



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 17, 2011

Mr. Humberto Aguilera  
Escamilla, Poneck & Cruz, LLP  
P.O. Box 200  
San Antonio, Texas 78291-0200

OR2011-11899

Dear Mr. Aguilera:

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# 427366.

The Clint Independent School District (the "district"), which you represent, received a request for information relating to a named employee, including an investigation involving the employee and his campus and district files. You state some of the requested information either has been or will be released. You also state you have redacted some of the submitted information pursuant to the previous determination issued in Open Records Decision No. 684 (2009).<sup>1</sup> You claim the rest of the submitted information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code.<sup>2</sup> We have considered the exceptions you claim and reviewed the information you submitted. We also have considered the comments we received from the requestor.<sup>3</sup>

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<sup>1</sup>Open Records Decision No. 684 is a previous determination issued by this office authorizing all governmental bodies to withhold ten categories of information without the necessity of requesting an attorney general decision. *See* ORD 684 at 14-15.

<sup>2</sup>As you also initially raised sections 552.101 and 552.135 of the Government Code, but have submitted no arguments in support of your assertion of those exceptions, this decision will not address sections 552.101 and 552.135. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must provide written comments stating why claimed exception applies to information at issue).

<sup>3</sup>*See* Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

We initially note the submitted information includes education records. 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”), section 1232g of title 20 of the United States Code, 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.<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”). Although you state the district has redacted information that identifies students from the submitted documents, we note some of the documents at issue contain unredacted student-identifying information. Because this office is prohibited from reviewing an education record for the purpose of determining whether appropriate redactions have been made under FERPA, we will not address the applicability of FERPA to the submitted information. Such determinations under FERPA must be made by the educational authority in possession of the education records.<sup>5</sup> We will consider your exceptions to disclosure under the Act.

We also note some of the submitted information falls within the scope of section 552.022 of the Government Code. Section 552.022(a)(1) provides for required public disclosure of “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body,” unless the information is excepted from disclosure under section 552.108 of the Government Code or expressly confidential under other law. Gov’t Code § 552.022(a)(1). We have marked completed evaluations made by the district that are subject to disclosure under section 552.022(a)(1). Section 552.022(a)(15) provides for required public disclosure of “information regarded as open to the public under an agency’s policies[,]” unless the information is expressly confidential under other law. *Id.* § 552.022(a)(15). Because the district’s personnel policies are published on its website, we find the personnel policy we have marked is regarded as open to the public under the district’s policies and thus is subject to section 552.022(a)(15). Although the district seeks to withhold the information encompassed by section 552.022(a)(1) and (15) under section 552.103 of the Government Code, that 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.) (governmental body may waive Gov’t Code § 552.103); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 is not other law that makes information confidential for purposes of section 552.022(a)(1) or (15). Therefore, the

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<sup>4</sup>A copy of this letter may be found on the attorney general’s website, <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

<sup>5</sup>If in the future the district does obtain parental consent to submit unredacted education records and seeks a ruling from this office on the proper redaction of those education records in compliance with FERPA, we will rule accordingly.

marked evaluations and personnel policy may not be withheld under section 552.103 of the Government Code. As you claim no other exception for the evaluations and personnel policy, they must be released pursuant to section 552.022 of the Government Code.

Next, we address your claim for the remaining information under section 552.103, which 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). A governmental body that claims section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information it seeks to withhold. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1<sup>st</sup> Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

This office has long held that "litigation," for purposes of section 552.103, includes "contested cases" conducted in a quasi-judicial forum. *See Open Records Decision Nos. 474 (1987), 368 (1983), 336 (1982), 301 (1982).* Likewise, "contested cases" conducted under the Texas Administrative Procedure Act, chapter 2001 of the Government Code, constitute "litigation" for purposes of section 552.103. *See Open Records Decision Nos. 588 (1991) (concerning former State Board of Insurance proceeding), 301 (1982) (concerning hearing before Public Utilities Commission).* In determining whether an administrative proceeding is conducted in a quasi-judicial forum, this office has focused on the following factors: (1) whether the dispute is, for all practical purposes, litigated in an administrative proceeding where (a) discovery takes place, (b) evidence is heard, (c) factual questions are resolved, and (d) a record is made; and (2) whether the proceeding is an adjudicative forum of first jurisdiction, *i.e.*, whether judicial review of the proceeding in district court is an

appellate review and not the forum for resolving a controversy on the basis of evidence. *See* ORD 588.

You contend the remaining information at issue is related to a grievance the named employee filed with the district. You explain that under the district's grievance procedures, the grievant may request a hearing before an arbitrator if mediation fails and may appeal the arbitrator's decision to the district's board of trustees (the "board") or the board's designee. You state the grievant is allowed to have representation, present his case, and offer witnesses and other evidence at the hearing before the board. You also state the board hears a response from the district and, acting as the fact finder, is allowed to question the parties and witnesses. You explain a record of the proceeding made by audio or audio/video recording or a court reporter is required. You note that in the event of an appeal from the board's decision to the state commissioner of education, the record of the grievance hearing and the evidence presented to the board are reviewed. *See* Educ. Code § 7.057(c) (in appeal against school district, commissioner shall issue decision based on review of record developed at district level under substantial evidence standard of review). Based on your representations, we find you have demonstrated the district's grievance process is conducted in a quasi-judicial forum and therefore constitutes litigation for purposes of section 552.103 of the Government Code. You state the named employee filed his grievance prior to the district's receipt of the instant request for information. Based on your representations, we find the district was a party to pending litigation on the date of its receipt of the request. We also find the remaining information at issue is related to the pending litigation. We therefore conclude the district may withhold the remaining information under section 552.103 of the Government Code.<sup>6</sup>

In reaching this conclusion with respect to the remaining information, we assume the named employee, as the opposing party in the pending litigation, has not seen or had access to any of the information at issue. 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, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). We note information to which the named employee had access in the usual scope of his employment is not considered to have been obtained by the opposing party to pending litigation and thus may be withheld under section 552.103. We also note the applicability of section 552.103 ends once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the district (1) must release the marked evaluations and personnel policy pursuant to section 552.022 of the Government Code and (2) may withhold the rest of the

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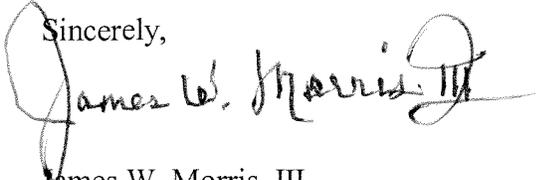
<sup>6</sup>As we are able to make this determination, we need not address your claim under section 552.107 of the Government Code.

submitted information under section 552.103 of the Government Code. This ruling does not address the applicability of FERPA to the submitted information. Should the district determine that all or portions of the submitted information consist of "education records" that must be withheld under FERPA, the district must dispose of that information in accordance with FERPA, rather than the Act.

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,

A handwritten signature in black ink that reads "James W. Morris, III". The signature is written in a cursive style with a large, looping initial "J".

James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/em

Ref: ID# 427366

Enc: Submitted documents

c: Requestor  
(w/o enclosures)