



October 16, 2001

Ms. Karen L. Johnson  
Bracewell & Patterson, LLP  
500 North Akard Street, Suite 4000  
Dallas, Texas 75201-3387

OR2001-4685

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# 152696.

The Grand Prairie Independent School District (the "district"), which you represent, received a request for copies of a specified bulletin for a particular time period, the 2000-2001 employee directory, a list of all district employees with other associated information, communications from residents of the City of Grand Prairie to the district's Board of Trustees, and a district telephone list and calendar. You state that the requestor has withdrawn her request pertaining to communications from residents of the City of Grand Prairie to the district's Board of Trustees. You also state that you will release some responsive information to the requestor, including a list of all district employees with other associated information and a copy of the new district telephone list and calendar. You claim, however, that the remaining requested information is excepted from disclosure pursuant to sections 552.101, 552.103, 552.107, 552.111, and 552.117 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and have reviewed the submitted information.

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<sup>1</sup> You also claim that portions of the submitted information are excepted from disclosure pursuant to sections 552.026, 552.114, and the Family Educational Rights and Privacy Act. However, since you submitted no arguments as to the applicability of these exceptions to the submitted information and since the submitted information does not appear to contain any information which might be subject to FERPA, we do not address these exceptions to disclosure. *But see* Open Records Decision No. 634 (1995) (finding that educational agencies or institutions may withhold information from disclosure that is protected by FERPA without necessity of requesting attorney general decision as to applicability of sections 552.026, 552.101, and 552.114 of Government Code).

You state that you will provide the requestor with a copy of the 2000-2001 directory, but that you will redact the home addresses and telephone numbers of district employees who have requested that this information not be disclosed under section 552.117 of the Government Code. Section 552.117(1) excepts from disclosure the home addresses and telephone numbers, 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. *See* Open Records Decision Nos. 622 (1994), 455 (1987). However, information subject to section 552.117(1) may not be withheld from disclosure if the current or former employee made the request for confidentiality under section 552.024 after the request for information at issue was received by the governmental body. Whether a particular piece of information is public must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). We conclude that you may withhold the home addresses and telephone numbers of district employees in the 2000-2001 directory pursuant to section 552.117(1), if the employees requested that this information be kept confidential under section 552.024 prior to the district's receipt of this request for information. However, if the district employees did not request that their home addresses and telephone numbers be kept confidential pursuant to section 552.024 prior to the district's receipt of the request for information, we conclude that you must release such information to the requestor.

You claim that portions of the submitted information are excepted from disclosure pursuant to section 552.103 of the Government Code. Section 552.103 was intended to prevent the use of the Public Information Act (the "Act") as a method of avoiding the rules of discovery in litigation. *See* Attorney General Opinion JM-1048 at 4 (1989). The purpose of section 552.103 is to protect a governmental body's position in litigation by forcing parties to obtain information relating to the litigation through the discovery process. *See* Open Records Decision No. 551 (1990). Further, section 552.103 only applies where the litigation involves or is expected to involve the governmental body which is claiming the exception. *See* Open Records Decision No. 392 (1983) (finding predecessor to section 552.103 only applicable to governmental body who has the litigation interest). Section 552.103 provides in pertinent 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.

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(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 district maintains the burden of providing relevant facts and documents to show that 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, and (2) the information at issue is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *see also 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 district must meet both prongs of this test for information to be excepted under section 552.103(a). Further, the litigation must be pending or reasonably anticipated on the date that the information is requested. *See* Gov't Code § 552.103(c). Contested cases conducted under the Administrative Procedure Act, chapter 2001 of the Government Code, are considered litigation for purposes of section 552.103. *See* Open Records Decision No. 588 at 7 (1991).

A governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture" when establishing that litigation is reasonably anticipated. *See* 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.<sup>2</sup> *See* Open Records Decision Nos. 555 (1990), 518 at 5 (1989) (litigation must be "realistically contemplated"). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986).

You claim that a number of entries in the submitted information relate to two instances of pending litigation and four instances of anticipated litigation. Based on your representations and our review of the submitted information, we find that litigation is pending as to the matter referenced by Cause No. DV99-05958-F and that the entry associated with that cause is related to the pending litigation for purposes of section 552.103. However, as to the matter involving the revocation of the license of a specified teacher, you do not indicate, nor can we

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<sup>2</sup>In 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).

ascertain, that the district is a party to any contested case hearing before the State Board for Educator Certification for purposes of section 552.103. *See* Open Records Decision No. 638 (1996). As to the entries pertaining to the cheerleader parent concern and the band director, you did not submit any comments stating the reasons why section 552.103 is applicable to this information. Therefore, we have no basis for concluding that any of these entries are excepted from disclosure under section 552.103. Finally, we find that you have only established that there is a chance of litigation or that litigation has been merely threatened with respect to potential Title IX problems associated with the athletic fields and the issuance of particular book covers throughout the district. Accordingly, other than the entry pertaining to Cause No. DV99-05958-F, we conclude that you may not withhold any of the submitted entries pursuant to section 552.103 of the Government Code.

However, we note that 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. *See* 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 may not be withheld from disclosure on that basis. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

You also claim that portions of the submitted information are excepted from disclosure pursuant to section 552.111 of the Government Code. Section 552.111 excepts from disclosure "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. *See City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *see also Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, No. 03-00-00219-CV, 2001 WL 23169, at \* 5 (Tex. App.--Jan. 11, 2001, no pet. h.). The purpose of section 552.111 is "to protect from public disclosure advice and opinions on policy matters and to encourage frank and open discussion within the agency in connection with its decision-making processes." *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.--San Antonio 1982, writ ref'd n.r.e.) (emphasis added). Section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *See Arlington Indep. Sch. Dist.* at \* 6-7; ORD 615 at 4-5.

An agency's policymaking functions 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. *See* Open Records Decision No. 615 at 5-6

(1993). You state that certain portions of the submitted information constitute policy discussions and communications between the Superintendent and the Board of Education that amount to information that is protected under section 552.111. Based on our review of the submitted information, we agree that some of the communications between the Superintendent and the Board of Education consist of advice, opinions, and recommendations that reflect the policymaking processes of the district. Accordingly, we conclude that you may withhold from disclosure the information that we have marked pursuant to section 552.111 of the Government Code.

You also claim that portions of the submitted information are excepted from disclosure pursuant to section 552.107 of the Government Code. Section 552.107(1) excepts information encompassed by the attorney-client privilege from disclosure. In Open Records Decision No. 574 (1990), this office concluded that section 552.107(1) excepts from 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. *See* Open Records Decision No. 574 at 5 (1990). Section 552.107(1) does not except purely factual information from disclosure, including factual recountings of events, documentation of calls made, meetings attended, or memos sent. *See id.* After careful review of your arguments and the submitted information, we conclude that none of the information constitutes either a client confidence or an attorney's legal advice or opinion. Therefore, the district may not withhold any of the submitted information from disclosure pursuant to section 552.107(1) of the Government Code.

You also claim that portions of the submitted information are excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.<sup>3</sup> Section 21.355 provides that "[a] 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. *See* 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. *See id.* Based on the reasoning set out in Open Records Decision No. 643, we conclude that none of the submitted information constitutes a document evaluating the performance of a teacher or administrator. Therefore, the district may not withhold any of the submitted information from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.

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<sup>3</sup> Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. Section 552.101 encompasses information protected by other statutes.

You also claim that a portion of the submitted information is subject to section 552.101 in conjunction with the Medical Practice Act (the "MPA"), subtitle B of Title 3 of the Occupations Code. The MPA provides that "a record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter." Occupations Code § 159.002(b). In addition, "[a] person who receives information from a confidential communication or record. . . may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained." Occupations Code § 159.002(c). Based on our review of your arguments and the portion of the submitted information that you claim is subject to the MPA, we conclude that none of this information constitutes either medical records or information obtained from medical records. Therefore, the district may not withhold any of the submitted information from disclosure pursuant to section 552.101 of the Government Code in conjunction with the MPA.

However, you also claim this information is excepted from disclosure pursuant to section 552.101 in conjunction with the common law right to privacy. Section 552.101 also encompasses the common law right to privacy. Information is protected by the common law right to privacy if it is information that 1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type of information considered intimate and embarrassing by the Texas 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. *See id.* at 683. We have marked the information that must be withheld from disclosure pursuant to section 552.101 of the Government Code in conjunction with the common law right to privacy.

In summary, the district must withhold from disclosure the home addresses and telephone numbers of district employees contained within the 2000-2001 directory pursuant to section 552.117(1) of the Government Code, if the subject employees requested that this information be kept confidential under section 552.024 of the Government Code prior to the district's receipt of this request for information. However, if the subject district employees did not request that their home addresses and telephone numbers be kept confidential pursuant to section 552.024 prior to the district's receipt of the request for information, the district must release this information to the requestor. The district may withhold from disclosure the information related to Cause No. DV99-05958-F that it marked as excepted pursuant to section 552.103 of the Government Code. The district may withhold from disclosure the marked information pursuant to section 552.111 of the Government Code. The district must withhold from disclosure the information that we have marked pursuant to section 552.101 of the Government Code in conjunction with the common law right to privacy. The district must release all other submitted information 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).

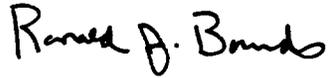
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

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 Hadassah Schloss at 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,

A handwritten signature in black ink that reads "Ronald J. Bounds". The signature is written in a cursive style with a large initial "R".

Ronald J. Bounds  
Assistant Attorney General  
Open Records Division

RJB/seg

Ref: ID# 152696

Enc. Marked documents

cc: Ms. Sally Claunch  
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(w/o enclosures)