



ATTORNEY GENERAL OF TEXAS
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October 18, 2011

Ms. Alicia Currin-Moore
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OR2011-15161

Dear Ms. Currin-Moore:

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# 433484.

The River Road Independent School District (the "district"), which you represent, received a request for (1) two named employees' employment contracts; (2) e-mails between a named employee and the district's superintendent during a specified time period; (3) all e-mails pertaining to two named employees; and (4) a specified formal complaint. You state the district provided the requestor with the requested contracts. You claim some information is not public information under the Act. You claim the remaining submitted information is excepted from disclosure under sections 552.101, 552.102, and 552.103 of the Government Code. In addition, you state, and provide documentation showing, you have notified the named employees at issue of the request and their right to submit arguments to this office as to why the information at issue should not be released. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of the submitted e-mails, which we have marked, are not responsive to the instant request because they are not between the named employee and the district's superintendent and do not pertain to the two named employees. 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.

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.¹ 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 and unredacted documents, which you claim are education records to this office for our review. *See* Gov’t Code § 552.114 (excepting from disclosure “student records”); Open Records Decision No. 539 (1990) (determining the same analysis applies under section 552.114 of the Government Code and FERPA). Because our office is prohibited from reviewing these records to determine whether appropriate redactions under FERPA have been made, we will not address the applicability of FERPA to any of the submitted documents. Such determinations under FERPA must be made by the educational authority in possession of such records.² Accordingly, we do not address the applicability of FERPA to the submitted information. However, we will consider your arguments against disclosure of the submitted information.

Next, we address your contention some of the submitted information is not public information subject to the Act. The Act is applicable only to “public information.” *See* Gov’t Code §§ 552.002, .021. Section 552.002(a) provides that “public information” consists of

information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body; or
- (2) for a governmental body and the governmental body owns the information or has a right of access to it.

Id. § 552.002(a). Thus, virtually all of the information in a governmental body’s physical possession constitutes public information and, thus, is subject to the Act. *Id.* § 552.002(a)(1); *see* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). You

¹A 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>.

²In 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.

assert the user name and password in the submitted information are not subject to the Act. Based on your representations and our review of the submitted information, we agree the user name and password you have marked do not constitute public information for the purposes of section 552.002. *See* Open Records Decision No. 581 (1990) (certain computer information, such as source codes, documentation information, and other computer programming, that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property, is not the kind of information that is made public under section 552.021 of the Act). Therefore, the marked user name and password are not subject to the Act, and the district need not release that information in response to this request.³

We next note some of the submitted information is subject to disclosure under 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). The completed evaluations we have marked are subject to section 552.022(a)(1). You seek to withhold these evaluations under section 552.103 of the Government Code, which 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). Therefore, the district may not withhold any information encompassed by section 552.022(a)(1) under section 552.103. However, sections 552.101 and 552.102, which you also claim, are other law that makes information confidential for purposes of section 552.022(a)(1). Accordingly, we will address the applicability of sections 552.101 and 552.102 to the submitted information, including the information encompassed by section 552.022(a)(1). We also will address your claim under section 552.103 for the information not subject to section 552.022(a)(1).

Section 552.103 of the Government Code provides, in relevant 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.

³As we are able to make this determination, we need not address your remaining argument against the disclosure of this information.

...

(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 the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing (1) litigation is pending or reasonably anticipated on the date the governmental body receives 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). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). *See* ORD 551 at 4.

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 litigation is reasonably anticipated, the governmental body must furnish concrete evidence litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* 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. Open Records Decision No. 555 (1990); *see also* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined 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 the district, at the time it received the request for information, reasonably anticipated litigation pertaining to one of the named employee's reassignment with the district. You state the employee at issue engaged the services of an attorney and, although a lawsuit has not been filed, is pursuing a claim against the district under the Whistleblower Act, chapter 554 of the Government Code. You also indicate the employee at issue filed a grievance with the district regarding her reassignment, and you inform us the employee may be represented by her attorney during the district's grievance process. You explain the grievance process is the administrative procedure that must be exhausted before the employee may file a lawsuit against the district. *See* Gov't Code § 554.006(a) (providing an aggrieved party must initiate action under the grievance or appeal procedures of the employing state or local governmental entity before filing suit). Based on your

representations and our review, we conclude the district reasonably anticipated litigation when it received the request for information. You state, and we agree, the information at issue relates to the litigation because it pertains to the district's anticipated defense against the employee's claims that form the basis of the anticipated litigation.

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) of the Government Code interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, any information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a). However, information accessed by the opposing party only in the usual scope of her employment with the district is not considered to have been obtained by the opposing party to the anticipated litigation and may, thus, be withheld under section 552.103. In this instance, some of the information at issue has been seen by the opposing party to the anticipated litigation. This information, which we have marked, may not be withheld under section 552.103. *Id.* Although some of the remaining e-mails at issue were seen by the opposing party, she only had access to this information in the usual scope of her employment with the district. Accordingly, these e-mails and the remaining information may be withheld under section 552.103. We note the applicability of section 552.103(a) ends once the litigation has been concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We now turn to your claims under sections 552.101 and 552.102 of the Government Code for the remaining information at issue. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses information protected by other statutes, such as section 21.355 of the Education Code. Section 21.355 provides "[a] document evaluating the performance of a teacher or administrator is confidential." Act of May 25, 2011, 82nd Leg., R.S., H.B. 2971, § 1 (to be codified at Educ. Code § 21.355(a)). 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 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 as an administrator, as that term is commonly defined, at the time of the evaluation. *Id.*

Upon review, we find the completed evaluations subject to section 552.022(a)(1) of the Government Code, constitute evaluations of an administrator. Therefore, provided the administrator was required to hold and did hold the appropriate certificate and was acting as an administrator at the time of the evaluations at issue, the information we have marked is confidential under section 21.355 of the Education Code and must be withheld under section 552.101 of the Government Code.

You claim the remaining information is excepted from disclosure under section 552.102 of the Government Code. Section 552.102(a) 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). You assert the privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). In *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref’d n.r.e.), the court ruled the privacy test under section 552.102(a) is the same as the *Industrial Foundation* privacy test. However, the Texas Supreme Court has expressly disagreed with *Hubert*’s interpretation of section 552.102(a) and held its privacy standard differs from the *Industrial Foundation* test under section 552.101. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, No. 08-0172, 2010 WL 4910163, at *5 (Tex. Dec. 3, 2010). The supreme court then considered the applicability of section 552.102 and held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Id.* at *10. Upon review, we find none of the remaining information may be withheld under section 552.102.

Next, we address your common-law privacy claim under section 552.101 of the Government Code. For information to be protected from public disclosure by the common-law right of privacy, the information must meet the criteria set out by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976). In *Industrial Foundation*, the Texas Supreme Court stated information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts, the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. 540 S.W.2d at 685. To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *See id.* at 681-82. The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *See id.* at 683. We note the public generally has a legitimate interest in information that relates to public employment and public employees. *See* Open Records Decisions Nos. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs, but in fact touches on matters of legitimate public concern), 542 (1990), 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees), 444 at 5-6 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (1984) (scope of public employee privacy is narrow). Upon review, we find none of the remaining information is highly intimate or embarrassing and not of legitimate public concern. Accordingly, the district may not withhold any of the remaining information under section 552.101 in conjunction with common-law privacy.

We note some of the remaining information is subject to sections 552.117(a)(1) and 552.137 of the Government Code.⁴ Section 552.117(a)(1) excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former official or employee of a governmental body who requests that the information be kept confidential under section 552.024 of the Government Code. Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 2 (to be codified as an amendment to Gov't Code § 552.117(a)(1)). Section 552.117 also encompasses personal cellular telephone and pager numbers, provided that a governmental body does not pay for the cellular telephone or pager service. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. We have marked information under section 552.117(a)(1) of the Government Code. The district must withhold the information we have marked under section 552.117(a)(1) to the extent the employees concerned timely elected under section 552.024 to keep their information confidential; however, the district may only withhold the cellular telephone number we have marked if the district does not pay for the cellular telephone service with public funds.

Section 552.137 of the Government Code 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). *See* Gov't Code § 552.137(a)-(c). The e-mail addresses we have marked do not appear to be of types specifically excluded by section 552.137(c). Accordingly, the district must withhold the e-mail addresses we have marked under section 552.137, unless the owners of the e-mail addresses have affirmatively consented to their disclosure.

In summary, the username and password you have marked are not subject to the Act and need not be released in response to the instant request. Except for the information we have marked, the district may withhold the remaining information under section 552.103 of the Government Code. Provided the administrator at issue was required to hold and did hold the appropriate certificate and was acting as an administrator at the time of the submitted evaluations, the district must withhold the marked evaluations subject to section 552.022(a)(1) of the Government Code under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. With regards to the

⁴The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

information seen by the opposing party to the anticipated litigation, the district must withhold the information we marked under section 552.117(a)(1) of the Government Code if the employees at issue timely elected to keep their information confidential, but may not withhold the marked cellular telephone number if the district pays for the cellular telephone service. The district must also withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless their owners affirmatively consent to their release. The remaining information seen by the opposing party to the anticipated litigation 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, 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,



Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/agn

Ref: ID# 433484

Enc. Submitted documents

c: Requestor
(w/o enclosures)