



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

March 15, 2011

Ms. Ellen H. Spalding  
Rogers, Morris & Grover, L.L.P.  
5718 Westheimer Road, Suite 1200  
Houston, Texas 77507

OR2011-03529

Dear Ms .Spalding:

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# 411362.

The Klein Independent School District (the "district"), which you represent, received a request for forty-two categories of information pertaining to the requestors' child, a specified incident, disciplinary records, and information pertaining to six named district employees and one former district employee. You state that some of the submitted information has been redacted pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.<sup>1</sup> We note you have also redacted social security numbers under section 552.147 of the Government Code.<sup>2</sup> You claim that the requested information is excepted from disclosure under sections 552.101, 552.102,

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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>.

<sup>2</sup>Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. Gov't Code § 552.147(b).

and 552.103 of the Government Code.<sup>3</sup> We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>4</sup> We have also received and considered comments from the requestors and their attorney. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

We note the requestors have asked the district to answer questions. The Act does not require a governmental body to answer factual questions, conduct legal research, or create new information in responding to a request. *See* Open Records Decision Nos. 563 at 8 (1990), 555 at 1-2 (1990). However, a governmental body must make a good faith effort to relate a request to information that existed at the time of the governmental body's receipt of the request and held by the governmental body. *See* Open Records Decision No. 561 at 8 (1990). We assume the district has made a good faith effort to do so.

Next, we note you have not submitted for our review any records regarding the requestors' child. To the extent information responsive to this aspect of the request existed on the date the district received this request, we assume you have released it pursuant to FERPA. *See* 20 U.S.C. § 1232g(a)(1)(A) (providing parents have right of access to own child's education records); 34 C.F.R. § 99.3 (defining "education records"); Open Records Decision No. 431 (1985) (stating information subject to right of access under FERPA may not be withheld pursuant to statutory predecessor to section 552.103 of the Government Code). If you have not released any such information, you must do so at this time. *See* 20 U.S.C. § 1232g(a)(1)(A); Gov't Code §§ 552.301(a), .302; 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).

We also note portions of the submitted information, which we have marked, are not responsive to the instant request because they were created after the date the request was received. The district need not release nonresponsive information in response to this request, and this ruling will not address that information.

Next, we note portions of the responsive information, which we have marked, are subject to section 406.014 of the Government Code. Chapter 406 of the Government Code is

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<sup>3</sup>Although you raise section 552.107 of the Government Code as an exception to disclosure, you have not submitted any arguments regarding the applicability of this exception nor have you identified any information you seek to withhold under this exception. Therefore, we do not address the applicability of section 552.107 to the requested information. *See* Gov't Code §§ 552.301, .302.

<sup>4</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.

applicable to notaries public. *See* Gov't Code § 406.001 *et seq.* Section 406.014 provides in part:

(b) Entries in the notary's book are public information.

(c) A notary public shall, on payment of all fees, provide a certified copy of any record in the notary public's office to any person requesting the copy.

*Id.* § 406.014(b)-(c). The information we have marked is contained in the notary public books of a district employee. This information is expressly made public by section 406.014 of the Government Code. Although you assert this information is excepted under section 552.103 of the Government Code, as a general rule, the exceptions to disclosure found in the Act do not apply to information other statutes make public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Therefore, the district may not withhold the information we have marked under section 552.103. As you raise no other exceptions to disclosure of the marked information, then, pursuant to section 406.014, it must be released.

We next note that some of the submitted information 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 submitted 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 raise section 552.103 of the Government Code, this section is a discretionary exception to disclosure that protects the governmental body's interests and may be waived. *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 section 552.103); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (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 any of the information that is subject to section 552.022 under section 552.103. However, you also claim section 552.101 of the Government Code for this information. Section 552.101 is "other law" for the purposes of section 552.022, and, thus, we will address whether section 552.101 applies to 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. This section encompasses information protected by other statutes. Section 21.355 of the Education Code provides that "[a] document evaluating the performance of a teacher or administrator is confidential." Educ. Code § 21.355. This office has interpreted this section to apply to any document that evaluates, as that term is commonly

understood, the performance of a teacher or administrator. Open Records Decision No. 643 (1996). In Open Records Decision No. 643, we determined that an "administrator" for purposes of section 21.355 means a person who is required to, and does in fact, hold an administrator's certificate under subchapter B of 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. *See id.* at 4. You assert the submitted evaluations, which are subject to section 552.022(a)(1), evaluate the performance of administrators who held the appropriate administrator's certificate at the time of the evaluations. Accordingly, we find these evaluations, which we have marked, are confidential under section 21.355 of the Education Code and must be withheld under section 552.101 of the Government Code.

You claim that the remaining responsive information is excepted in its entirety under section 552.103 of the Government Code. Section 552.103 of the Government Code 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). 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, 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). Whether litigation is reasonably

anticipated must be determined on a case-by-case basis. ORD 452 at 4. 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. ORD 555; *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).

You assert that the district reasonably anticipates litigation will ensue between the district and the requestors. You state, and submit documentation reflecting, that prior to the district's receipt of the instant request, the requestors sent a complaint letter to the Texas Education Agency in which the requestors allege district administrators and teachers subjected their child to "severe intimidation, interrogation, harassment and humiliation[.]" used institutional and professional privilege for personal advantage, violated a code of ethics, made false and slanderous statements, and falsified district records. You further state that, prior to the district's receipt of the instant request, the requestors retained an attorney who sent a demand letter to the district alleging the district violated the requestor's child's due process rights and rights under the Fifth, Eighth, and Fourteenth Amendments of the United States Constitution and also subjected him to false imprisonment. You have submitted these letters for our review. In addition, you represent the requestors' attorney has made multiple oral threats to sue the district for this alleged conduct. Upon review of your arguments and the submitted information, we agree the district reasonably anticipated litigation on the date it received the present request for information. You also assert that the remaining information pertains to the claims that form the basis of the anticipated litigation. Upon review, we agree that the remaining information is related to the anticipated litigation for purposes of section 552.103. Accordingly, we find the remaining information is generally subject to section 552.103.<sup>5</sup>

We note once the information at issue has been obtained by all parties to the anticipated litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to the information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Accordingly, the district may only withhold the remaining information that the opposing parties to the litigation have not seen or had access to under section 552.103 of the Government Code. We note that the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the district must release the information we have marked pursuant to section 406.014 of the Government Code. The district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with

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<sup>5</sup>As our ruling on this information is dispositive, we need not address your remaining arguments against disclosure.

section 21.355 of the Education Code. The district may withhold the remaining responsive information 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,



Jennifer Luttrall  
Assistant Attorney General  
Open Records Division

JL/dls

Ref: ID# 411362

Enc. Submitted documents

c: Requestor  
(w/o enclosures)