



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

March 4, 2003

Mr./Ms. T. Berry
Director of Human Resources
Elgin Independent School District
P. O. Box 351
Elgin, Texas 78621

OR2003-1407

Dear Mr./Ms. Berry:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 177372.

The Elgin Independent School District (the "district"), which you represent, received a request for twenty-seven categories of information relating to a specified incident that occurred on or about November 1, 2002. You state that the district has released some responsive information to the requestor. You claim, however, that the remaining requested information, or portions thereof, is excepted from disclosure pursuant to sections 552.026, 552.101, 552.102, 552.103, 552.114, and 552.130 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

Initially, we note that section 552.301(e) of the Government Code requires that a governmental body that requests an attorney general decision under section 552.301(a) must, within a reasonable time, but not later than the fifteenth business day after the date of receiving the written request, submit to the attorney general, among other items, a copy of the specific information requested, or representative samples of it, if a voluminous amount was requested, labeled to indicate which exceptions apply to which parts of the copy. See Gov't Code § 552.301(e). To date, the district has not submitted the documents that are responsive to request items six and eleven for which it claims that the entirety, or portions thereof, are excepted from disclosure under sections 552.103 and 552.130 of the Government Code. Thus, with regard to these particular documents, we find that the district failed to comply with section 552.301 of the Government Code in requesting this decision from us.

Because the district failed to comply with the procedural requirements of section 552.301 with regard to these documents, this particular information is now presumed public. *See* Gov't Code § 552.302; *see also* *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.--Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). The district must demonstrate a compelling interest in order to overcome the presumption that this information is now public. *See id.* Normally, a compelling interest is demonstrated when some other source of law makes the requested information confidential or when third party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). Although the district claims that this information is excepted from disclosure pursuant to section 552.103, we note that this exception to disclosure is a discretionary exception that may be waived by a governmental body.¹ Thus, section 552.103 does not constitute a compelling interest that is sufficient to overcome the presumption that this information is now public. Accordingly, we conclude that the district may not withhold any portion of this information under section 552.103 of the Government Code. Furthermore, although the district claims that portions of this particular information are excepted from disclosure pursuant to section 552.130, we have no basis for concluding that any portion of it is so excepted because the district did not submit this information to us for our review. Accordingly, we conclude that the district must release this particular information to the requestor.

However, we caution the district that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. *See* Gov't Code § 552.352. Prior to releasing this particular information, the district should ensure that it does not contain any such confidential information. If the district believes that any portion of this information is indeed confidential and may not lawfully be released, the district must challenge this ruling in court as outlined below.

We now address your claim that the submitted information is excepted from disclosure pursuant to section 552.103 of the Government Code. 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

¹ Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential), 473 (1987) (governmental body may waive section 552.111), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

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 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 on the date that the district receives the request for information 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).

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.² *See Open Records Decision Nos. 555 (1990), 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)*. Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. *See Open Records Decision No. 361 (1983)*. Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See Open Records Decision No. 452 at 4 (1986)*. After carefully reviewing your arguments and the submitted information, we find that the district has failed to present us with concrete evidence that litigation was reasonably anticipated by the district

² In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: 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)*.

on the date that it received this request. Accordingly, we conclude that the district may not withhold any portion of the submitted information pursuant to section 552.103 of the Government Code.

You claim that portions of the requested information are excepted from disclosure pursuant to sections 552.026 and 552.114 of the Government Code. In Open Records Decision No.634 (1995), this office concluded that (1) an educational agency or institution may withhold information from disclosure that is protected by the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g, and excepted from disclosure under sections 552.026 and 552.101 of the Government Code 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 information from disclosure that is excepted from 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. Since the district has made a determination that portions of the requested information constitute "student records," we conclude that the district must comply with FERPA guidelines in withholding this information from the requestor.³ See Open Records Decision Nos. 539 (1990), 332 (1982), 206 (1978).

Section 552.101 excepts from disclosure "information deemed confidential by law, either constitutional, statutory, or by judicial decision." See Gov't Code § 552.101. Section 552.101 encompasses information that is protected from disclosure by other statutes. Criminal history record information ("CHRI") generated by the National Crime Information Center or by the Texas Crime Information Center is confidential. Federal regulations prohibit the release of CHRI maintained in state and local CHRI systems to the general public. See 28 C.F.R. § 20.21(c)(1) ("Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given."), (2) ("No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself."). Section 411.083 of the Government Code provides that any CHRI maintained by the Department of Public Safety ("DPS") is confidential. Gov't Code § 411.083(a). Similarly, CHRI obtained from the DPS pursuant to statute is also confidential and may only be disclosed in very limited instances. See *id.* § 411.084; see also *id.* § 411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). Accordingly, assuming that the district has responsive CHRI in its possession that falls within the ambit of these state and federal regulations, the district must withhold it from the requestor.

³ We note for your information that portions of the submitted information are also subject to FERPA as personally identifiable student information.

In addition, you claim that portions of the submitted information are excepted from disclosure pursuant to section 552.101 in conjunction with section 101.104 of the Civil Practice and Remedies Code. Section 101.104 prohibits the discovery and admission of insurance information during a trial under the Texas Tort Claims Act, chapter 101 of the Civil Practice and Remedies Code. *See City of Bedford v. Schattman*, 776 S.W.2d 812, 813-14 (Tex. App.--Fort Worth 1989, orig. proceeding) (protection from producing evidence of insurance coverage under section 101.104 is limited to actions brought under Tort Claims Act). However, section 101.104 does not make insurance information confidential for purposes of section 552.101 of the Government Code. *See Open Records Decision No. 551 at 3 (1990)* (provisions of section 101.104 "are not relevant to the availability of the information to the public"). Chapter 552 of the Government Code differs in purpose from statutes and procedural rules providing for discovery in judicial proceedings. *See Gov't Code* §§ 552.005 (chapter 552 does not affect scope of civil discovery), .006 (chapter 552 does not authorize withholding public information or limit availability of public information to public except as expressly provided by chapter 552); *see also* Attorney General Opinion JM-1048 (1989); Open Records Decision No. 575 (1990) *overruled in part* by Open Records Decision No. 647 (1996) (section 552.101 does not encompass discovery privileges). Section 101.104 does not make any portion of the submitted information confidential for purposes of section 552.101. Accordingly, we conclude that the district may not withhold any portion of the submitted information pursuant to section 552.101 of the Government Code in conjunction with section 101.104 of the Civil Practice and Remedies Code.

Further, you claim that portions of the submitted information are excepted from disclosure pursuant to section 552.102 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). Section 552.102(a) is generally applicable to information relating to a public official or employee. *See Open Records Decision No. 327 at 2 (1982)* (anything relating to employee's employment and its terms constitutes information relevant to person's employment relationship and is part of employee's personnel file). 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 from disclosure under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected from disclosure under the common-law right to privacy as incorporated by section 552.101 of the Government Code. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

Information is protected from disclosure under the common-law right to privacy 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. *See id.* After carefully reviewing your arguments and the information at issue, we find that no portion of this information is protected from disclosure under the common-law right to privacy. *See Open Records Decision Nos. 470 (1987)* (public employee's job

performance does not generally constitute his private affairs), 455 (1987) (public employee's job performances or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (1984) (statutory predecessor applicable when information would reveal intimate details of highly personal nature), 405 at 2 (1983) (manner in which employee performed his job cannot be said to be of minimal public interest), 400 at 5 (1983) (statutory predecessor protected information only if its release would lead to clearly unwarranted invasion of privacy). Accordingly, we conclude that the district may not withhold any portion of the submitted information pursuant to section 552.102 of the Government Code.

You also contend that portions of the submitted information must be withheld from disclosure on privacy grounds because the release of the information may place someone in a false light. We note that the false-light invasion of privacy was discussed at length in Open Records Decision No. 579 (1990). As noted in that decision, the gravamen of a false-light privacy complaint is not that the information revealed is confidential, but that it is false. Therefore, an exception to the Public Information Act focused on the confidentiality of information does not embrace this particular tort doctrine. We further note that the Texas Supreme Court has held that false-light privacy is not an actionable tort in Texas. *See Cain v. Hearst Corp.*, 878 S.W.2d 577, 579 (Tex. 1994). Accordingly, we conclude that the district may not withhold any portion of the submitted information on this basis.

We note that a portion of the submitted information may be subject to section 552.117(1) 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 timely request that this information be kept confidential under section 552.024 of the Government Code. *See Gov't Code* § 552.117(1). However, information that is responsive to a request may not be withheld from disclosure under section 552.117(1) if the official or employee with whom the information is associated did not request confidentiality for the information in accordance with section 552.024 or if the request for confidentiality regarding the information under section 552.024 was not made until 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). Accordingly, we conclude that the district must withhold the information that we have marked pursuant to section 552.117(1) of the Government Code, if the employee with whom this information is associated requested confidentiality for this information in accordance with section 552.024 prior to the district's receipt of this request. Otherwise, the district must release this information to the requestor.

Finally, you claim that portions of the submitted information are excepted from disclosure pursuant to section 552.130 of the Government Code. Section 552.130 excepts information from disclosure that relates to a motor vehicle operator's or driver's license or permit issued

by an agency of this state or a motor vehicle title or registration issued by an agency of this state. *See* Gov't Code § 552.130. Accordingly, we conclude that the district must withhold the portions of the submitted information which we have marked pursuant to section 552.130 of the Government Code.

In summary, the district must release the documents that are responsive to request items six and eleven pursuant to section 552.302 of the Government Code. The district must comply with FERPA guidelines in withholding the information from the requestor that it has withheld from our office. Assuming that the district has responsive CHRI in its possession that falls within the ambit of state and federal regulations, the district must withhold it from the requestor. The district must withhold the information that we have marked pursuant to section 552.117(1) of the Government Code, if the employee with whom this information is associated requested confidentiality for this information in accordance with section 552.024 prior to the district's receipt of this request. The district must withhold the information that we have marked pursuant to section 552.130 of the Government Code. The district must release the remaining 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).

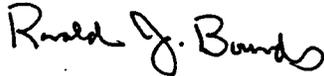
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 Dep't of Pub. 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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/lmt

Ref: ID# 177372

Enc. Marked documents

c: Mr. Bobby R. Taylor
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(w/o enclosures)