



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 13, 2016

Ms. Ellen H. Spalding
Counsel for KIPP Houston Public Schools
Rogers, Morris & Grover, L.L.P.
5718 Westheimer Road, Suite 1200
Houston, Texas 77057

OR2016-15786

Dear Ms. Spalding:

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# 618084.

KIPP Houston Public Schools ("KIPP"), which you represent, received a request for information pertaining to the requestor's client. We understand KIPP redacted some information from the submitted documents pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.¹ You claim the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.² We have also received and considered comments

¹The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office FERPA does not permit state and local educational authorities to disclose to this office, without parental or student 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 FERPA determinations must be made by the educational authority in possession of the education records. A copy of this letter may be found on the Office of the Attorney General's website: <https://www.texasattorneygeneral.gov/files/og/20060725usdoe.pdf>.

²We 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 that those records contain substantially different types of information than that submitted to this office.

from the requestor. *See* Gov't Code § 552.304 (permitting interested third party to submit to attorney general reasons why requested information should or should not be released).

Initially, we note the information KIPP marked, and the additional information we marked, are not responsive to the instant request. This ruling does not address the public availability of any information that is not responsive to the request and KIPP is not required to release such information in response to this request.

Next, we note KIPP has redacted certain information from the submitted information. Section 552.024(c) of the Government Code authorizes a governmental body to withhold, in pertinent part, a current or former employee's home address, home telephone number, and social security number subject to section 552.117 of the Government Code without requesting a decision from this office if the employee or official or former employee or official timely chooses not to allow public access to the information. *See id.* §§ 552.024(c), .117(a)(1). 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. *See id.* § 552.147(b). However, we note the information KIPP redacted includes the home address, home telephone number, and social security number of the requestor's client.

We note sections 552.117 and 552.147 of the Government Code protect personal privacy. Accordingly, the requestor has a right of access to his client's redacted home address, home telephone number, and social security number under section 552.023 of the Government Code. *See id.* § 552.023(b) (governmental body may not deny access to person to whom information relates or person's agent on ground that information is considered confidential by privacy principles); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individuals request information concerning themselves). Accordingly, KIPP may not withhold the requestor's client's home address or home telephone number pursuant to section 552.117 or her social security number under section 552.147.

Additionally, we note KIPP also redacted e-mail addresses pursuant to Open Records Decision No. 684 (2009) authorizes a governmental body to withhold certain information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without seeking a ruling from this office. Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body," unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). Gov't Code § 552.137(a)-(c). We are unable to determine whether the personal e-mail addresses at issue, which are located within e-mails communicating official business of KIPP, belong to KIPP officials or employees. Thus, we rule conditionally. To the extent the e-mail addresses KIPP redacted are the personal e-mail addresses of KIPP officials or employees, this information is not subject to section 552.137 and may not be withheld on that basis. *See Austin Bulldog v. Leffingwell*, No. 03-13-00604-CV, 2016

WL 1407818 (Tex. App.—Austin, April 8, 2016, no pet.) (holding personal e-mail addresses of government officials used to conduct official government business are not e-mail addresses of “members of the public” for purposes of Gov’t Code § 552.137(a)). To the extent the e-mail addresses at issue are not the personal e-mail addresses of KIPP officials or employees, this information is subject to section 552.137 and must be withheld under section 552.137, unless the owners of the e-mail addresses affirmatively consent to their release.

Section 552.103 of the Government Code provides, in relevant 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.

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).

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 demonstrate litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, an attorney for a potential opposing party making a demand for payment and asserting an intent to sue if such payments are not made. Open Records Decision Nos. 555 at 3 (1990), 346 (1982). In addition, this office has concluded litigation

was reasonably anticipated when the potential opposing party threatened to sue on several occasions and hired an attorney. *See* Open Records Decision No. 288 at 2 (1981). However, an individual publicly threatening to bring suit against a governmental body, but who does not actually take objective steps toward filing suit, is not concrete evidence that litigation is reasonably anticipated. *See* Open Records Decision No. 331 at 1-2 (1982).

This office has long held that “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).

KIPP argues it anticipated litigation when it received the request for information because the requestor is an attorney representing a terminated employee and in the request for information he asked for a due process hearing to appeal the decision to terminate his client. However, KIPP has failed to provide any explanation as to how this due process hearing constitutes litigation for the purposes of section 552.103. Further, KIPP has not demonstrated any party has taken concrete steps toward filing litigation when it received the request. Therefore, we find KIPP has failed to demonstrate it reasonably anticipated litigation when it received the request for information. Accordingly, KIPP may not withhold any of the submitted information under section 552.103.

Section 552.117(a)(1) of the Government Code 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.³ Gov’t Code §§ 552.117(a)(1), .024. We note section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Whether information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, a governmental body must withhold information under section 552.117(a)(1) on behalf of a current or former official or employee only if the individual made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. We are unable to determine if the individuals whose information is

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

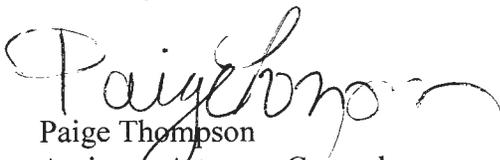
at issue are current or former KIPP employees or officials. Accordingly, if the individuals whose information is at issue are current or former KIPP employees or officials and timely requested confidentiality pursuant to section 552.024, KIPP must withhold the information we marked under section 552.117(a)(1) of the Government Code; however, KIPP may only withhold the cellular telephone numbers at issue if the service is not paid for by a governmental body. KIPP may not withhold this information under section 552.117(a)(1) if the individuals whose information is at issue are not current or former KIPP employees or officials or if the individuals did not make timely elections to keep the information confidential.

In summary, to the extent the e-mail addresses KIPP redacted are not the personal e-mail addresses of KIPP officials or employees, KIPP must withhold them under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their release. If the individuals whose information is at issue are current or former KIPP employees or officials and timely requested confidentiality pursuant to section 552.024, KIPP must withhold the information we marked under section 552.117(a)(1) of the Government Code; however, KIPP may only withhold the cellular telephone numbers at issue if the service is not paid for by a governmental body. KIPP must release the remaining information to this requestor.

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,



Paige Thompson
Assistant Attorney General
Open Records Division

PT/dls

Ref: ID# 618084

Enc. Submitted documents

c: Requestor
(w/o enclosures)