



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

July 10, 2003

Ms. Marianna M. McGowan
Abernathy, Roeder, Boyd & Joplin
P.O. Box 1210
McKinney, Texas 75070-1210

OR2003-4778

Dear Ms. McGowan:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 184015.

The Collin County Community College District (the "district"), which you represent, received a request for access to and copies of all documents pertaining to the requestor's quality of performance as an employee of the district. You state that you have released some responsive information to the requestor. However, you claim that the remaining requested information is excepted from disclosure under sections 552.026, 552.101, 552.103, 552.107, and 552.114 of the Government Code. We have considered the exceptions you claim and reviewed the submitted sample of information.¹

Initially, we note that some of the information at issue may be subject to a previous ruling. In Open Records Letter No. 2003-4668 (2003), this office considered a request to the district for performance and student evaluations of the individual whose information is at issue in the present request. In that ruling, we held that the district must withhold some information under section 552.114 and that the district could withhold some information under section 552.103. To the extent that any of the information subject to the present request is identical to the information we previously determined was excepted from public disclosure

¹ We assume that 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.

and the law, facts, and circumstances surrounding our previous ruling have not changed, you may rely on our prior ruling to withhold the requested information. *See* Open Records Decision No. 673 at 6-7 (2001) (criteria of previous determination regarding specific information previously ruled on). However, you must release the information that we previously found must be released. *See* Gov't Code § 552.007; *see also* Gov't Code § 552.301(f).

We next note that Exhibit E contains completed evaluations, which are subject to section 552.022 of the Government Code. This section provides that “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body,” is public and may not be withheld unless it is expressly confidential under other law or excepted from disclosure by section 552.108. Gov't Code § 552.022(a)(1). You do not claim that the submitted information is excepted under section 552.108. You claim that this information may be withheld under section 552.103. This section is a discretionary exception and is not “other law” for the purpose of section 552.022. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 663 (1999) (governmental body may waive section 552.103), 522 at 4 (1989) (discretionary exceptions in general). Therefore, the evaluations may not be withheld on the basis of section 552.103. We have marked the type of documents that are subject to section 552.022. However, you also assert that portions of the evaluations are excepted under sections 552.026, 552.101, and 552.114, and we will address those arguments.

Section 552.114 of the Government Code excepts from disclosure student records at an educational institution funded completely or in part by state revenue. This office generally applies the same analysis under section 552.114 and the Family Educational Rights and Privacy Act of 1974 (“FERPA”).² Open Records Decision No. 539 (1990). FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information (other than directory information) contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1). “Education records” means those records that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. *Id.* § 1232g(a)(4)(A). Section 552.026 of the Government Code provides that “information contained in education records of an educational agency or institution” may only be released under the Public Information Act in accordance with FERPA.

²Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section incorporates confidentiality provisions such as FERPA into the Public Information Act.

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). Such information includes both information that directly identifies a student, as well as information that, if released, would allow the student's identity to be easily traced. See Open Records Decision No. 224 (1979) (finding student's handwritten comments protected under FERPA because they make identity of student easily traceable through handwriting, style of expression, or particular incidents related). We have marked a sample of the type of information that must be redacted from the student evaluations pursuant to section 552.114 as well as FERPA. Because you have claimed no other exceptions for the remaining information in the student evaluations and they are not otherwise confidential by law, they must be released.

We turn now to your claim regarding section 552.103 for the remaining information. This section provides in 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.

The district has 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 the governmental body received 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). The district must meet both prongs of this test for information to be excepted under 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” 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. 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). 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 (“EEOC”), *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). 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. Open Records Decision No. 361 (1983).

You assert that the district anticipates litigation by the requestor and that the requested information relates to that anticipated litigation. You have submitted information to this office showing that the requestor has filed a complaint with the Texas Commission on Human Rights (the “TCHR”) alleging discrimination.³ Based on the information you have provided, we conclude that you have shown that the department reasonably anticipated litigation at the time it received this request. *See, e.g.*, Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982) (pending EEOC complaint indicates litigation is reasonably anticipated). In addition, our review of the remaining information shows that it is related to the anticipated litigation for purposes of section 552.103(a). Thus, with the exception of the completed student evaluations, you have demonstrated the applicability of section 552.103 to the requested information.

We note, however, that once information has been obtained by all parties to the anticipated litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). In this instance, it appears that the opposing party has

³The TCHR operates as a federal deferral agency under section 706(c) of title VII, 42 U.S.C. § 2000e-5. The EEOC defers jurisdiction to the TCHR over complaints alleging employment discrimination. *Id.*

seen some of the information at issue. You may not withhold any such information under section 552.103. However, until such time as the anticipated litigation has concluded, pursuant to section 552.103, you may withhold Exhibits B, C, and D and the documents in Exhibit E that do not constitute completed evaluations, with the exception of any materials previously seen by the opposing party. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982) (concluding that applicability of litigation exception ends when litigation is concluded).

To summarize, you must withhold the information in the student evaluations contained in Exhibit E that we have marked pursuant to FERPA and section 552.114. The remaining information in the student evaluations must be released pursuant to section 552.022. You may withhold the remaining information under section 552.103.⁴

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).

⁴ As we are able to make this determination, we need not address your argument under section 552.107.

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,



Jennifer E. Berry
Assistant Attorney General
Open Records Division

JEB/sdk

Ref: ID# 184015

Enc: Submitted documents

c: Mr. George Henson
c/o Marianna M. McGowan
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