



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 29, 2009

Mr. Christopher B. Gilbert  
Thompson & Horton LLP  
Attorneys for Katy Independent School District  
711 Louisiana Street, Suite 2100  
Houston, Texas 77002-2746

OR2009-15430

Dear Mr. Gilbert:

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# 359852.

The Katy Independent School District (the "district"), which you represent, received a request for all information related to the decision to place three specified employees on administrative leave. You claim the submitted letters and employee information sheets are excepted from disclosure under sections 552.102, 552.103, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You claim the submitted information is excepted from disclosure under section 552.103 of the Government Code, which provides:

- (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). A governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

To demonstrate 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. Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim litigation is reasonably anticipated may include, for example, the governmental body's receipt of a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. See ORD 452 at 4.

This office has long held that for purposes of section 552.103, "litigation" includes "contested cases" conducted in a quasi-judicial forum. See Open Records Decision Nos. 474 (1987), 368 (1983), 336 (1982), 301 (1982). In determining whether an administrative proceeding is conducted in a quasi-judicial forum, this office has focused on the following factors: (1) whether the dispute is, for all practical purposes, litigated in an administrative proceeding where (a) discovery takes place, (b) evidence is heard, (c) factual questions are resolved, and (d) a record is made; and (2) whether the proceeding is an adjudicative forum of first jurisdiction, *i.e.*, whether judicial review of the proceeding in district court is an appellate review and not the forum for resolving a controversy on the basis of evidence. See Open Records Decision No. 588 (1991).

You inform us that, prior to the receipt of the present request, the specified employees were put on administrative leave by the district, and the district's board of trustees (the "board") voted to approve the termination of these employees' term contracts. You state these employees are "eligible to request . . . formal due process appeal [hearings] from the Texas Education Agency under Chapter 21 of the Texas Education Code" to appeal the board's decision to terminate their contracts. You further inform us that two of the employees'

attorneys have “announced their intent to seek . . . Chapter 21 hearing[s] regarding their clients’ proposed terminations.”

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 a teacher the right to be represented by a representative of the teacher’s choice; the right to hear the evidence on which the charges are based; the right to cross-examine each adverse witness; and the right to present evidence. *See id.* § 21.256(c). Section 21.256(d) provides the Texas Rules of Evidence apply at the hearing. *See id.* § 21.256(d). 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 commissioner of education 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), .301(c) (appeal based solely on local record), .307(e) (substantial evidence rule for judicial review). Having considered your arguments, we find that, when the district received the request for information, litigation in the form of hearings under chapter 21 of the Education Code was reasonably anticipated for the two employees who announced their intent to seek hearings. *See* ORD 301 (litigation includes contested case before administrative agency). Further, you indicate the submitted information relates to the anticipated litigation because the information pertains to the subject that is the basis of the litigation. Based on your representations and our review, we find the submitted letters and employee information sheets are related to the anticipated litigation.

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). Thus, information that has either been obtained from or provided to the opposing party in the litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. In this instance, the two employees with whom litigation is anticipated have already seen the submitted letters informing them they were being put on administrative leave. Therefore, because the opposing party in each of the anticipated appeals has seen these letters, the letters may not be withheld under section 552.103 of the Government Code. However, the remaining letter and submitted employee information sheets, which we have marked, may be withheld under section 552.103 of the Government Code.<sup>1</sup>

You claim the employees’ home addresses in the remaining letters are confidential under sections 552.102 and 552.117 of the Government Code. Section 552.102(a) of the Government Code excepts from disclosure “information in a personnel file, the disclosure

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<sup>1</sup>As our ruling is dispositive for this information, we need not address your remaining arguments against disclosure for portions of this information.

of which would constitute a clearly unwarranted invasion of personal privacy.” Gov’t Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, the court ruled the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Act. See *Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546, 550 (Tex. App.—Austin 1983, writ ref’d n.r.e.) (citing *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976)). 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. 540 S.W.2d 668 at 685. Although you seek to withhold the employees’ home addresses under section 552.102(a), this office has determined that an individual’s name, home address, and telephone number are generally not private information. See Open Records Decision No. 554 at 3 (1990) (disclosure of person’s home address and telephone number is not an invasion of privacy), 455 at 7 (1987) (home addresses and telephone numbers ordinarily not private). Thus, you have failed to demonstrate the applicability of common-law privacy to the employees’ home addresses in the remaining letters. Consequently, the district may not withhold this information under section 552.102(a) 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 numbers, and family member information of current or former officials or employees of a governmental body who request 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). The 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.

In the remaining letters, you have marked employees’ home addresses that you seek to withhold under section 552.117. You have not informed us, however, that any of the employees whose information is at issue timely chose to not allow public access to their personal information. Therefore, if the employees timely elected to withhold their home addresses, the district must withhold the addresses you have marked pursuant to section 552.117(a)(1) of the Government Code. If the employees did not timely elect to withhold their home addresses, then the district may not withhold the marked addresses under section 552.117(a)(1) of the Government Code.

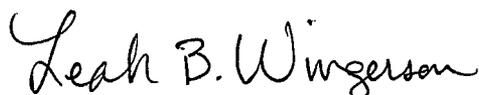
In summary, the district may withhold the marked letter and employee information sheets under section 552.103 of the Government Code. If the employees whose information is at issue timely elected to withhold their home addresses, the district must withhold the marked

addresses in the remaining letters pursuant to section 552.117(a)(1) of the Government Code. The remaining information must be released.

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, toll free, at (888) 672-6787.

Sincerely,



Leah B. Wingerson  
Assistant Attorney General  
Open Records Division

LBW/dls

Ref: ID# 359852

Enc. Submitted documents

c: Requestor  
(w/o enclosures)