



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 29, 2005

Mr. Miles T. Bradshaw
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5718 Westheimer, Suite 1200
Houston, Texas 77057

OR2005-02638

Dear Mr. Bradshaw:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 220845.

The Fort Bend Independent School District (the "district"), which you represent, received a request for records pertaining to a named district employee. You assert the district has provided the requestor with some of the requested information. You inform us that the district is withholding some of the requested information pursuant to Open Records Decision No. 634 (1995).¹ You claim that some of the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.108, 552.117, and 552.135 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We note that the district informs us that it has redacted portions of the requested information pursuant to section 552.117 of the Government Code. You do not assert, nor does our

¹In Open Records Decision No. 634 (1995), this office concluded that (1) an educational agency or institution may withhold information that is protected from disclosure by the Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g, and that is excepted from disclosure by sections 552.026 and 552.101 of the Government Code without the necessity of requesting an attorney general decision as to those exceptions to disclosure, and (2) an educational agency or institution that is state-funded may withhold information that is excepted from disclosure by section 552.114 of the Government Code 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 to disclosure.

review of our records indicate, that you have been authorized by this office to withhold any such information without seeking a ruling from this office. *See* Gov't Code § 552.301(2); Open Records Decision 673 (2000). Because we can discern the nature of the information that has been redacted, being deprived of the information at issue does not inhibit our ability to make a ruling in this instance. Nevertheless, be advised that a failure to provide this office with requested information generally deprives us of the ability to determine whether information may be withheld and leaves this office with no alternative other than ordering that the redacted information be released. *See* Gov't Code §§ 552.301(e)(1)(D) (governmental body must provide this office with copy of "specific information requested" or representative sample), 552.302.

Next, we note that the submitted information includes an arrest warrant and a complaint and supporting affidavit. Article 15.26 of the Code of Criminal Procedure states "[t]he arrest warrant, and any affidavit presented to the magistrate in support of the issuance of the warrant, is public information." Article 15.04 of the Code of Criminal Procedure provides that "[t]he affidavit made before the magistrate or district or county attorney is called a 'complaint' if it charges the commission of an offense." Case law indicates that a complaint can support the issuance of an arrest warrant. *See Janecka v. State*, 739 S.W.2d 813, 822-23 (Tex. Crim. App. 1987); *Villegas v. State*, 791 S.W.2d 226, 235 (Tex. App.—Corpus Christi 1990, pet. ref'd); *Borsari v. State*, 919 S.W.2d 913, 918 (Tex. App.—Houston [14 Dist.] 1996, pet. ref'd) (discussing well-established principle that complaint in support of arrest warrant need not contain same particularity required of indictment). The exceptions to disclosure in the Act do not apply to information that is made public by other statutes. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Therefore, the arrest warrant and the complaint and supporting affidavit must be released pursuant to article 15.26 of the Code of Criminal Procedure.²

In addition, we note that the submitted information contains completed reports and contracts that are subject to section 552.022 of the Government Code. Under section 552.022(a)(1), a completed report, audit, evaluation, or investigation made of, for, or by a governmental body is expressly public unless it either is excepted under section 552.108 of the Government Code or is expressly confidential under other law. Under section 552.022(a)(3), information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body is expressly public unless it is expressly confidential under other law. Section 552.103 is a discretionary exception to disclosure that protect the governmental body's interests and may be waived. *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 No. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived); *see also* Open Records Decision

²We note that we contacted the district regarding the possible sealing by court order of these records, but to date we have received no indication that any records at issue have been sealed. *See generally* Tex. R. Civ. Proc. 76a (procedural mechanism for sealing court records).

No. 522 (1989) (discretionary exceptions in general). As such, section 552.103 is not "other law" that makes information confidential for the purposes of section 552.022. Therefore, the information subject to section 552.022 may not be withheld under section 552.103. Section 552.101 is "other law" for purposes of section 552.022; therefore, we will address whether this section requires the district to withhold the information subject to section 552.022.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision" and it encompasses information protected by other statutes. Section 261.201 of the Family Code provides as follows:

The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

- (1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and
- (2) except as otherwise provided in this section, the files, reports, records, communications, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201. Because some of the remaining information at issue consists of files, reports, records, communications, or working papers used or developed in an investigation under chapter 261, this information is within the scope of section 261.201 of the Family Code. You have not indicated that the district has adopted a rule governing the release of this type of information; therefore, we assume that no such regulation exists. Given that assumption, the information at issue, which we have marked, is confidential pursuant to section 261.201 of the Family Code, and the district must withhold it under section 552.101 of the Government Code. *See* Open Records Decision No. 440 at 2 (1986) (predecessor statute).

Section 552.101 also encompasses section 411.097 of the Government Code. Criminal history record information ("CHRI") generated by the National Crime Information Center or by the Texas Crime Information Center is confidential. Part 20 of title 28 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of

Public Safety ("DPS") maintains, except that the DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov't Code § 411.083.

A school district may obtain from CHRI from the DPS if authorized by section 411.097 and subchapter C, chapter 22 of the Education Code; however, a school district may not release CHRI except as provided by section 411.097(d). *See* Gov't Code § 411.097(d); Educ. Code § 22.083(c)(1) (authorizing school district to obtain from any law enforcement or criminal justice agency all CHRI relating to school district employee); *see also* Gov't Code § 411.087. Section 411.087 authorizes a school district to obtain CHRI from the Federal Bureau of Investigation or any other criminal justice agency in this state. *Id.* Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. *See* Open Records Decision No. 565 (1990). Furthermore, any CHRI the district obtained from the DPS or any other criminal justice agency in this state must be withheld under section 552.101 of the Government Code in conjunction with section 411.097(d) of the Government Code. *See* Educ. Code § 22.083(c)(1).

Section 552.101 also encompasses section 21.355 of the Education Code, which provides that "[a] document evaluating the performance of a teacher or administrator is confidential." Educ. Code § 21.355. This office has interpreted section 21.355 to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher. *See* Open Records Decision No. 643 (1996). In Open Records Decision No. 643, we determined that the word "teacher" for purposes of section 21.355 means a person who (1) is required to and does in fact hold a teaching certificate under subchapter B of chapter 21 of the Education Code or a school district teaching permit under section 21.055 and (2) is engaged in the process of teaching, as that term is commonly defined, at the time of the evaluation. *See id.* at 4. On review of the information, we agree that a portion of the submitted information consists of evaluations. Thus, provided the employee at issue was required to hold and did hold the appropriate certificate and was teaching at the time of the submitted teaching evaluations, the information we have marked under section 21.355 is confidential, and the district must withhold it under section 552.101 of the Government Code. However, we find that the remainder of the information at issue does not consist of evaluations of the performance of the teacher at issue for purposes of section 21.355, and the district may not withhold this information under section 552.101.

Section 552.101 also encompasses the doctrine of 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. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). 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. *Id.* at 683. In addition, this office has found that the following types of information are excepted from required public disclosure under common law privacy: an individual's criminal history when compiled by a governmental body, *see* Open Records Decision No. 565 (citing *U. S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989)); personal financial information not relating to a financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990); some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps); and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). We have marked the information that is confidential under common law privacy and that the district must withhold under section 552.101. However, we do not find the remaining information to be highly intimate or embarrassing information; therefore, the remaining information is not confidential under common law privacy, and the district may not withhold it under section 552.101 on that ground.

The district asserts that some of the submitted information not subject to section 552.022 is excepted under section 552.103 of the Government Code. Section 552.103 provides as follows:

(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.

Gov't Code § 552.103(a), (c). 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. *Univ. of Tex. Law Sch. v. Tex. 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 section 552.103(a).

You inform us that the requestor has requested a hearing regarding the district's recommendation of termination pursuant to chapter 21 of the Education Code. Section 21.256 of the Education Code provides that hearings requested under section 21.253 of the Education Code "shall be conducted in the same manner as a trial without a jury in a district court of [Texas]." Educ. Code § 21.256(e). Section 21.256 also specifically affords the person making the appeal the right to be represented by a representative of the person's own choice, to hear evidence on which the charge is based, to cross-examine each adverse witness, and to present evidence. *See id.* § 21.256. It also states that the Texas Rules of Civil Evidence apply at the hearing. *See id.* We also note that, in a chapter 21 hearing, the hearing examiner may issue subpoenas for the attendance of witnesses and the production of documents, an appeal of the proceedings to the commission is based only on the record of the local hearing, and, in a judicial appeal of the commissioner's decision, the court must review the evidence pursuant to the substantial evidence rule. *Id.* §§ 21.255(a) (subpoena power of examiner), 21.301(b) (appeal based only on hearing record), 21.307(e) (substantial evidence rule for judicial review). Therefore, we conclude that litigation in the form of a hearing under chapter 21 of the Education Code was pending when the district received the request for information. *See* Open Records Decision Nos. 588 (1991) (concluding that contested case under Administrative Procedure Act qualifies as litigation under statutory predecessor to section 552.103), 301 (1982) (litigation includes a contested case before administrative agency). We also find that the information at issue relates to the pending litigation. Therefore, section 552.103 is generally applicable to the information at issue.

We note, however, that the district seeks to withhold under section 552.103 information that the opposing party to the pending litigation already has seen or to which he has already had access. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information that relates to the litigation through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). Thus, if the opposing party to pending litigation has already seen or had access to information that relates to the litigation, through discovery or otherwise, there is no interest in now withholding such information under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, the submitted information that the opposing party has already seen or to which the party has already had access is not excepted under section 552.103. The district may withhold the information that we have marked under section 552.103.³

You contend that some of the submitted information may be withheld under section 552.117 of the Government Code. Section 552.117(a)(1) of the Government Code excepts from disclosure the current and former home addresses and telephone numbers, social security

³We note that the district may no longer withhold any of the information at issue under section 552.103 once litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

governmental body who request that this information be kept confidential under section 552.024. You state, and provide supporting documentation showing, that the employee whose information is at issue timely elected to keep confidential his home address, home telephone number, and social security number; therefore, the district must withhold this information, which we have marked, under section 552.117. However, as there was no timely election to withhold the employee's family member information, the district may not withhold any family member information relating to this employee under section 552.117(a)(1).

We note that the documents at issue also contain information pertaining to other district employees. For those employees who timely elected to keep their personal information confidential, the district must withhold the employees' home addresses and telephone numbers, social security numbers, and any information that reveals whether these employees have family members, which we have marked. The district may not withhold this information under section 552.117(a)(1) for those employees who did not make a timely election to keep the information confidential.

You contend that the identities of three individuals in the remaining information are excepted under section 552.135 of the Government Code, which provides the following:

(a) "Informer" means a student or former student or an employee or former employee of a school district who has furnished a report of another person's or persons' possible violation of criminal, civil, or regulatory law to the school district or the proper regulatory enforcement authority.

(b) An informer's name or information that would substantially reveal the identity of an informer is excepted from [required public disclosure].

(c) Subsection (b) does not apply:

(1) if the informer is a student or former student, and the student or former student, or the legal guardian, or spouse of the student or former student consents to disclosure of the student's or former student's name; or

(2) if the informer is an employee or former employee who consents to disclosure of the employee's or former employee's name; or

(3) if the informer planned, initiated, or participated in the possible violation.

(d) Information excepted under Subsection (b) may be made available to a law enforcement agency or prosecutor for official purposes of the agency or

prosecutor upon proper request made in compliance with applicable law and procedure.

(e) This section does not infringe on or impair the confidentiality of information considered to be confidential by law, whether it be constitutional, statutory, or by judicial decision, including information excepted from the requirements of Section 552.021.

Gov't Code § 552.135. Because the legislature limited the protection of section 552.135 to the identity of a person who reports a possible violation of "law," a school district that seeks to withhold information under that exception must clearly identify to this office the specific civil, criminal, or regulatory law that is alleged to have been violated. *See* Gov't Code § 552.301(e)(1)(A). You indicate that the remaining information at issue contains identifying information of employees who reported a teacher's possible violations of various provisions of the Penal Code and chapter 247 of title 19 of the Texas Administrative Code. We agree that the district may withhold from disclosure the identities of the employees who have alleged these violations, unless the informers consent to the release of this information. We have marked the information that the district may withhold pursuant to section 552.135.

Finally, we note that some of the remaining information is excepted under section 552.137 of the Government Code. Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). Section 552.137 does not apply to a government employee's work e-mail address because such an address is not that of the employee as a "member of the public," but is instead the address of the individual as a government employee. The e-mail address at issue does not appear to be of a type specifically excluded by section 552.137(c). You do not inform us that a member of the public has affirmatively consented to the release of the e-mail address contained in the submitted materials. Therefore, the district must withhold the e-mail address we have marked under section 552.137.

To conclude, the district must release the arrest warrant and the complaint and supporting affidavit pursuant to article 15.26 of the Code of Criminal Procedure. The district must withhold pursuant to section 552.101 of the Government Code the following: (1) the marked teaching evaluations that are confidential under section 21.355 of the Education Code, (2) under chapter 411 of the Government Code, any CHRI the district obtained from the DPS or any other criminal justice agency in this state; (3) the marked information that is confidential under section 261.201 of the Family Code; and (4) the marked information that is confidential under common law privacy. It must also withhold the information we have marked under section 552.117 of the employee whose records are at issue, as well as the information of other district employees we have marked under that section if those employees timely elected under section 552.024 to keep such information confidential. The

district may withhold the information we have marked under sections 552.103 and 552.135. Finally, the district must withhold the e-mail address we have marked under section 552.137. The district must release the remaining information at issue. As our ruling is dispositive, we do not address your arguments for exception of the information at issue.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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).

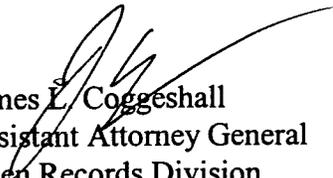
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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,



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Assistant Attorney General
Open Records Division

JLC/seg

Ref: ID# 220845

Enc. Submitted documents

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(w/o enclosures)