



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 4, 2015

Ms. Holly G. McIntush
Counsel for the Abilene Independent School District
Thompson & Horton, L.L.P.
400 West 15th Street, Suite 1430
Austin, Texas 78701

OR2015-10980

Dear Ms. McIntush:

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# 566567.

The Abilene Independent School District (the "district"), which you represent, received a request for all e-mails between the district's board president, the district's legal staff, and the district's superintendent during a specified time period. You state the district will withhold e-mail addresses of members of the public under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).¹ You state the district will release some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.109, 552.111, 552.114, and 552.135 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

¹Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

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”). We understand the district has redacted student-identifying information from the submitted documents pursuant 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 to any of the submitted records. *See* 20 U.S.C. § 1232g(a)(1)(A). Such determinations under FERPA must be made by the district. Likewise, we do not address your argument under section 552.114 of the Government Code. *See* Gov’t Code §§ 552.026 (incorporating FERPA into the Act), 552.114 (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.

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). 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

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>.

meet both prongs of this test for information to be excepted from disclosure under section 552.103(a).

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 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.” *Id.* In Open Records Decision No. 638 (1996), this office stated a governmental body has met its burden of showing litigation is reasonably anticipated by representing it received a notice-of-claim letter that is in compliance with the Texas Tort Claims Act (“TTCA”), chapter 101 of the Civil Practices and Remedies Code. If that representation is not made, the receipt of the claim letter is a factor we will consider in determining, from the totality of the circumstances presented, whether the governmental body has established litigation is reasonably anticipated. *See* ORD 638 at 4.

The district states the information submitted as Exhibit A pertains to a criminal prosecution that was pending with the Taylor County District Attorney’s Office (the “district attorney’s office”) on the date the district received the request for information. We note the district is not a party to the pending criminal litigation and does not have a litigation interest in the matter for purposes of section 552.103. *See* Gov’t Code § 552.103(a); Open Records Decision No. 575 at 2 (1990). In such a situation, we require an affirmative representation from the governmental body with the litigation interest that the governmental body wants the information at issue withheld from disclosure under section 552.103(a). The district has submitted a representation from the district attorney’s office objecting to the release of the information at issue under section 552.103(a) because it would interfere with the pending criminal prosecution at issue. Based on this representation, we agree section 552.103(a) is applicable to Exhibit A. Thus, the district may withhold Exhibit A under section 552.103(a) of the Government Code.

The district argues the information submitted as Exhibit B is related to civil litigation and thus is protected by section 552.103 of the Government Code. You inform us, and provide documentation demonstrating, prior to the district’s receipt of the instant request for information, the district received correspondence from an attorney representing a former district employee. In his correspondence, the attorney alleges violation of a Voluntary Separation Agreement, claims his client was harmed by the violation, and notifies the district of the former employee’s intent to make a claim against the district and to “pursue all legal remedies that are available to him.” You do not affirmatively represent to this office the correspondence at issue is in compliance with the TTCA. Therefore, we will only consider the claim as a factor in determining whether the district reasonably anticipated litigation when it received the request for information. Based on your representations, our review of the submitted documents, and the totality of circumstances, we find the district has demonstrated it reasonably anticipated litigation when it received the request for information. We also find the information submitted as Exhibit B is related to the anticipated litigation

for purposes of section 552.103(a). Therefore, the district may also withhold Exhibit B under section 552.103(a) of the Government Code.³

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 or is no longer anticipated. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

In summary, the district may withhold the information submitted as Exhibits A and B 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.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,



Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/som

Ref: ID# 566567

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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