



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 25, 2009

Mr. Tony Resendez
Walsh, Anderson, Brown, Shulze & Aldridge, P.C.
P.O. Box 460606
San Antonio, Texas 78246

OR2009-03873

Dear Mr. Resendez:

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# 338166.

The Brownsville Independent School District (the "district"), which you represent, received a request for a report that was submitted to the board of trustees regarding a named district employee from the internal auditing department and the administration board agenda for a specified date. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.116 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note you have not submitted any information responsive to the request for the administration board agenda. Therefore, to the extent this information existed when the present request was received, we assume it has been released. If such information has not been released, then it must be released at this time. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

You claim that the submitted information is excepted from disclosure under section 552.103 of the Government Code, which provides in relevant 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.

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 on the date the governmental body received the request, 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 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982).

In this instance, you state that the district reasonably anticipates litigation because the employee at issue has retained counsel and filed a grievance against the district, and because the grievance alleges harassment, retaliation, and a hostile working environment. However, you have not demonstrated that, at the time of the request, the employee at issue had taken concrete steps towards litigation. *See* Open Records Decision No. 361 (1983). Furthermore, you have not explained how the grievance process is considered to be litigation for the purposes of section 552.103. *See* Open Records Decision No. 588 (1991) (discussing factors

used by attorney general in determining whether administrative proceeding not subject to Administrative Procedure Act may be considered to be litigation); *see also* Gov't Code § 552.301(e)(1) (requiring governmental body to explain applicability of raised exception). Thus, we find that you have failed to establish that the district reasonably anticipated litigation when it received the request for information. Accordingly, we conclude that none of the submitted information may be withheld under section 552.103.

Next, you raise section 552.116 of the Government Code for the submitted information, which provides:

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, a school district, or a joint board operating under Section 22.074, Transportation Code, including any audit relating to the criminal history background check of a public school employee, is excepted from the requirements of Section 552.021. If information in an audit working paper is also maintained in another record, that other record is not excepted from the requirements of Section 552.021 by this section.

(b) In this section:

(1) "Audit" means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, a resolution or other action of a board of trustees of a school district, including an audit by the district relating to the criminal history background check of a public school employee, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.

(2) "Audit working paper" includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116. You state that the submitted information consists of audit working papers pertaining to an audit that has not been completed. However, for the purposes of section 552.116, a school district must establish that an audit is authorized or required by a resolution or other action of a board of trustees of a school district. *Id.* § 552.116(b)(1).

Beyond a general statement that the information pertains to an audit of the district, you have provided no arguments demonstrating that the audit at issue was authorized or required by a resolution or other action of the district's board of trustees. Thus, we conclude that you have failed to establish that section 552.116 is applicable to the submitted information, and none of it may be withheld under this exception.

Section 552.101 excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. Section 552.101 encompasses information that other statutes make confidential. You assert that the submitted information contains documents that are excepted from disclosure under section 552.101 in conjunction with 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 or an administrator. *See* Open Records Decision No. 643 (1996). We have determined that the word "administrator" in section 21.355 means a person who is required to and does in fact hold an administrator's certificate under chapter 21 of the Education Code and is performing the functions of an administrator, as that term is commonly defined, at the time of the evaluation. *Id.*

The submitted information consists of investigation documents relating to alleged wrongdoing by the employee at issue. Upon review, we find you have not explained, nor do the documents reflect, that the submitted internal investigation reports are evaluations of an administrator. Thus, you may not withhold any portion of the submitted information under section 552.101 in conjunction with section 21.355 of the Education Code.

You also claim that the submitted information is excepted from disclosure under the doctrine of common-law privacy. Section 552.101 of the Government Code also encompasses the common-law right of privacy, which protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (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. Generally, however, the public has a legitimate interest in information that relates to public employment and public employees, and information that pertains to an employee's actions as a public servant generally cannot be considered beyond the realm of legitimate public interest. *See* Open Records Decisions 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); 542 (1990); 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees); 444 at 5-6 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation

of public employees); 423 at 2 (1984) (scope of public employee privacy is narrow). The submitted information pertains to public employees and their conduct within the workplace. Upon review, we find that although portions of the submitted information are highly intimate or embarrassing, this information is of legitimate public interest. Therefore, none of the submitted information may be withheld under section 552.101 on the basis of common-law privacy.

We note that some of the submitted information may be excepted from disclosure under section 552.117 of the Government Code.¹ Section 552.117(a)(1) excepts from disclosure the current and former 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 of the Government Code. Gov't Code § 552.117(a)(1). Whether information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). You have not indicated whether the employee whose information we have marked in the submitted information has timely elected to keep his information confidential. The district may only withhold information under section 552.117(a)(1) on behalf of current or former employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Accordingly, if the employee at issue timely elected to keep his personal information confidential, the district must withhold the information we have marked under section 552.117(a)(1) of the Government Code. If the employee did not make such an election, the information may not be withheld under section 552.117(a)(1) of the Government Code.

In summary, if the employee at issue timely elected to keep his personal information confidential, the district must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The remaining information must be released to the requestor.

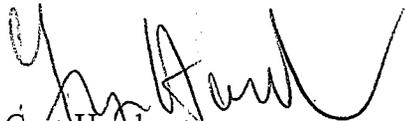
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

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, 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

¹The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,

A handwritten signature in black ink, appearing to read "Greg Henderson", written over the typed name.

Greg Henderson
Assistant Attorney General
Open Records Division

GH/jb

Ref: ID#338166

Enc. Submitted documents

c: Requestor
(w/o enclosures)