed exception under the Act for the information you state is not subject to FERPA.

You first contend that all of the student information requested in the October 2014 request is exempt from disclosure under section 552.104 of the Government Code, which excepts from required public disclosure “information that, if released, would give advantage to a competitor or bidder.” TEX. GOV’T CODE ANN. § 552.104. This exception protects a governmental body’s interests in connection with competitive bidding and in certain other competitive situations. *See* Open Records Decision No. 593 (1991) (construing statutory predecessor). This office has held a governmental body may seek protection as a competitor in the marketplace under section 552.104 and avail itself of the “competitive advantage” aspect of this exception if it can satisfy two criteria. *See id.* First, the governmental body must demonstrate it has specific marketplace interests. *See id.* at 3. Second, the governmental body must demonstrate a specific threat of actual or potential harm to its interests in a particular competitive situation. *See id.* at 5. Thus, the question of whether the release of particular information will harm a governmental body’s legitimate interests as a competitor in a marketplace depends on the sufficiency of the governmental body’s demonstration of the prospect of specific harm to its marketplace interests in a particular competitive situation. *See id.* at 10. A general allegation of a remote possibility of harm is not sufficient. *See* Open Records Decision No. 514 (1988) at 2.

You argue the requestor is “currently, and will continue to be, engaged in direct competition with [the District] for the provision of educational services to students and families in the south-central region of San Antonio.” You assert release of the information at issue would give the requestor a competitive advantage in the local marketplace by “laying the predicate for targeted efforts on the part of [the requestor] to deprive [the District] of newly registered students.” Upon review, we find the District has failed to demonstrate it has a specific marketplace interest or is a “competitor” for the purposes of section 552.104. Accordingly, the District may not withhold any of the information at issue under section 552.104.

You also claim that all of the information in the request received in October 2014 is exempt from disclosure under section 552.103 of the Government Code. Section 552.103 of the Government Code 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 on the date that the requestor applies to the officer for public information for access to or duplication of the information.

TEX. GOV'T CODE ANN. § 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 that it seeks to withhold. To meet this burden, the governmental body must demonstrate (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 the pending or anticipated 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.). The governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a). *See* Open Records Decision No. 551 (1990) at 4.

You state, and provide documentation showing, that prior to the District's receipt of the October 2014 request, the District had filed a Petition for Declaratory Judgment styled *Harlandale Independent School District v. Office of the Attorney General*, No. D-1-GV-14-000601 (200th Dist. Ct., Travis Cnty., Tex. May 16, 2014), which is currently pending in the District Court, Travis County, 200th Judicial District (the "petition"). The petition seeks relief in relation to a prior ruling of this office, OR2014-07339 (the "prior ruling"), which concerned a request the District received on February 11, 2014. You state, and provide documentation showing, that the information sought in the October 9, 2014 request is the same information sought in the February 11, 2014 request, except that the October 9, 2014 request (1) seeks the same categories of information for students who were not enrolled at the time of the February 11, 2014 request and (2) requests an additional category of student information. Based on our review of your arguments and the submitted information, we find the submitted information is related to this pending litigation.

Therefore, we conclude the District may withhold the information under section 552.103 of the Government Code. Please note that the applicability of section 552.103(a) ends once the litigation has been concluded. *See* Attorney General Opinion MW-575 (1982) at 2; *see also* Open Records Decision No. 350 (1982) at 3.

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](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,



William A. Hill  
Assistant Attorney General  
Opinion Committee

WAH/sdk

Ref: ID# 549139

Enc. Submitted documents

c: Requestor  
(w/o enclosures)