



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 13, 2005

Mr. Andrew Borrego  
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P.O. Box 200  
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OR2005-09311

Dear Mr. Borrego:

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# 234188.

The San Antonio Independent School District (the "school district"), which you represent, received a request for information pertaining to a named former school district employee. You claim that the requested information is excepted from disclosure under sections 552.026, 552.101, 552.102, 552.103, 552.107, 552.111, 552.114, 552.117, and 552.135 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that a portion of the submitted information is made expressly public under section 552.022 of the Government Code. Section 552.022 provides, in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are

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<sup>1</sup>We note that the school district failed to raise section 552.102 within the ten-business day deadline mandated by section 552.301(b) of the Government Code. See Gov't Code § 552.301(b). However, because section 552.102 is a mandatory exception that can provide a compelling reason to withhold information, we will consider your arguments under this exception. See Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302).

public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

....

(16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege:

Gov't Code § 552.022(a)(16). Thus, information contained in a governmental body's attorney fee bills must be released under section 552.022(a)(16), unless the information is expressly confidential under other law. You claim that portions of the attorney fee bills that you submitted as Exhibit L are confidential under rule 503 of the Texas Rule of Evidence. The Texas Supreme Court has held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will consider your arguments under rule 503.

Rule 503 provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

- (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
- (B) between the lawyer and the lawyer's representative;
- (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
- (D) between representatives of the client or between the client and a representative of the client; or
- (E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5). Thus, in order to withhold attorney-client privileged

information from disclosure under rule 503, a governmental body must: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You state that the marked portions of the submitted attorney fee bills reveal or reflect confidential information communicated between school district employees and school district attorneys. You have also identified several principal parties to the communications. Based on your representations and our review, we agree that some of the information you have marked is protected by the attorney-client privilege and is therefore excepted from disclosure pursuant to rule 503 of the Texas Rules of Evidence. We have marked the information in the fee bills that may be withheld under rule 503. The remaining information you have marked in Exhibit L, however, does not reveal confidential attorney-client communications, or pertains to communications involving parties with whom you have not identified as being in a privileged relationship with the district or its representatives. We therefore find the remaining information you have marked is not protected by the attorney-client privilege and may not be withheld under rule 503.

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 encompasses information made confidential by other statutes. Gov’t Code § 552.101. Section 552.101 encompasses the Family Educational Rights and Privacy Act of 1974 (“FERPA”), section 1232g of title 20 of the United States Code. 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); *see also* 34 C.F.R. § 99.3 (defining personally identifiable information). Section 552.026 of the Government Code incorporates FERPA into the Act. *See* Open Records Decision No. 634 at 6-8 (1995). Section 552.026 provides as follows:

This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

Gov't Code § 552.026. "Education records" under FERPA are those records that contain information directly related to a student and that are maintained by an educational agency or institution or by a person acting for such agency or institution. *See* 20 U.S.C. § 1232g(a)(4)(A). Information must be withheld 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).

Section 552.114(a) of the Government Code excepts from disclosure "information in a student record at an educational institution funded wholly or partly by state revenue." This office generally has treated "student record" information under section 552.114(a) as the equivalent of "education record" information that is protected by FERPA. *See* Open Records Decision No. 634 at 5 (1995).

Under FERPA, a student's parents have an affirmative right of access to their child's education records, although this right does not extend to information in the student's records that identifies other students. *See* 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.3; *see also* 34 C.F.R. § 99.12(a) ("If the education records of a student contain information on more than one student, the parent or eligible student may inspect and review or be informed of only the specific information about that student."). We note that, while you inform us that the requestor is an attorney who represents a parent of one of the students to whom the submitted information pertains, you do not assert, and the request itself does not reflect, that the requestor is seeking the submitted records on behalf of her client. Accordingly, if the requestor is seeking the submitted information on behalf of the parent at issue, the requestor has an affirmative right of access to the education records of her client's child under FERPA. We note that section 552.101 is a state statute that is preempted by federal law to the extent it conflicts with that federal law. *See, e.g., Equal Employment Opportunity Comm'n v. City of Orange*, 905 F. Supp 381, 382 (E.D. Tex. 1995). Thus, to the extent the requestor has an affirmative right of access to the information at issue, such information may not be withheld from the requestor under section 552.101. We conclude that, if the requestor is seeking the submitted information on behalf of the parent at issue, the school district must release the education records of that parent's child to the requestor upon receipt of a proper written consent as required by section 1232g(b)(2). *See* 20 U.S.C. § 1232g(b)(2) (prescribing elements of proper written authorization by student's parent or legal guardian).

You claim that the information submitted as Exhibit E is excepted from disclosure pursuant to section 552.101 in conjunction with section 21.355 of the Education Code. Section 21.355 provides that "[a] document evaluating the performance of a teacher or administrator is confidential." Educ. Code § 21.355. 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.* 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. *See id.* We note that section 21.352(c) specifically provides that “[e]ach teacher is entitled to receive a written copy of the evaluation on its completion.” It is well established that statutes governing access to a specific subset of information held by a governmental body prevail over the generally applicable provisions of the Act. *See, e.g.,* Open Records Decision No. 478 at 2-3 (1987) (Act does not govern special rights of access granted under other statutes).

You inform us that the individual who is the subject of the Exhibit E held a certificate or permit required under chapter 21 and was teaching or performing the duties of an administrator at the time of her evaluations. Thus, we find that the documents submitted as Exhibit E constitute evaluations, as that term is commonly understood, of this teacher. Therefore to the extent the requestor has a right of access under section 21.352(c), Exhibit E must be released. However, if the requestor does not have a right of access under section 21.352(c), Exhibit E is excepted from disclosure pursuant to section 552.101 in conjunction with section 21.355 of the Education 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 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 school 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 school 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 school 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 school 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 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. Open Records Decision Nos. 349 (1982), 320 (1982). We note that, while some of this information appears to have been previously made available to or otherwise seen by the opposing party, the opposing party only had access to this information in the usual scope of her employment with the school district. Such information, which we have marked, is not considered to have been obtained by the opposing parties to the litigation and may therefore still be withheld under section 552.103. However, there is no section 552.103 interest in withholding the remaining information to which the requestor has had access. Therefore, the remaining submitted information that the opposing party has already seen or to which the opposing party has already had access is not excepted under section 552.103.<sup>2</sup>

Section 552.102(b) of the Government Code excepts from disclosure "a transcript from an institution of higher education maintained in the personnel file of a professional public school employee." Gov't Code § 552.102(b). This section further provides, however, that "the degree obtained or the curriculum on a transcript in the personnel file of the employee"

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<sup>2</sup>We 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).

are not excepted from disclosure. Therefore, except for the information that reveals the degree obtained and the courses taken, the school district must withhold the college transcripts under section 552.102(b).

Section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses, home 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. *See* Gov't Code § 552.117(a)(1). 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). Thus, the school district may only withhold information under section 552.117(a)(1) on behalf of current or former officials or employees who made requests for confidentiality under section 552.024 prior to the date on which the request for this information was made. You do not indicate, however, whether the employees at issue made timely elections to keep their home addresses, home telephone numbers, social security numbers, and family member information confidential. If these employees elected prior to the receipt of this request to keep the information we have marked confidential, the school district must withhold this information pursuant to section 552.117(a)(1).

Even if the employees did not elect to withhold their social security numbers under section 552.024, these social security numbers are confidential under section 552.147 of the Government Code.<sup>3</sup> Section 552.147 provides that “[t]he social security number of a living person is excepted from” required public disclosure under the Act. Therefore, the school district must withhold the social security numbers contained in the submitted information under section 552.147.<sup>4</sup>

The remaining information includes e-mail addresses that are excepted from disclosure 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). The e-mail addresses at issue does not appear to be of a type specifically excluded by section 552.137(c). You do not inform us that any relevant member of the public has affirmatively consented to the release of any of the e-mail addresses at issue. The school district must, therefore, withhold the e-mail addresses we have marked

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<sup>3</sup>Added by Act of May 23, 2005, 79th Leg., R.S., S.B. 1485, § 1, sec. 552.147(a) (to be codified at Tex. Gov't Code § 552.147).

<sup>4</sup>We note that section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

under section 552.137 of the Government Code. As our ruling on this issue is dispositive, we need not address your remaining arguments.

Finally, we note that, while you inform us that the requestor is the attorney representing the former school district employee in pending litigation, you do not assert, and the request itself does not reflect, that the requestor is seeking the submitted records on behalf of her client. Section 552.023 of the Government Code provides a person or a person's authorized representative with a 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. Accordingly, if the requestor is seeking the submitted information on behalf of the individual at issue, pursuant to section 552.023 of the Government Code, the requestor has a special right of access to the submitted information pertaining to her client otherwise excepted under sections 552.117(a)(1) and 552.147 of the Government Code.

In summary, the portions of Exhibit L that we have marked are confidential under rule 503 of the Texas Rules of Evidence. The student-identifying information that you have marked must be withheld pursuant to section 552.101 of the Government Code in conjunction with FERPA. However, to the extent the requestor has a right of access under FERPA, the school district must allow the requestor to inspect and review or be informed of information pertaining to her client's child in the submitted education records. The teacher evaluations submitted as Exhibit E must be withheld under section 552.101 in conjunction with section 21.355 of the Education Code unless the requestor has a right of access under section 21.352(c) of the Education Code. Except for information to which the opposing party in the pending litigation has had access outside of the usual scope of her employment with the school district, the submitted information that you have marked may be withheld under section 552.103 of the Government Code. Except for information that reveals the degree obtained and the courses taken, the school district must withhold the college transcripts under section 552.102(b). The school district must withhold the information it has marked and the additional information we have marked under sections 552.117(a)(1), 552.137, and 552.147 of the Government Code. However, if the requestor is seeking the submitted information on behalf of the former school district employee at issue, pursuant to section 552.023 of the Government Code, the requestor has a special right of access to her client's information otherwise excepted from disclosure under sections 552.117(a)(1) and 552.147. The remaining information must be released 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, 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); *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 Office of the Attorney General 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,



L. Joseph James  
Assistant Attorney General  
Open Records Division

LJJ/seg

Ref: ID# 234188

Enc. Submitted documents

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(w/o enclosures)