



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 26, 2011

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

OR2011-12398

Dear Ms. McGowen:

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# 428087 (ORR# 10355).

The Dallas Independent School District (the "district") received a request for seven categories of information pertaining to the requestor's client. You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

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 information contained in education records for the purpose of our review in the open records ruling process under the Act.<sup>1</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

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<sup>1</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>.

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>2</sup> We will, however, address the applicability of the claimed exceptions to the submitted information.

Next, we note that some of the submitted information is subject to section 552.022 of the Government Code, which provides in pertinent part:

(a) Without limiting the amount or kind of information that is public information under this chapter, 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:

(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). The submitted information contains completed evaluations made by the district. Pursuant to section 552.022(a)(1) of the Government Code, completed evaluations are expressly public unless they are either excepted under 552.108 of the Government Code or are expressly confidential under other law. Section 552.103 of the Government Code is a discretionary exception that protects a governmental body's interest 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); Open Records Decision No. 552 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential); *see also* 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. Consequently, the completed evaluations may not be withheld under section 552.103 of the Government Code. As you raise no further exceptions for the completed evaluations, this information must be released. We will, however, consider your claims under sections 552.101 and 552.103 for the information not subject to section 552.022.

Section 552.103 of the Government Code 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.

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<sup>2</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.

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(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 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 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. *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). The remaining information relates to the requestor's client, whose termination has been recommended by the district. You state litigation related to the submitted information is pending because the requestor's client has appealed this recommendation and requested the appointment of an independent hearing officer by the Texas Education Agency, to be conducted pursuant to chapter 21 of the Education Code.

Section 21.256 of the Education Code provides that hearings requested under section 21.253 of the Education Code “shall be conducted in the same manner as a trial without a jury in a district court of [Texas].” Educ. Code § 21.256(e). Section 21.256 also specifically affords a teacher the right to be represented by a representative of the teacher's choice; the right to hear the evidence on which the charges are based; the right to cross-examine each adverse witness; and the right to present evidence. *See id.* § 21.256(c). Section 21.256(d) provides that the Texas Rules of Evidence apply at the hearing. *See id.* § 21.256(d). We also note that, in a chapter 21 hearing, the hearing examiner may issue subpoenas for the attendance of witnesses and the production of documents; an appeal of the proceedings to the commissioner of education is based only on the record of the local hearing; and in a judicial appeal of the commissioner's decision, the court must review the evidence pursuant to the substantial evidence rule. *Id.* §§ 21.255(a) (subpoena power of examiner), .301(c) (appeal based solely on local record), .307(e) (substantial evidence rule for judicial review). Therefore, based on the district's representations and our review of the relevant law, we determine a hearing under chapter 21 of the Education Code constitutes litigation for purposes of section 552.103. Consequently, we find that litigation was pending when the district received the request for information. We also find that the information at issue is related to the pending litigation.

However, the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to the litigation to obtain such information through discovery procedures. *See* ORD 551 at 4-5. Thus, when the opposing party has seen or had access to information relating to pending litigation, there is

no interest in withholding that information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). In this instance, some of the remaining information at issue reflects it was obtained from or provided to the requestor's client, who is the district's only opposing party in the pending litigation. This information, which we have marked for release, may not be withheld under section 552.103. *Id.* The district may withhold the remaining information that is not subject to section 552.022 under section 552.103.<sup>3</sup> However, we note the applicability of section 552.103(a) ends once the litigation has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the district must release the information subject to section 552.022(a)(1) of the Government Code. With the exception of the information we have marked for release, the district may withhold the remaining information under section 552.103 of the Government Code.<sup>4</sup>

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,



Nneka Kanu  
Assistant Attorney General  
Open Records Division

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<sup>3</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure.

<sup>4</sup>We note the information being released contains information to which the requestor has a right of access as the attorney for the individual whose information is at issue. *See* Gov't Code § 552.023(b) (governmental body may not deny access to person to whom information relates, or that person's representative, solely on grounds that information is considered confidential by privacy principles). Because such information may be confidential with respect to the general public, if the district receives another request for this information from a different requestor, the district must again seek a ruling from this office.

Ref: ID# 428087

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)