



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 23, 2009

Mr. J. Erik Nichols  
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5718 Westheimer Road, Suite 1200  
Houston, Texas 77057

OR2009-02353

Dear Mr. Nichols:

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# 335517.

The Alief Independent School District (the "district"), which you represent, received three requests for six categories of information related to a recent election, including (1) e-mails from four named individuals to principals and department directors for a specified time period; (2) specified video recordings; (3) a list of voters; and (4) a list of high school students aged eighteen and above. You state, and provided documentation showing, that one of the requestors withdrew his request. You state that the district sought and received clarification from the remaining two requestors regarding their requests, and that each withdrew the portions of his request related to video recordings. *See* Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used). You state that the district has redacted or withheld some of the responsive information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.<sup>1</sup> You assert that a portion of the requested information, which you have redacted, consists of records that are not subject to the Act. You claim that the

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<sup>1</sup>The United States Department of Education Family Compliance Office has informed this office that FERPA does not permit state and local educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable information contained in education records for the purposes of review in the open records ruling process under the Act. Because our office is prohibited from reviewing education records to determine whether appropriate redactions under FERPA have been made, we will not address the applicability of FERPA to any of the submitted information. *See* Gov't Code §§ 552.026 (incorporating FERPA into the Act), .114 (excepting from disclosure "student records"); Open Records Decision No. 539 (1990) (determining the same analysis applies under section 552.114 of the Government Code and FERPA). Such determinations under FERPA must be made by the educational authority in possession of the education record.

submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.104, 552.108, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by one of the requestors. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

You assert that the submitted information is excepted under section 552.103 of the Government Code, which provides in part 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.

*Id.* § 552.103(a), (c). The governmental body 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 for information 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 governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* 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.<sup>2</sup> 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). Based on your representations and our review of the submitted documents, we conclude you have not established that litigation was reasonably anticipated when the district received the request for information. Therefore, the district may not withhold the submitted information under section 552.103.

The district raises section 552.101 of the Government Code in conjunction with the Americans with Disabilities Act (the “ADA”). Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision[.]” and encompasses information that other statutes make confidential. Gov’t Code § 552.101. The ADA provides for the confidentiality of certain medical records of employees and applicants. Specifically, the ADA provides that information about the medical conditions and medical histories of applicants or employees must be (1) collected and maintained on separate forms, (2) kept in separate medical files, and (3) treated as a confidential medical record. In addition, an employer’s medical examination or inquiry into the ability of an employee to perform job-related functions is to be treated as a confidential medical record. 29 C.F.R. § 1630.14(c); *see also* Open Records Decision No. 641 (1996). The EEOC determined medical information for the purposes of the ADA includes “specific information about an individual’s disability and related functional limitations, as well as, general statements that an individual has a disability or that an ADA reasonable accommodation has been provided for a particular individual.” *See* Letter from Ellen J. Vargyas, Legal Counsel, EEOC, to Barry Kearney, Associate General Counsel, National Labor Relations Board, 3 (Oct. 1, 1997). Federal regulations define “disability” for the purposes of the ADA as “(1) a physical or mental impairment that substantially limits one or more of the major life activities of the individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment.” 29 C.F.R. § 1630.2(g). The regulations further provide that physical or mental impairment means: (1) any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or (2) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. *See id.* § 1630.2(h). You assert that documents 157, 185-193, 200, and 212 of

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<sup>2</sup>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 (the “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).

Exhibit F are confidential pursuant to the ADA. Upon review of your arguments, we find the district has failed to demonstrate the ADA is applicable to any portion of the information at issue, and none of the submitted information may be withheld under section 552.101 on that basis.

The district seeks to withhold the marked information in documents 7, 99-100, 139-142, 157, 185-193, 200, and 212 of Exhibit F under section 552.101 of the Government Code in conjunction with common-law privacy. Section 552.101 also encompasses common-law privacy. Common-law privacy protects information that (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. The types 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 certain kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987), 455 (1987) (information pertaining to prescription drugs, specific illnesses, operations and procedures, and physical disabilities protected from disclosure).

The common-law right to privacy is a personal right that lapses at death, and therefore it does not encompass information that relates to a deceased individual. *See Moore v. Charles B. Pierce Film Enterprises Inc.*, 589 S.W.2d 489 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.); *see also* Attorney General Opinions JM-229 (1984); H-917 (1976). In this instance, most of the information you seek to withhold under common-law privacy pertains to a deceased individual. Further, we note that some of the information at issue consists of employment information that is of legitimate public interest. *See* Open Records Decision Nos. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs, but in fact touches on matters of legitimate public concern), 470 at 4, 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of governmental employees); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). We also note the fact that a public employee is sick is public information, but specific information about illnesses is excepted from disclosure. *See* ORD 470 at 4.

Upon review, we agree some of the information at issue is protected by common-law privacy. Thus, the district must withhold the information we have marked under section 552.101 on that basis. However, we find that the remaining information you claim is private does not contain information that is highly intimate or embarrassing and of no legitimate concern to the public. Accordingly, you may not withhold any portion of the remaining information under section 552.101 in conjunction with common-law privacy.

You also assert that document 7 of Exhibit F is excepted from disclosure pursuant to section 552.102 of the Government Code. Section 552.102(a) excepts from disclosure “[i]nformation 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 is applicable only to information contained in the personnel file of an employee of a governmental body. *See Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.--Austin 1983, writ ref’d n.r.e.); *see also* Open Records Decision Nos. 473 at 3 (1987), 444 at 3-4 (1986), 423 at 2 (1984). You have failed to demonstrate that the information at issue is maintained in the personnel file of a governmental employee. Therefore, we conclude that section 552.102 is inapplicable to document 7 of Exhibit F and it may not be withheld on that basis.

The district raises section 552.104 of the Government Code, which excepts from required public disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104. This exception protects a governmental body’s interests in connection with competitive bidding and in certain other competitive situations. *See* Open Records Decision No. 593 (1991) (construing statutory predecessor). This office has held that a governmental body may seek protection as a competitor in the marketplace under section 552.104 and avail itself of the “competitive advantage” aspect of this exception if it can satisfy two criteria. *See id.* First, the governmental body must demonstrate that it has specific marketplace interests. *See id.* at 3. Second, the governmental body must demonstrate a specific threat of actual or potential harm to its interests in a particular competitive situation. *See id.* at 5. Thus, the question of whether the release of particular information will harm a governmental body’s legitimate interests as a competitor in a marketplace depends on the sufficiency of the governmental body’s demonstration of the prospect of specific harm to its marketplace interests in a particular competitive situation. *See id.* at 10. A general allegation of a remote possibility of harm is not sufficient. *See* Open Records Decision No. 514 at 2 (1988).

You state that release of documents 6, 13, and 87 of Exhibit F would create potential harm to the district’s interests in the marketplace and give an advantage to competitors in the industry. Upon review of your arguments and the information at issue, we conclude the district has failed to demonstrate that release of these three documents would cause a specific threat of actual or potential harm to its interests in a particular competitive situation. Accordingly, the district may not withhold documents 6, 13, or 87 of Exhibit F under section 552.104 of the Government Code.

Next, you assert that documents 1-4, 14-19, and 158-159 of Exhibit F are excepted from public disclosure under section 552.108 of the Government Code. Section 552.108 excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). A governmental body that claims information is excepted from disclosure

under section 552.108 must reasonably explain how and why section 552.108 is applicable to the information. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986).

A school district is not a law enforcement agency. By its terms, section 552.108 applies only to a law enforcement agency or a prosecutor. This office has determined, however, that where an incident involving alleged criminal conduct is still under active investigation or prosecution, section 552.108 may be invoked by any proper custodian of information that relates to the incident. *See* Open Records Decision Nos. 474 (1987), 372 (1983) (where incident involving allegedly criminal conduct is still under active investigation or prosecution, section 552.108 may be invoked by any proper custodian of information relating to incident). Where a non-law enforcement agency has custody of information relating to a pending case of a law enforcement agency, the agency having custody of the information may withhold the information under section 552.108 if the agency demonstrates that the information relates to the pending case and provides this office with a representation from the law enforcement entity that the law enforcement entity wishes to withhold the information. In this instance, the district has not provided our office with any representation to indicate that a law enforcement agency wishes to withhold the information at issue. Therefore, the district may not withhold documents 1-4, 14-19, and 158-159 of Exhibit F under section 552.108(a)(1) of the Government Code.

Section 552.117(a)(1) of the Government Code 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 request that this information be kept confidential under section 552.024. Gov't Code § 552.117. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is received. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the district may only withhold information under section 552.117 on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was received. You state that the employee whose information is at issue made a request for confidentiality under section 552.024. However, we are unable to determine if this employee made the request under section 552.024 prior to the date on which the request for this information was received. Accordingly, if the employee whose information is at issue timely elected to keep her personal information confidential, the district must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The district may not withhold this information under section 552.117(a)(1) if the employee did not make a timely election to keep the information confidential.

Finally, we address the claims of the district under section 552.137 of the Government Code. Section 552.137 makes certain e-mail addresses confidential and provides as follows:

(a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

(c) Subsection (a) does not apply to an e-mail address:

(1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Gov't Code § 552.137. Section 552.137 does not apply to a government employee's work e-mail address or a business's general e-mail address or web address. Most of the e-mail addresses at issue are not of a type specifically excluded by section 552.137(c). You inform us that the individuals to whom these e-mail addresses belong have not affirmatively consented to their public disclosure. Upon review, we agree that some of the information you have marked must be withheld under section 552.137. We have marked some additional e-mail addresses that the district must withhold under section 552.137. However, the remaining information that you have marked is not protected under section 552.137, and the district may not withhold it on that basis. We have marked the information that must be released.

In summary, the district must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. If the employee whose information is at issue timely elected to keep her personal information confidential, the district must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The district may not withhold this information under section 552.117(a)(1) if the employee did not make a timely election to keep the information confidential. Except for the information we have marked for release, the district must withhold the e-mail addresses you have marked, and the additional e-mail addresses that we have marked, in accordance with section 552.137 of the Government Code. The remaining submitted information must be released to the requestor.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/jb

Ref: ID# 335517

Enc. Submitted documents

c: 3 Requestors  
(w/o enclosures)