



October 10, 2000

Mr. Richard M. Abernathy
Abernathy Roeder Boyd & Joplin P.C.
Attorneys at Law
P.O. Box 1210
McKinney, Texas 75070-1210

OR2000-3907

Dear Mr. Abernathy:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 139953.

The Plano Independent School District (the "district"), which your law firm represents, received a request for copies of all cancelled checks made out to your law firm, as well as the personnel files of four named district employees. In your brief to this office dated August 3, 2000, you state that you have sent the requestor an itemized statement of the costs associated with retrieving and copying the cancelled checks. We assume that upon the timely receipt of the requestor's confirmation of the itemized statement, you released the cancelled checks to the requestor. You claim that the remaining information is excepted from disclosure under sections 552.101, 552.102, 552.103, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We first address your arguments under section 552.103 of the Government Code. Section 552.103(a) excepts from disclosure information relating to litigation to which a governmental body is or may be a party. 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. In order to meet this burden, the governmental body must show that (1) litigation is pending or reasonably anticipated, 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 (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). Section 552.103 requires concrete evidence that litigation may ensue. To demonstrate that litigation is reasonably anticipated, the city must furnish evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 at 5 (1989). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

Concrete evidence to support a claim that 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.¹ Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that 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). You supplied this office with a sampling of the letters and threats the requestor has submitted to the district and its representatives. The district claims that the requestor's letter of June 18, 2000, is evidence of his intent to "sue" two district employees in their capacities as district administrators. However, you have not demonstrated that the requestor has taken concrete steps towards litigation. Therefore, we do not find that litigation is realistically or reasonably anticipated. The district may not withhold the requested information under section 552.103.

We next address the submitted teacher and administrator evaluations. Section 552.101 exempts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Section 21.355 of the Education Code 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). In that opinion, this office also concluded that a "teacher" is someone who is required to hold and does hold a certificate or permit required under chapter 21 of the Education Code, and is teaching at the time of his or her evaluation. *Id.* An "administrator" is a person who is required to hold and does hold an administrator's certificate under chapter 21 of the Education Code, and is performing the functions of an administrator at the time of the evaluation. *Id.* Based on the reasoning set out in Open Records Decision No. 643 (1996), we conclude that the evaluations found in the submitted documents 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 submitted evaluations. We have marked examples of the types of information you must withhold.

Some of the submitted information appears to identify school district students and parents of school district students. Such information is excepted from disclosure under the federal Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g, or

¹In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

section 552.114 of the Government Code. *See* Open Records Decision No. 634 (1995). Under FERPA, a student's education records must be withheld from required public disclosure only to the extent "reasonable and necessary to avoid personally identifying a particular student." Open Records Decision Nos. 332 (1982), 206 (1978). Therefore, the district must not release any student-identifying information in the requested records. We have marked examples of documents that may contain student-identifying information.

Section 159.002(b) of the Occupations Code protects from disclosure "[a] record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician." Some of the documents you submitted to this office include medical records, access to which is governed by provisions outside the Public Information Act. Medical records may only be released as provided by chapter 159 of the Occupations Code. Open Records Decision No. 598 (1991). The Occupations Code provides for both the confidentiality of medical records and certain statutory access requirements. *Id.* at 2. We have marked the documents that fall within the protection of chapter 159 and must be withheld.

The submitted records also contain information excepted from disclosure under chapter 551 of the Government Code. Section 551.104(c) of the Government Code provides that "[t]he certified agenda or tape of a closed meeting is available for public inspection and copying *only under a court order issued under Subsection (b)(3).*" (emphasis added). Thus, such information cannot be released to a member of the public in response to an open records request. *See* Open Records Decision No. 495 (1988). Therefore, the district must withhold the certified agendas under section 552.101 of the Government Code in conjunction with section 551.104(c) of the Government Code.

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), *cert. denied*, 430 U.S. 931 (1977), for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101 of the Public Information Act. Therefore, we will apply that test to the information at issue.

Section 552.101 encompasses common law privacy and excepts from disclosure private facts about an individual. *Industrial Found.*, 540 S.W.2d 668 (Tex. 1976). Information must be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 at 1 (1992). An individual's personal financial information may be excepted from required public

disclosure under the common law privacy aspect of section 552.101. *See* Open Records Decision No. 373 (1983). Whether the public has a legitimate interest in such information, however, must be determined on a case-by-case basis. *Id.* at 4; *see also* Open Records Decision Nos. 600 (1992), 545 (1990). We have marked the personal financial information contained in the submitted documents that is protected by section 552.101 and common law privacy.

The district asserts that much of the information found on the submitted college transcripts is excepted from the requirements of public disclosure under section 552.024. However, this argument is properly raised under section 552.102(b) of the Government Code, which reads:

Information is excepted from the requirements of [public disclosure] if it is a transcript from an institution of higher education maintained in the personnel file of a professional public school employee, except that this section does not exempt from disclosure the degree obtained or the curriculum on a transcript in the personnel file of the employee.

You represent that the submitted transcripts are maintained in the personnel files of professional public school employees. As such, the district must withhold all information on the submitted transcripts, except for the degree obtained and the curriculum.

Sections 552.024 and 552.117 provide that a public employee or official can opt to keep private his or her home address, home telephone number, social security number, and information that reveals that the individual has family members. Such information must be withheld if, as of the time of the request for the information, the employee has elected to keep the information private. Open Records Decision Nos. 530 (1989), 482 (1987), 455 (1987). You indicate that the district's records show that prior to the date of the request here, some of the subject employees had made the election under section 552.024 to prohibit the release of section 552.117 information. However, our review of the submitted election forms indicates that the signed election forms pre-date the 1995 amendment to section 552.117 that allows public officials and employees to protect information about family members and social security numbers. Please note that whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, a proper election must be made *prior* to the request for information. Because the employees did not elect prior to the request to keep their social security numbers and family member information confidential under the current section 552.024, their social security numbers and family member information may not be withheld from public disclosure based on section 552.117.

We note that a social security number is excepted from required public disclosure under section 552.101 of the Government Code in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), *if it was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990.*

See Open Records Decision No. 622 (1994). It is not apparent to us that the social security numbers contained in the records at issue were obtained or are maintained by the district pursuant to any provision of law enacted on or after October 1, 1990. You have cited no law, nor are we aware of any law, enacted on or after October 1, 1990, that authorizes the district to obtain or maintain a social security number. Therefore, we have no basis for concluding that the social security numbers at issue were obtained or are maintained pursuant to such a statute and are, therefore, confidential under section 405(c)(2)(C)(viii)(I). We caution, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing the social security numbers at issue, you should ensure that the numbers were not obtained or are not maintained by the district pursuant to any provision of law enacted on or after October 1, 1990.

We note, however, that information may be withheld from public disclosure in “special circumstances,” under section 552.101 in conjunction with common law and constitutional privacy. *See* Open Records Decision No. 169 (1977). We consider “special circumstances” to refer to a very narrow set of situations in which release of the information would likely cause someone to face “an imminent threat of physical danger.” *Id.* at 6. We note that “special circumstances” do not include “a generalized and speculative fear of harassment or retribution.” *Id.* Based on your representations, the correspondence from the requestor to various district employees and their representatives, and the nature of the documents at issue, we find that the release of all of the employees’ home addresses, telephone numbers, and family member information would likely result in an imminent threat of physical danger to them and the members of their families. Accordingly, under section 552.101 in conjunction with common law and constitutional privacy, the district must withhold all of the employees’ personal information that is not otherwise protected under section 552.117 of the Government Code or the social security statute. We have marked examples of the home addresses, telephone numbers, and family member information that must be withheld under section 552.101.

Finally, we note that some of the information submitted is protected from disclosure under section 552.130 of the Government Code. Section 552.130 provides in relevant part as follows:

- (a) Information is excepted from [required public disclosure] if the information relates to:
 - (1) a motor vehicle operator’s or driver’s license or permit issued by an agency of this state; [or]
 - (2) a motor vehicle title or registration issued by an agency of this state[.]

We have marked examples of the types of information protected by section 552.130. To the extent that the responsive information contains Texas driver's license numbers, they must be withheld under section 552.130.

In summary, you may not withhold any of the submitted information under section 552.103. The district must withhold the submitted teacher and administrator evaluations, as well as the home addresses, telephone numbers, and family member information of the four district employees. Additionally, we have marked personal financial information and driver's license information that must be withheld from disclosure. With the exception of the curriculum and the degree obtained, the submitted college transcripts must be withheld. We have also marked medical records, FERPA records, and certified agendas that must be withheld. The remaining information must be released to the requestor.

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).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to the General Services Commission at 512/475-2497.

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,

Open Records Division
Office of the Attorney General

Ref: ID# 139953

Encl: Submitted documents

cc: Mr. Les J. Ruston
Penguin Enterprises Unlimited
P.O. Box 703853
Dallas, Texas 75370
(w/o enclosures)