

The ruling you have requested has been amended as a result of litigation and has been attached to this document.



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 28, 2003

Ms. Carrie Galatas
General Counsel
Conroe Independent School District
3205 West Davis
Conroe, Texas 77304-2098

OR2003-6080

Dear Ms. Galatas:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 186719.

The Conroe Independent School District (the "district") received a request for

1. documents regarding two employees' job duties;
2. information regarding complaints against four employees;
3. information regarding any sexually inappropriate or unprofessional conduct toward any female employee or student;
4. communications between the district and two employees;
5. the personnel files of four employees;
6. payroll information of four employees;
7. appointments and schedules of four employees;
8. communications concerning claims or defenses regarding sexual harassment;

9. recommendations for employment of two employees;
10. insurance agreements or policies of liability coverage for sexual harassment claims;
11. settlement agreements, termination letters, contracts, or indemnity agreements the district has with two employees; and
12. communications between two employees and the district from March 1, 2003 to June 9, 2003.

The district has released some of the requested information. The district asserts the submitted information is excepted from public disclosure under sections 552.101 and 552.103 of the Government Code and the attorney-client and work product privileges. We have considered the district's arguments and reviewed the submitted sample of information.¹

Some of the requested information was addressed in Open Records Letter No. 2003-3204 (2003). The district explains it has released to the requestor any information that is responsive and required to be released in that prior decision with the exception of certain information that is subject to a pending lawsuit, *Jane Doe v. Greg Abbott, Attorney General of the State of Texas & Conroe Independent School District*, No. GN301690 (126th Dist. Ct., Travis County, Tex., filed May 23, 2003). Because of the pending lawsuit filed against the Office of the Attorney General over the release of the information in question, we will not address the matter in this decision and will allow the trial court to resolve the issue of whether this information must be released to the requestor.

The district asserts section 552.103 excepts Exhibits B and D from public disclosure. We first note Exhibit D contains a court document, telephone bills, and a settlement agreement subject to section 552.022 of the Government Code. Section 552.022(a) makes the following categories of information public and not excepted from required disclosure under the Public Information Act unless the information is expressly confidential under other law:

- (3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;

...

¹We 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.

(17) information that is also contained in a public court record; and

(18) a settlement agreement to which a governmental body is a party.

Gov't Code § 552.022(a)(3), (18). Our office has previously concluded section 552.103 is a discretionary exception. *See* Open Records Decision No. 551 (1990) (statutory predecessor to section 552.103 serves only to protect a governmental body's position in litigation, and does not itself make information confidential). Section 552.103 does not "expressly [make] information confidential under other law." Gov't Code § 552.022. Therefore, the court record, telephone bills, and settlement agreement may not be withheld under section 552.103.

However, the court record, telephone bills, and settlement agreement do contain information made confidential by law. The telephone bills contain an account number made confidential by section 552.136. Section 552.136 of the Government Code states that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136. The district must, therefore, withhold the account number under section 552.136.

The telephone bills also contain a phone number, which we have marked, that may be confidential under section 552.117(a)(1).² Section 552.117 excepts from disclosure the home telephone number of a current or former employee of a governmental body who request that this information be kept confidential under section 552.024. 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, the district may only withhold information under section 552.117 on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. If the employee timely elected to keep her telephone number confidential, the district must withhold the employee's home telephone number. The district may not withhold this information under section 552.117 if the employee did not make a timely election to keep the information confidential.

The settlement agreement and telephone bills contain information made confidential by section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by common-law privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931

²Act of May 30, 2003, 78th Leg., R.S., S.B. 1388, § 1 (to be codified as an amendment to Gov't Code § 552.117).

(1977). A sexual harassment victim's identifying information is protected under section 552.101 in conjunction with common-law privacy. *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied). We have marked the private information the district must withhold.

The court record contains information made confidential by the Family Educational Rights and Privacy Act of 1974 ("FERPA"). 20 U.S.C. § 1232g. 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 id.* § 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). This office generally applies the same analysis under section 552.114 of the Government Code and FERPA. Open Records Decision No. 539 (1990). Section 552.114 excepts from disclosure student records at an educational institution funded completely or in part by state revenue. 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 have marked the types of information that may reveal or tend to reveal information about a student that must be withheld pursuant to FERPA. Except for information protected by sections 552.117 and 552.136, FERPA, and *Ellen*, the district must release the rest of the court record, telephone bills, and settlement agreement.

Next, we consider the district's section 552.103 claim for Exhibit B and the remaining information in Exhibit D. Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state or a political subdivision is or may be a party. 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, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Tex. 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). The district must meet both prongs of this test for information to be excepted under section 552.103(a). Furthermore, section 552.103 applies only if the litigation is pending or reasonably anticipated on the date that the district receives the request for information. Gov't Code § 552.103(c).

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). You have submitted an Equal Employment Opportunity Commission ("EEOC") complaint filed against the district. 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). By showing that

the complaint was filed with the EEOC on May 23, 2003, you have shown that litigation was reasonably anticipated at the time the district received the request for information. Our review of the records at issue also shows that they are related to anticipated litigation for purposes of section 552.103(a). Thus, you may withhold Exhibit B and most of the remaining information in Exhibit D pursuant to section 552.103(a).³

However, we note that once the information has been obtained by all parties to the pending litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). Some of the information in Exhibit D was provided by the opposing party. Thus, the district must release such information, which we have marked.⁴ We also note that the applicability of section 552.103(a) ends when the litigation is concluded. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

As for Exhibit E, the district asserts the evaluations are confidential under section 21.355 of the Education Code. Section 21.355 of the Education Code provides, "A document evaluating the performance of a teacher or administrator is confidential." This office 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.* Similarly, 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.* It is unclear whether all of the employees at issue in Exhibit E are administrators as defined by chapter 21. For those who are administrators, we agree the evaluations are confidential under section 21.355 of the Education Code and must be withheld. The district must release the evaluations of those who are not administrators as defined by chapter 21.

Lastly, the district contends Exhibit F, insurance and liability information, is confidential under section 101.104 of the Civil Practice and Remedies Code, which states the following:

(a) Neither the existence nor the amount of insurance held by a governmental unit is admissible in the trial of a suit under [the Texas Tort Claims Act].

³Because section 552.103 is dispositive as to Exhibit B, we do not address the district's claims under the work product and attorney-client privileges.

⁴We note that some of the information is private under *Ellen* and must not be released even after litigation has concluded. Here, the requestor has a special right of access under section 552.023 of the Government Code. Gov't Code § 552.023 (person's authorized representative has special right of access to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect the person's privacy interests). If you receive a subsequent request for the information, you should reassert your arguments against disclosure at that time. Gov't Code § 552.352 (distribution of confidential information is criminal offense).

(b) Neither the existence nor the amount of the insurance is subject to discovery.

Civ. Prac. & Rem. Code § 101.104; *see In re Sabine Valley Center*, 986 S.W.2d 612 (Tex. 1999) (statute “prohibits discovery of insurance covering claims against a governmental unit and against its employees for which it could be liable, directly or vicariously, under the [Texas Tort Claims] Act”). Although the statute provides that the information at issue is not subject to discovery, the statute does not make the information expressly confidential. *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”). Therefore, we conclude the district may not withhold Exhibit F under section 101.104 of the Civil Practice and Remedies Code as section 101.104 is not a confidentiality statute. Accordingly, the district must release Exhibit F to the requestor.

In summary, the district may withhold Exhibit B and most of the information in Exhibit D pursuant to section 552.103(a). The district must withhold the student identifying information in the court record under FERPA. The district must also withhold the alleged sexual harassment victim’s identifying information in the settlement agreement and telephone bills that we have marked under section 552.101. The account number in the telephone bills is confidential under section 552.136. Lastly, the district must withhold the marked telephone number in the telephone bills under section 552.117 if the employee made a timely election to keep her information confidential. The district must release the remaining submitted information.

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,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/sdk

Ref: ID# 186719

Enc. Marked documents

c: Mr. Gilbert G. Garcia
Garcia & Garcia
220 North Thompson, Suite 202
Conroe, Texas 77301
(w/o enclosures)

Telephone: 713/960-6000
Facsimile: 713/960-6025

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that on this the 2nd day of October, 2003, a true and correct copy of the foregoing document was served on counsel for Defendant via facsimile:

Mr. Jason Ray
Assistant Attorney General
Price Daniel Building
209 W. 14th Street
Austin, Texas 78701
(Via Facsimile 512/320-0167)



Attorney for Plaintiffs

VL5872PG024

~~VL5732PG082~~