



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

November 15, 2010

Ms. DeAndrea C. Washington  
Thompson & Horton LLP  
For the Humble Independent School District  
711 Louisiana Street, Suite 2100  
Houston, Texas 77002-2746

OR2010-17249

Dear Ms. Washington:

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# 399970.

The Humble Independent School District (the "district"), which you represent, received a request for information indicating when a named employee was employed by the district; all notes, memoranda, statements, or recordings of any conversations with seven named individuals relating to the requestor's client's grievance against the district; all notes, memoranda, statements, or recordings of conversations with a named individual relating to his experience or training to coach cross country running; all notes, memoranda, statements, or recordings of any conversations with a named individual in reference to purchase of goods from a named company; all notes, memoranda, statements, or recordings of any conversations or meetings indicating who entered the final grades for a named student during the 2009-2010 school year; and all notes, memoranda, statements, or recordings of any conversations or meetings indicating who the teachers of record were for the named student during the same time period. You state you have released some information to the requestor. You state you have redacted student-identifying 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 claim the submitted information is excepted from disclosure under

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<sup>1</sup>The United States Department of Education Family Policy Compliance Office (the "DOE") 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 purpose of our review in the open records ruling process under the Act. The DOE has determined that FERPA determinations must be made by the educational authority in possession of the education records. We have posted a copy of the letter from the DOE to this office on the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information, a portion of which consists of a representative sample.<sup>2</sup>

Initially, we note some of the submitted information, which we have marked, is not responsive to the instant request for information because it was created after the date the request was received. This ruling does not address the public availability of non-responsive information, and the district is not required to release non-responsive information in response to this request.

Next, we note you have redacted e-mail addresses within the responsive information under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).<sup>3</sup> Section 552.137 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). We note this exception is not applicable to institutional e-mail addresses or e-mail addresses that a governmental entity maintains for one of its officials or employees. Some of the e-mail addresses you have redacted are either institutional e-mail addresses or are e-mail addresses maintained by a governmental entity. These e-mail addresses may not be withheld under section 552.137. However, you also raise section 552.103 of the Government Code for this information. Therefore, we will address the applicability of this exception to these e-mail addresses, as well as the remaining responsive information.

Next, we note that a portion of the responsive information, which we have marked, is subject to required public disclosure under section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) provides for the required public disclosure of “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]” Gov’t Code § 552.022(a)(1). Some of the responsive information consists of completed evaluations that are subject to section 552.022(a)(1) of the Government Code. Therefore, the district may only withhold this information if it is confidential under “other law.” Although you seek to withhold these completed evaluations under section 552.103 of the Government Code, this section is a discretionary exception to disclosure that protects a 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.) (section 552.103 may be waived); Open Records Decision

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<sup>2</sup>We assume that 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 that those records contain substantially different types of information than that submitted to this office.

<sup>3</sup>We note this office issued Open Records Decision No. 684, 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.

Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 does not make information confidential for the purposes of section 552.022. Consequently, the district may not withhold the completed evaluations under section 552.103 of the Government Code. As no other exceptions to disclosure have been claimed for this information, the completed evaluations must be released.

We now turn to your argument under section 552.103 of the Government Code for the remaining responsive information. Section 552.103 provides 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 governmental body claiming this exception bears the burden of providing relevant facts and documents to demonstrate the applicability of the exception. 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.* This office has stated that a pending complaint with the Equal Employment Opportunity Commission (the "EEOC") indicates 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 this request, the requestor's client filed a charge of discrimination with the EEOC alleging racial discrimination and retaliation by the district. Based on your representations and our review, we conclude the district reasonably anticipated litigation on the date it received the instant

request. Further, we find the remaining responsive information is related to the anticipated litigation. Accordingly, the district may withhold the information in Exhibit E and the information we have marked in Exhibit D under section 552.103 of the Government Code.

We note the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* ORD 551 at 4-5. Thus, if the opposing party has seen or had access to information relating to litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). You state, and provide documentation in Exhibit G showing, the district has provided portions of the remaining information in Exhibit D to the requestor and his client. We note the remaining information in Exhibit D consists of letters or e-mails sent or received by the requestor's client. Because the remaining information in Exhibit D has been seen by the opposing party to the anticipated litigation, the district may not withhold it under section 552.103 of the Government Code. As you raise no further exception to the disclosure of these documents, they must be released. Further, the applicability of section 552.103(a) ends once the litigation has concluded or is no longer anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

In summary, the district may withhold Exhibit E and the information we have marked in Exhibit D under section 552.103 of the Government Code. The remaining responsive 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,



Kate Hartfield  
Assistant Attorney General  
Open Records Division

KH/em

Ref: ID# 399970

Enc. Submitted documents

c: Requestor  
(w/o enclosures)