



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 2, 2010

Ms. Karla Schultz
Walsh, Anderson, Brown, Aldridge & Gallegos, PC
P.O. Box 2156
Austin, Texas 78768

OR2010-01595

Dear Ms. Schultz:

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# 369094.

The Navasota Independent School District (the "district"), which you represent, received a request for twelve categories of information pertaining to a named district employee and a specified incident. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, we note the district may have previously released some of the information you now seek to withhold. You state on October 26, 2009, the district provided the requestor with all public documents located in the named employee's personnel file, but further disclosures could impact the ongoing investigation. We are unable to determine if the district now seeks to withhold information that was previously released. Section 552.007 of the Government Code provides that if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further

¹We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

disclosure unless its public release is expressly prohibited by law or the information is confidential under law. *See* Gov't Code. § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, the district may not now withhold previously released information unless its release is expressly prohibited by law or the information is confidential under law. You seek to withhold the entirety of the submitted information under sections 552.103 and 552.108 of the Government Code. Sections 552.103 and 552.108 do not prohibit release of information or make information confidential. *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 Gov't Code § 552.103); Open Records Decision No. 177 at 3 (1977) (statutory predecessor to Gov't Code § 552.108 did not prohibit release of information). Thus, to the extent any of the submitted information has previously been voluntarily released to any member of the public, the district may not now withhold such information under section 552.103 or section 552.108 of the Government Code. However, you also claim sections 552.101 and 552.102 for portions of the submitted information. Further, portions of the information are subject to sections 552.117 and 552.137 of the Government Code. Sections 552.101, 552.102, 552.117, and 552.137 prohibit release of information or make information confidential. Thus, to the extent any portion of the submitted information has been previously released, we will address the applicability of sections 552.101, 552.102, 552.117, and 552.137 to the information. We will also consider your arguments under sections 552.103 and 552.108 to the extent the submitted information was not previously released.

Next, we note the submitted information includes minutes of a public district board meeting. Minutes of a governmental body's public meetings are specifically made public under the Open Meetings Act, chapter 551 of the Government Code. *See* Gov't Code § 551.022 (minutes and tape recordings of open meeting are public records and shall be available for public inspection and copying on request to governmental body's chief administrative officer or officer's designee). As a general rule, the exceptions to disclosure found in the Act, such as sections 552.103 and 552.108, do not apply to information other statutes make public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Therefore, the minutes of the public district board meeting, which we have marked, must be released pursuant to section 551.022 of the Government Code.

Next, we note the requested information may contain education records subject to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code. Recently, the United States Department of Education Family Policy Compliance Office (the "DOE") informed this office 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 purpose of our

review in the open records ruling process under the Act.² Because our office is prohibited from reviewing education records, we will not address FERPA with respect to the information other than to note a parent has a right of access to her child's education records. 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.3. We further note the DOE has informed this office if a state law prohibits a school district from providing a student with access to her education records and an opportunity to inspect and review the record, then the state statute conflicts with FERPA, and an educational agency or institution must comply with FERPA if it wishes to continue to receive federal education funds. Letter advisement from Ellen Campbell, Family Compliance Office, U.S. Department of Education to Robert Patterson, Open Records Division, Office of the Texas Attorney General (April 9, 2001). *See Equal Employment Opportunity Comm'n v. City of Orange*, 905 F. Supp 381, 382 (E.D. Tex. 1995); Open Records Decision No. 431 (1985) (FERPA prevails when in conflict with state law). Should the district determine all or portions of the requested information consists of education records, the district must dispose of the information in accordance with FERPA, rather than the Act. However, we will address your claimed exceptions against disclosure of the requested information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information other statutes make confidential. You raise section 552.101 in conjunction with section 551.104 of the Open Meetings Act for the certified agenda of a closed meeting. Section 551.104 provides, in part, "[t]he certified agenda or tape of a closed meeting is available for public inspection and copying only under a court order issued under Subsection (b)(3)." *Id.* §551.104(c). Thus, such information cannot be released to a member of the public in response to an open records request. *See* Attorney General Opinion JM-995 at 5-6 (1988) (public disclosure of certified agenda of closed meeting may be accomplished only under procedures provided in Open Meetings Act). Section 551.146 of the Open Meetings Act makes it a criminal offense to disclose a certified agenda or tape recording of a lawfully closed meeting to a member of the public. *See* Gov't Code § 551.146(a)-(b); *see also* Open Records Decision No. 495 at 4 (1988) (attorney general lacks authority to review certified agendas or tapes of executive sessions to determine whether governmental body may withhold such information under statutory predecessor to Gov't Code § 552.101). You state the information at issue contains a certified agenda of a closed meeting. Based on your representations, we agree the district must withhold the certified agenda of a closed meeting under section 552.101 of the Government Code in conjunction with section 551.104 of the Government Code.³

²A copy of this letter may be found on the attorney general's website, *available at* <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

³We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including a certified agenda of a closed meeting under section 552.101 in conjunction with section 551.104 of the Government Code, without the necessity of requesting an attorney general decision.

Next, we address your argument under section 552.103 of the Government Code with respect to any portion of the remaining information that has not previously been released to the public pursuant to section 552.007 of the Government Code. Section 552.103 provides, in relevant part:

(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 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 was pending or reasonably anticipated on the date that the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex. App.—Austin 2002, no pet.); *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 establish 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"). This office has concluded that a governmental body's receipt of a claim letter that it represents to be in compliance with the notice requirements of the Texas Tort Claims Act (the "TTCA"), chapter 101 of the Civil Practice and Remedies Code, is sufficient to establish that litigation is reasonably anticipated. *See* Open Records Decision No. 638 at 4 (1996). 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. Open Records Decision No. 331 (1982). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. ORD 452 at 4.

You assert the district reasonably anticipated litigation on the date it received the request for information. You state prior to the district's receipt of the request for information, the requestor notified the district he had been retained as legal counsel by the parents of a district student and instructed the district to place a litigation hold on all documents or information that might directly or indirectly relate to the subject matter of the anticipated litigation. You also state on the date the request for information was received, the district received a letter that is in compliance with the notice requirements of the TTCA, notifying the district of a claim against the district. Thus, we find the district reasonably anticipated litigation on the date the request was received. In addition, you state the remainder of the submitted information directly relates to the litigation, in that the litigation centers on the conduct of the named district employee. Based on your representations and our review of the information at issue, we find the remainder of the submitted information is related to the anticipated litigation. We therefore conclude to the extent the remainder of the submitted information has not previously been released to the public, the district may withhold the information under section 552.103 of the Government Code.⁴

However, once information has been obtained by all parties to the anticipated 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 anticipated litigation is not excepted from disclosure under section 552.103(a), and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

To the extent any of the submitted information has been previously released pursuant to section 552.007 of the Government Code, we will address whether any portion of it is confidential under law. Section 552.101 also encompasses section 21.048 of the Education Code, which addresses teacher certification examinations. Section 21.048(c-1) provides as follows:

The results of an examination administered under this section are confidential and are not subject to disclosure under Chapter 552, Government Code, unless:

⁴As our ruling is dispositive with respect to any information that has not previously been released, we need not address your remaining argument against disclosure under section 552.108.

- (1) the disclosure is regarding notification to a parent of the assignment of an uncertified teacher to a classroom as required by Section 21.057; or
- (2) the educator has failed the examination more than five times.

Educ. Code § 21.048(c-1). Portions of the submitted information contain TEXES and TOPT exam results of the educator at issue. We note this information reveals the individual at issue has failed one of the examinations more than five times. Thus, subsection 21.048(c-1)(2) is applicable to a portion of the information at issue. Therefore, the results of that examination are not confidential under section 21.048(c-1). However, we have no indication subsection 21.048(c-1)(1) or (2) applies to the remaining information at issue. Therefore, the district must withhold the information we have marked under section 552.101 in conjunction with section 21.048 of the Education Code.

Section 552.101 of the Government Code also encompasses the common-law right of privacy. Common-law privacy protects information if it (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. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). This office has found personal financial information not relating to a financial transaction between an individual and a governmental body is excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 600 (1992) (public employee's withholding allowance certificate, designation of beneficiary of employee's retirement benefits, direct deposit authorization, and employee's decisions regarding voluntary benefits programs, among others, are protected under common-law privacy), 545 (1990) (deferred compensation information, mortgage payments, assets, bills, and credit history). Upon review of the submitted information, we find a portion of the information, which we have marked, constitutes personal financial information in which there is no legitimate public interest. Thus, we find the marked information is confidential under common-law privacy and must be withheld under section 552.101 of the Government Code.

The submitted information contains college transcripts for the district employee whose information is at issue. Section 552.102 of the Government Code excepts from public 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 exception further provides, however, "the degree obtained or the curriculum on a transcript in the personnel file of the employee" are not excepted from disclosure. *Id.*; *see also* Open Records Decision No. 526 (1989). Thus, with the exception of the employee's name, courses taken, and degree obtained, the district must withhold the college transcripts in Exhibit 17 pursuant to section 552.102(b) of the Government Code.

Section 552.117(a)(1) excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former employee of a governmental body who requests this information be kept confidential under section 552.024. *See* Gov't Code § 552.117(a)(1). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. We note you have redacted the social security number, home address, and home telephone number of a district employee from the submitted documents. *See* Gov't Code § 552.024 (governmental body may redact information under section 552.117 without the necessity of requesting a decision from this office). We have marked additional information that may be subject to section 552.117(a)(1). Therefore, to the extent the employee timely requested confidentiality under section 552.024, the district must withhold the information you have redacted, as well as the additional information we have marked, under section 552.117(a)(1) of the Government Code.

We note the submitted information contains an e-mail address that may be subject to section 552.137 of the Government Code, which 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 id.* § 552.137(a)-(c). Accordingly, the district must withhold the e-mail address we have marked under section 552.137, unless the owner of the e-mail address has affirmatively consented to its release. *See id.* § 552.137(b).⁵

In summary, the minutes of the public district board meeting must be released in accordance with section 551.022 of the Government Code. This ruling does not address the applicability of FERPA to the requested information. Should the district determine that all or portions of the information consists of an "education record" subject to FERPA, the district must dispose of the information in accordance with FERPA, rather than the Act. The certified agenda of a closed meeting is confidential under section 552.101 of the Government Code in conjunction with section 551.104(c) of the Government Code. To the extent the remainder of the submitted information has not previously been released to the public, the district may withhold such information under section 552.103 of the Government Code. To the extent the district has previously released to the public any portion of the remaining submitted information, the district must (1) withhold the information we have marked under

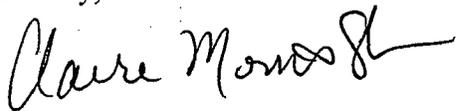
⁵We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

section 552.101 in conjunction with section 21.048 of the Education Code; (2) withhold the college transcript in Exhibit 17 pursuant to section 552.102(b) of the Government Code, with the exception of the employee's name, courses taken, and degree obtained; (3) withhold the marked personal information under section 552.117(a)(1) of the Government Code, to the extent the employee timely requested confidentiality under section 552.024; (4) withhold the marked e-mail address under section 552.137 of the Government Code, unless the owner of the e-mail address has affirmatively consented to its release; and (5) release any remaining information.

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 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,



Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/jb

Ref: ID# 369094

Enc. Submitted documents

c: Requestor
(w/o enclosures)