



July 12, 2000

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OR2000-2620

Dear Ms. Johnson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 136983.

The Grand Prairie Independent School District (the “district”), which you represent, received two requests from a single requestor for six categories of information related to district operations. You claim that the district will release some of the information requested. However, the district objects to release of information responsive to two request items which are: 1) “bulletins” sent from the district’s superintendent to the members of the Board of Trustees from Dec. 18, 1999 to April 20, 1999; and 2) the results of “end-of-year meeting surveys” for 1999 and 2000. You claim that this information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.107, 552.111, and 552. 114 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted information.

You claim that a portion of the requested bulletins is confidential under sections 552.101 and 552.102. Section 552.102 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). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref’d n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation of the South v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), for information claimed to be protected under

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<sup>1</sup>The information at issue consists of Superintendent Barbosa’s weekly communications with the district board of trustee’s through a printed newsletter known as “Barbosa’s Bulletins” covering a six-month period, and the end-of-year surveys for 1999 and 2000.

the doctrine of common law privacy as incorporated by section 552.101 of the Government Code. Section 552.101 protects “information considered to be confidential by law, either constitutional, statutory, or by judicial decision,” including information protected by the common law right of privacy. *Industrial Found.*, 540 S.W.2d at 683-85. Accordingly, we address the district’s claim of section 552.102 by simply applying common law privacy as encompassed by section 552.101. The doctrine of common law privacy protects information that contains highly intimate or embarrassing facts about a person’s private affairs such that its release would be highly objectionable to a reasonable person and the information must be of no legitimate concern to the public. *Id.* The type of information considered intimate and embarrassing by the supreme court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. We have reviewed the submitted information and marked those portions that the district must withhold under common law privacy as encompassed by section 552.101.

You assert that the requested bulletins contain confidential information regarding students and is therefore excepted from disclosure under section 552.114 of the Government Code and the federal Family Education Rights and Privacy Act (“FERPA”). In Open Records Decision No. 634 (1995), this office concluded that (1) an educational agency or institution may withhold from public disclosure information that is protected by FERPA and excepted from required public disclosure by sections 552.026 and 552.101 without the necessity of requesting an attorney general decision as to those exceptions, and (2) an educational agency or institution that is state-funded may withhold from public disclosure information that is excepted from required public disclosure by section 552.114 as a “student record,” insofar as the “student record” is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception.

Information must be withheld from required public disclosure under FERPA only to the extent “reasonable and necessary to avoid personally identifying a particular student.” *See* Open Records Decision Nos. 332 (1982), 206 (1978). We note that you have properly marked the information that must be withheld pursuant to FERPA as identifying information that may reveal or tend to reveal information about students.

Next, you claim that portions of the bulletins are excepted under section 552.103. Section 552.103(a) excepts from disclosure information relating to litigation to which a governmental body is or may be a party. The primary purpose of the litigation exception is to enable governmental bodies to protect their position in litigation by requiring parties seeking relevant information to obtain it, if at all, through “discovery” processes. *Cornyn v. City of Garland*, 994 S.W.2d 258, 265 (Tex. App. – Austin 1999, no pet.). The governmental body has the burden of providing relevant facts and documents to show that section 552.103(a) is applicable in a particular situation. To show that section 552.103 is applicable, the

governmental body must demonstrate that: 1) litigation is pending or reasonably anticipated at the time of the request, and 2) the information at issue is related to that litigation. *University of Tex. Law Sch., v. Texas 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).

You assert that the documents at issue contain information concerning a complaint filed with the Equal Employment Opportunity Commission (“EEOC”). This office has stated that a pending EEOC complaint indicates litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982). Based on your statement that a complaint filed with the EEOC is pending, we find that you have shown that litigation is reasonably anticipated. We have reviewed the information that you have indicated relates to this complaint and agree that it is related to the anticipated litigation for purposes of section 552.103(a).

You also seek to withhold information related to a complaint pending before the federal Department of Education’s Office of Civil Rights. You explain that the filing of such a complaint constitutes an administrative remedy that must be exhausted before proceeding to a suit in federal court. Moreover, you explain that due to the filed complaint, the district has been subject to an investigation during which the department has been in a position of defending itself. Based on these representations, we find that you have shown that litigation involving the district is reasonably anticipated in this matter as well. Our review of the information at issue in regard to this anticipated litigation also shows that it is related to the anticipated litigation for purposes of section 552.103(a). We have marked both sets of information the district may withhold under section 552.103.

Generally, 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. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. We also note that the applicability of section 552.103(a) ends once the litigation has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

You also argue that one bulletin entry is excepted under section 552.107. Section 552.107(1) of the Government Code excepts from disclosure information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107(1) excepts from public disclosure only “privileged information,” that is, information that reflects either confidential communications from the client to the attorney or the attorney’s legal advice or opinions; it does not apply to all client information held by a governmental body’s attorney. Open Records Decision No. 574 at 5 (1990). When communications from attorney to client do not reveal the client’s

communications to the attorney, section 552.107(1) protects them only to the extent that such communications reveal the attorney's legal opinion or advice. Open Records Decision No. 574 at 3 (1990). In addition, basically factual communications from attorney to client, or between attorneys representing the client, are not protected. *Id.* You have marked a single entry as consisting of confidential attorney-client communications. Based on our review of this information, we conclude that the information contained in the single entry is not excepted from disclosure under section 552.107(1). As you have raised no other exception for this information, the district must release it to the requestor.

Finally in regard to the bulletin materials, you claim that portions are excepted under section 552.111. Section 552.111 excepts "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. An agency's policymaking functions, however, do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 at 5-6 (1993). In addition, section 552.111 does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Id.* at 4-5.

We have reviewed the information that you have marked as material reflecting the policymaking processes of the district. We agree that the district may withhold most of the information that you have marked under section 552.111. However, we have marked information on one document that is purely factual and which the district may therefore not withhold under section 552.111. The district must release the information that we have marked.

In regard to the end-of-year survey results, you claim that the end-of-year surveys are confidential under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. Section 552.101 excepts from disclosure information protected by other statutes. Section 21.355 provides that, "[a]ny document evaluating the performance of a teacher or administrator is confidential." This office has interpreted this section to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. Open Records Decision No. 643 (1996). This office has also concluded that, for purposes of section 21.355, an administrator is someone who is required to hold and does hold a certificate required under chapter 21 of the Education Code and is administering at the time of his or her evaluation. *Id.* Based on the reasoning set out in Open Records Decision No. 643 (1996), we conclude that the end-of-year surveys, which evaluate administrators, are confidential under section 21.355 of the Education Code.

Therefore, pursuant to section 552.101 of the Government Code, the district must withhold the end-of-year surveys.

In conclusion, the district must withhold the information that we have marked under common law privacy as encompassed by section 552.101 in the bulletin materials. Moreover, the district must withhold the information that you have marked under FERPA in the bulletin materials. The district may withhold the types of information that we have marked under sections 552.103 and 552.111 in the bulletin materials. The district must release the remainder of the submitted information in the bulletin materials. As for the end-of-year survey results, the district must withhold all of this information under section 21.355 of the Education Code in conjunction with section 552.101.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

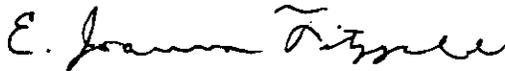
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental

body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



E. Joanna Fitzgerald  
Assistant Attorney General  
Open Records Division

EJF/nc

Ref: ID# 136983

Encl. Submitted documents

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