



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 8, 2010

Ms. Leticia D. McGowan  
School Attorney  
Dallas Independent School District  
3700 Ross Avenue  
Dallas, Texas 75204

OR2010-10093

Dear Ms. McGowan:

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# 385904.

The Dallas Independent School District (the "district") received a request for 27 categories of information pertaining to the requestor, who is a former district employee, and other named district personnel. You state the requestor has received some of the requested information. Additionally, you state the information responsive to Categories 17, 18, 19, 21, 22, 23, and 24 of the request does not exist.<sup>1</sup> You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, and 552.135 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative samples of information.<sup>2</sup>

Initially, we note that the United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g, does not permit state and local educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable

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<sup>1</sup>We note the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

<sup>2</sup>We 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.

information contained in education records for the purpose of our review in the open records ruling process under the Act.<sup>3</sup> Consequently, state and local educational authorities that receive a request for education records from a member of the public under the Act must not submit education records to this office in unredacted form; that is, in a form in which “personally identifiable information” is disclosed. *See* 34 C.F.R. § 99.3 (defining “personally identifiable information”). The submitted information includes unredacted education records. Because our office is prohibited from reviewing these records to determine whether appropriate redactions under FERPA have been made, we will not address the applicability of FERPA to any of the submitted records. Such determinations under FERPA must be made by the educational authority in possession of such records.<sup>4</sup> We will, however, address the applicability of the claimed exceptions to the submitted information.

Next, we note that a portion of the submitted information appears to be the subject of a previous ruling by this office. In Open Records Letter No. 2010-07825 (2010), this office ruled that portions of the information at issue must be withheld under sections 552.101, 552.102, 552.108, 552.117, 552.130, 552.135, 552.136, and 552.137 of the Government Code and rule 503 of the Texas Rules of Evidence. As we have no indication that the law, facts, and circumstances on which this prior ruling was based have changed, the district must continue to rely on Open Records Letter No. 2010-07825 as a previous determination and withhold the information at issue in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). However, to the extent the information in the current request is not encompassed by that previous decision, we will address your arguments for the remaining information.

We note portions of the submitted information are subject to section 552.022 of the Government Code. Section 552.022 provides in part:

- (a) the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

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<sup>3</sup>A copy of this letter may be found on the Office of the Attorney General’s website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

<sup>4</sup>In the future, if the district does obtain parental consent to submit unredacted education records and the district seeks a ruling from this office on the proper redaction of those education records in compliance with FERPA, we will rule accordingly.

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[;]

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(1), (3). You have submitted completed reports, evaluations, investigations, and contracts that are subject to sections 552.022(a)(1) and 552.022(a)(3). Although you raise section 552.103 of the Government Code for this information, section 552.103 is a discretionary exception to disclosure that protects the governmental body's interests and may be waived. *See id.* § 552.007; *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 section 552.103); Open Records Decision No. 665 at 2 n.5 (discretionary exceptions generally), 663 (1999) (governmental body may waive section 552.103). As such, section 552.103 is not other law that makes information confidential for the purposes of section 552.022. Therefore, the district may not withhold the information at issue under section 552.103. However, as sections 552.101, 552.102, and 552.135 are other law for purposes of section 552.022, we will consider the applicability of those exceptions to the submitted information. Additionally, we note portions of the information at issue may be subject to sections 552.117 and 552.137 of the Government Code, which are also other law for purposes of section 552.022; thus, we will consider the applicability of these sections as well. Moreover, we will consider your claim under section 552.103 for the portions of the submitted information not subject to section 552.022.

You raise section 552.101 in conjunction with section 21.355 of the Education Code for a portion of the information subject to section 552.022. 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. Section 552.101 encompasses section 21.355 of the Education Code, which provides that "a document evaluating the performance of a teacher or administrator is confidential." 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). In that decision, we concluded a "teacher" for purposes of section 21.355 means a person who (1) is required to and does in fact hold a certificate or permit required under chapter 21 of the Education Code and (2) is teaching at the time of his or her evaluation. *Id.* We further determined that "teacher interns, teacher trainees, librarians, educational aids and counselors cannot be teachers or administrators for purposes of section 21.355." *See id.* at 5. In Open Records Decision No. 643, this office also concluded that 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. *Id.* at 4. You assert the information at issue evaluates the performance of

teachers who hold the appropriate certificates for the purpose of section 21.355. Thus, to the extent the employees in question were serving as teachers or administrators at the time of the evaluations, we find that the information we have marked is confidential under section 21.355 of the Education Code and must be withheld under section 552.101 of the Government Code. However, you have not demonstrated that any of the remaining information at issue evaluates the performance of a teacher or administrator for purposes of section 21.355; thus none of the remaining information at issue may be withheld on that basis.

You claim portions of the remaining information are excepted under section 552.101 of the Government Code in conjunction with common-law privacy and section 552.102 of the Government Code. 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, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *See id.* at 681-82. Section 552.102(a) of the Government Code excepts from public disclosure "information 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 to information that relates to public officials and employees. *See Open Records Decision No. 327 at 2 (1982)* (anything relating to employee's employment and its terms constitutes information relevant to person's employment relationship and is part of employee's personnel file). The privacy analysis under section 552.102(a) is the same as the common-law privacy standard under section 552.101. *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.) (addressing statutory predecessor). We will therefore consider the applicability of common-law privacy under section 552.101 together with your claim regarding section 552.102.

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. *See Indus. Found.* 540 S.W.2d 668 at 683. This office has found that some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure pursuant to common-law privacy. *See Open Records Decision Nos. 470 (1987)* (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Furthermore, this office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is also excepted from required public disclosure under common-law privacy. *See Open Records Decision Nos. 600 (1992)* (finding personal financial information to include designation of beneficiary of employee's retirement benefits and optional insurance coverage; choice of particular insurance carrier; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group

insurance, health care, or dependent care), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). We note, however, that generally the public has a legitimate interest in information that relates to public employment and public employees. *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 (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 remaining information subject to section 552.022 includes a sexual harassment investigation. In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *Ellen*, 840 S.W.2d at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the public's interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held that "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.*

Thus, if there is an adequate summary of an investigation of sexual harassment, the summary must be released along with the statement of the person accused of sexual harassment, but the identities of the victims and witnesses must be redacted and their detailed statements must be withheld from disclosure. If no adequate summary of the investigation exists, then detailed statements regarding the allegations must be released, but the identities of victims and witnesses must be redacted from the statements. In either event, the identity of the individual accused of sexual harassment is not protected from public disclosure. We note that supervisors are not witnesses for purposes of *Ellen*, and thus supervisors' identities may generally not be withheld under section 552.101 and common-law privacy.

You state, and we agree, that the information at issue includes an adequate summary of the investigation into alleged sexual harassment, as well as a statement by the person accused of sexual harassment. The summary and the statement are not confidential; however, information within these documents identifying the alleged victims and witnesses, which we have marked, is confidential under common-law privacy. Thus, the district must withhold this marked information under section 552.101 of the Government Code in conjunction with common-law privacy and the court's ruling in *Ellen*. Furthermore, we find the additional portion of information we have marked is highly intimate or embarrassing and of no legitimate public interest; thus, the district must withhold this information under section 552.101 in conjunction with common-law privacy. None of the remaining

information, however, is confidential under common-law privacy, and it may not be withheld under section 552.101 or 552.102 on that basis.

Section 552.101 of the Government Code also encompasses section 261.201(a) of the Family Code, which provides in pertinent part:

(a) Except as provided by Section 261.203, the following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

- (1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and
- (2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). You assert some of the remaining information is confidential under section 261.201 of the Family Code because this information was obtained “in order to investigate a child abuse claim.” *See id.* § 261.001(1) (defining “abuse” for purposes of chapter 261 of the Family Code); *see also id.* § 101.003(a) (defining “child” for purposes of this section as person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes). We note the district is not an agency authorized to conduct an investigation under chapter 261 of the Family Code. *See* Fam. Code § 261.103 (listing agencies that may conduct child abuse investigations). However, you state the district has an employee on staff who is shared with the Texas Department of Family and Protective Services (“DFPS”) to receive and investigate child abuse claims. Furthermore, you state the information at issue was obtained by the Dallas Police Department, DFPS, or district police officers, who are commissioned peace officers with the authority to investigate child abuse claims, to investigate such claims. Upon review, we find that none of the incidents in the remaining information meet the definition of alleged or suspected abuse for purposes of chapter 261. *See id.* § 261.001(1). Additionally, although one of the incidents at issue lists a student as the alleged victim, this alleged victim was eighteen years old at the time of the incident. Consequently, the district may not withhold any of the remaining information on the basis of section 261.201 in conjunction with section 552.101 of the Government Code.

Section 552.135 of the Government Code provides the following:

(a) “Informer” means a student or former student or an employee or former employee of a school district who has furnished a report of another person’s

possible violation of criminal, civil, or regulatory law to the school district or the proper regulatory enforcement authority.

(b) An informer's name or information that would substantially reveal the identity of an informer is excepted from [required public disclosure].

(c) Subsection (b) does not apply:

(1) if the informer is a student or former student, and the student or former student, or the legal guardian, or spouse of the student or former student consents to disclosure of the student's or former student's name; or

(2) if the informer is an employee or former employee who consents to disclosure of the employee's or former employee's name; or

(3) if the informer planned, initiated, or participated in the possible violation.

*Id.* § 552.135(a)-(c). Because the legislature limited the protection of section 552.135 to the identity of a person who reports a possible violation of "law," a school district that seeks to withhold information under the exception must clearly identify to this office the specific civil, criminal, or regulatory law that is alleged to have been violated. *See id.* § 552.301(e)(1)(A). You indicate that some of the remaining information reveals the identities of employees and students of the district who reported possible violations of laws by district employees. Based on this representation and our review of the information in question, we conclude the district must withhold the identities of the individuals we have marked under section 552.135 of the Government Code. However, the district has failed to demonstrate how the remaining information reveals the identify of an informer for section 552.135 purposes. Accordingly, none of the remaining information may be withheld on this basis.

We note portions of the remaining information subject to section 552.022 may be subject to sections 552.117 and 552.137 of the Government Code.<sup>5</sup> 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 this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the

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<sup>5</sup>The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

request for it is made. *See* Open Records Decision No. 530 at 5 (1989). We have marked information pertaining to current or former district employees that may be subject to section 552.117. The district must withhold this information under section 552.117(a)(1) if the individuals in question elected confidentiality under section 552.024 prior to the date on which the request for this information was made. However, if the individuals did not make timely elections under section 552.024, the district may not withhold the marked information under section 552.117(a)(1).

Section 552.137 of the Government Code 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). Gov’t Code § 552.137(a)-(c). The e-mail address we have marked in the remaining information is not specifically excluded by section 552.137(c). Accordingly, the district must withhold this e-mail address under section 552.137, unless its owner has affirmatively consented to its release.<sup>6</sup> As you raise no further exceptions to disclosure for the remaining information subject to section 552.022, that information must be released.

You state the remaining information is excepted from disclosure under section 552.103 of the Government Code. Section 552.103 provides in 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). 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

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<sup>6</sup>We 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.

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). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See id.*

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). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See id.* This office has found that a pending EEOC complaint and a pending complaint filed with the Texas Workforce Commission’s Civil Rights Division indicate litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982).

You state, and provide documentation showing, that prior to the district’s receipt of the instant request, the requestor filed an EEOC complaint against the district. Based on your arguments and our review of the submitted information, we find the district reasonably anticipated litigation on the date this request was received. You also state, and we agree, that the remaining information relates to the substance of the discrimination claim at issue. Accordingly, the district may withhold the remaining information under section 552.103 of the Government Code.

We note, however, that once an opposing party in the anticipated litigation has seen or had access to information that is related to litigation, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Moreover, we note the applicability of this exception ends once the litigation has been concluded or is no longer pending. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, this ruling does not address the applicability of FERPA to the submitted information. Determinations under FERPA must be made by the district. To the extent the information at issue is encompassed by Open Records Letter Nos. 2010-07825 (2010), the district must continue to rely on that ruling and withhold the information we have ruled on previously in accordance with that ruling. The district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. The district must withhold the information we have marked under the doctrine of common-law privacy. The district must withhold the information we have marked under section 552.135 of the Government Code. The district must withhold the information we have marked under section 552.117(a)(1) of the Government Code to the extent it pertains to individuals who timely elected confidentiality under section 552.024 of the Government Code. The district must withhold the information we have marked under section 552.137 of the Government Code. The district must release the remaining information that is subject to sections 552.022(a)(1) and 552.022(a)(3) of the

Government Code.<sup>7</sup> The district may withhold the remaining information not subject to section 552.022 under section 552.103 of the Government Code.

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,



James McGuire  
Assistant Attorney General  
Open Records Division

JM/dls

Ref: ID# 385904

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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<sup>7</sup>We note the information being released contains confidential information to which the requestor has a right of access. See Gov't Code § 552.023 (person has special right of access to information that relates to the person and that is protected from disclosure by laws intended to protect person's privacy interests). Thus, if the district receives another request for this particular information from a different requestor, then the district should again seek a decision from this office.