



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 6, 2011

Ms. Leanne Lundy  
Rogers, Morris & Grover, LLP  
5718 Westheimer Road, Suite 1200  
Houston, Texas 77057

OR2011-07926

Dear Ms. Lundy:

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# 419952.

The Birdville Independent School District (the "district"), which you represent, received a request for information pertaining to the district's nurse's office, the administration of medications, and a specified incident, as well as specified policies and a named individual's employment file. You state the district is withholding W-4 forms, I-9 forms, copies of Texas driver's licenses, and personal e-mail addresses pursuant to Open Records Decision No. 684 (2009).<sup>1</sup> You further state you will withhold social security numbers under section 552.147 of the Government Code.<sup>2</sup> You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, and 552.103 of the Government Code. We have

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<sup>1</sup>Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including Form I-9 and attachments under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code; W-4 forms under section 552.101 of the Government Code in conjunction with section 6103(a) of chapter 26 of the United States Code; a copy of a Texas driver's license under section 552.130 of the Government Code; and an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

<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. See Gov't Code § 552.147(b).

considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>3</sup>

Initially, you state you have redacted student-identifying information from the submitted documents pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code. The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office FERPA does not permit state and local educational authorities to disclose to this office, without parental or an adult student's consent, unredacted, personally identifiable information contained in education records for the purposes of our review in the open records ruling process under the Act.<sup>4</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"). You have submitted redacted education records for our review. Because our office is prohibited from reviewing these education 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, other than to note parents and their legal representatives have a right of access to their own child's education records and their right of access prevails over a claim under section 552.103 of the Government Code. See 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.3; Open Records Decision No. 431 (1985) (information subject to right of access under FERPA may not be withheld pursuant to statutory predecessor to Gov't Code § 552.103); see also *Equal Employment Opportunity Comm'n v. City of Orange, Tex.*, 905 F. Supp. 381, 382 (E.D. Tex. 1995) (holding FERPA prevails over inconsistent provision of state law). Such determinations under FERPA must be made by the educational authority in possession of the education records.<sup>5</sup> However, we will consider the district's claimed exceptions to the extent the student's parent or the parent's legal representative do not have a right of access to the submitted information under FERPA.

Next, we note you have redacted additional information from the submitted documents. Pursuant to section 552.301 of the Government Code, a governmental body that seeks to withhold requested information must submit to this office a copy of the information, labeled

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<sup>3</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.

<sup>4</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>5</sup>In the future, if the district does obtain parental or an adult student's 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.

to indicate which exceptions apply to which parts of the copy, unless the governmental body has received a previous determination for the information at issue. Gov't Code § 552.301(a), (e)(1)(D). You do not assert, nor does our review of our records indicate, the district has been authorized to withhold the additional redacted information without seeking a ruling from this office. *See id.* § 552.301(a). In this instance, we can discern the nature of the additional redacted information; thus, being deprived of that information does not inhibit our ability to make a ruling. However, in the future, the district must not redact information from the information it submits to this office in seeking an open records ruling, unless the information is the subject of a previous determination under section 552.301 of the Government Code. *See id.* §§ 552.301(e)(1)(D), .302. Failure to comply with section 552.301 may result in the information being presumed public under section 552.302 of the Government Code. *See id.* § 552.302.

Next, we note portions of the submitted information are subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

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

(1) 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). Exhibit C consists of a completed investigation that is subject to section 552.022(a)(1). Further, portions of Exhibit D consist of completed evaluations that are subject to section 552.022(a)(1). The district must release this information pursuant to section 552.022 unless it is excepted from disclosure under section 552.108 of the Government Code or is expressly made confidential under other law. *See id.* You claim Exhibit C is subject to sections 552.101 and 552.103 of the Government Code. Further, you claim the information at issue in Exhibit D is subject to sections 552.102(a) and 552.103 of the Government Code. Section 552.103 is a discretionary exception to disclosure that protects the governmental body's interests and is therefore not "other law" that makes information expressly confidential for purposes of section 552.022(a). *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Consequently, the district may not withhold Exhibit C or the information at issue in Exhibit D under section 552.103 of the Government Code. However, because sections 552.101 and 552.102(a) of the Government Code are other laws for purposes of section 552.022(a)(1), we will consider your argument under section 552.101 for Exhibit C and your argument under section 552.102(a) for the information at issue in Exhibit D. We will also consider your argument under section 552.103 for the remaining information not subject to section 552.022(a)(1).

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. You raise section 552.101 in conjunction with section 21.355 of the Education Code, which provides, "[a] document evaluating the performance of a teacher or administrator is confidential." Educ. Code § 21.355. The Third Court of Appeals has concluded a written reprimand constitutes an evaluation for purposes of section 21.355 because "it reflects the principal's judgment regarding [a teacher's] actions, gives corrective direction, and provides for further review." *Abbott v. North East Indep. Sch. Dist.*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.). 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 administrator. *See* Open Records Decision No. 643 (1996). In Open Records Decision No. 643, we determined for purposes of section 21.355, the word "teacher" means a person who is required to and does in fact hold a teaching certificate under subchapter B of chapter 21 of the Education Code and who is engaged in the process of teaching, as that term is commonly defined, at the time of the evaluation. *See id.* at 4.

You contend Exhibit C consists of confidential evaluations of a substitute teacher by the district. You inform us the individual at issue was certified as a teacher by the State of Texas at the time the evaluations were prepared. However, we note the individual at issue was acting as a substitute nurse at the time the information was created. Thus, the individual was not engaged in the process of teaching, as that term is commonly defined, at the time the information was created. Therefore, we find you have failed to demonstrate how Exhibit C consists of documents evaluating the performance of a teacher for purposes of section 21.355 of the Education Code. Accordingly, you have failed to demonstrate the applicability of section 21.355 of the Education Code to the information at issue, and it may not be withheld under section 552.101 of the Government Code on that basis. As you raise no further exceptions to disclosure for Exhibit C, it must be released.

Section 552.101 of the Government Code also encompasses the Medical Practice Act ("MPA"), subtitle B of title 3 of the Occupations Code, which governs release of medical records. *See* Occ. Code §§ 151.001-165.160. Section 159.002 of the MPA provides, in relevant part:

- (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.
- (b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

*Id.* § 159.002(a)-(c). This office has determined in governing access to a specific subset of information, the MPA prevails over the more general provisions of the Act, such as section 552.103 of the Government Code. *See* Open Records Decision No. 598 (1991). This office has concluded the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Information subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code §§ 159.002, .004; ORD 598. We have further found when a file is created as a result of a hospital stay, all the documents in the file referring to diagnosis and treatment constitute physician-patient communications or “[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician.” Open Records Decision No. 546 (1990).

Upon review, we find portions of Exhibit B constitute records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that were created or are maintained by a physician, and information that was obtained from the patient's medical records. This information, which we have marked, is subject to the MPA. Medical records involving a minor, and information obtained from those medical records, must be released on receipt of the parent's or legal guardian's signed, written consent, provided the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. *See* Occ. Code §§ 159.004, .005. Any subsequent release of medical records must be consistent with the purposes for which the governmental body obtained the records. *See id.* § 159.002(c); Open Records Decision No. 565 at 7(1990). In this instance, as the attorney for the parent of the child whose medical information is at issue, the requestor may have a right of access to the marked information under the MPA. *See* Occ. Code § 159.005(a)(2). Thus, the information we have marked must be withheld under section 552.101 of the Government Code in conjunction with the MPA, unless the district receives written consent for release of those records that complies with sections 159.004 and 159.005 of the MPA.

Section 552.102(a) of the Government Code excepts from 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). Having carefully reviewed the information subject to section 552.022(a)(1) in Exhibit D, we find no portion of the information at issue may be withheld under section 552.102(a) of the Government Code. As you raise no further exceptions to disclosure for the information subject to section 552.022(a)(1) in Exhibit D, it must be released.

Section 552.103 of the Government Code provides in relevant part 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.

*Id.* § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show section 552.103(a) 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. *See 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). *See* ORD 551.

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." *See* 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 letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. *See* Open Records Decision No. 555 (1990); *see also* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). In Open Records Decision No. 638 (1996), this office stated a governmental body has met its burden of showing that litigation is reasonably anticipated when it received a notice of claim letter and the governmental body represents that the notice of claim letter is in compliance with the requirements of the Texas Tort Claims Act ("TTCA"), Civ. Prac. & Rem. Code, ch. 101. If that representation is not made, the receipt of a claim letter is a factor we will consider in determining, from the totality of the circumstances presented, whether the governmental body has established litigation is reasonably anticipated. *Id.*

You state the district reasonably anticipates litigation because an attorney has threatened litigation and started the process of litigation against the district. You inform us the district

received a notice of claim against the district and the named individual, which states it is submitted "pursuant to [section] 22.0513 of the Texas Education Code and pursuant to the [TTCA.]" You do not affirmatively represent to this office the notice of claim complies with the TTCA. We note section 22.0513(a) of the Texas Education Code requires a person to give written notice of a claim, reasonably describing the incident from which the claim arose, not later than the 90th day before the date a person files a suit against a professional employee of a school district. *See* Educ. Code § 22.0513(a). You state this notice of claim is the first step that must be taken in filing a lawsuit against the district and its employees. Thus, you argue the notice of claim and the legal authority cited therein indicate the requestor will file suit against the district and the named individual pertaining to the specified incident. We note the notice of claim at issue was provided to the district in the same correspondence as the instant request for information. Based on your representations, our review, and the totality of the circumstances, we find the district reasonably anticipated litigation on the date the district received the request for information. We further find the submitted information pertains to the substance of the anticipated litigation. Therefore, the district may withhold the remaining information under section 552.103 of the Government Code.<sup>6</sup>

Generally, however, 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. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to all parties to the pending or 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 anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

In summary, the district must release the information in Exhibit C and the information we have marked in Exhibit D pursuant to section 552.022(a)(1) of the Government Code. The medical records we have marked in Exhibit B must be withheld under section 552.101 of the Government Code in conjunction with the MPA, unless the district receives written consent for release of those records that complies with sections 159.004 and 159.005 of the MPA. The district may withhold the remaining information under section 552.103 of the Government Code.<sup>7</sup>

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<sup>6</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure of the remaining information.

<sup>7</sup>We note the information being released in this instance includes information that may be confidential with respect to the general public. *See* Gov't Code § 552.023(b) (governmental body may not deny access to person to whom information relates or person's agent on ground that information is considered confidential by privacy principles); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individuals request information concerning themselves). Therefore, if the district receives another request for this information from a different requestor, the district must again seek a ruling from this office.

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,



Claire V. Morris Sloan  
Assistant Attorney General  
Open Records Division

CVMS/bs

Ref: ID# 419952

Enc. Submitted documents

c: Requestor  
(w/o enclosures)