



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 29, 2012

Ms. Heather R. Rutland
Counsel for the Lockhart Independent School District
Henslee Schwartz, L.L.P.
816 Congress Avenue, Suite 800
Austin, Texas 78701-2443

OR2012-08179

Dear Ms. Rutland:

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# 454817.

The Lockhart Independent School District (the "district"), which you represent, received a request for information pertaining to any settlement between the district and a named employee involving any grievance filed during a specified time period. You claim the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we note 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 or an adult student's 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.

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>.

§ 99.3 (defining “personally identifiable information”). In this instance, the submitted information includes redacted and unredacted education records. 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. *See* 20 U.S.C. § 1232g(a)(1)(A). Such determinations under FERPA must be made by the educational authority in possession of the education records.² We will, however, consider your arguments against disclosure of the submitted information.

We note section 552.022(a) of the Government Code is applicable to a portion of the submitted information, which provides in relevant part the following:

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 unless made confidential under this chapter or other law:

...

(18) a settlement agreement to which a governmental body is a party.

Gov't Code § 552.022(a)(18). The submitted information includes a settlement agreement that is subject to section 552.022(a)(18) of the Government Code. Although you raise section 552.103 of the Government Code for this information, this section is a discretionary exception to disclosure that protects a governmental body's interest and does not make information confidential under the Act. *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 Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential). Consequently, the district may not withhold the settlement agreement, which we have marked, under section 552.103 of the Government Code. However, we will address your argument under section 552.103 of the Government Code for the information that is not subject to section 552.022(a)(18).

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

²In 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.

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 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 that (1) litigation is 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). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

To establish litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing 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. *See 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.³ *See* 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 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). Further, the fact a potential opposing party has hired an attorney who makes a request for information does not establish litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983).

³In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

You explain the named employee filed a grievance against the district which resulted in a settlement agreement. You also explain a dispute has arisen between the district and the named employee regarding the settlement agreement. You state, and provide documentation showing, the district received a letter from the named employee's attorney threatening to sue the district if the settlement agreement is not honored. Based on your representations and our review of the submitted documents, we conclude the district reasonably anticipated litigation on the date it received the present request for information. We further find the information not subject to section 552.022(a)(18) relates to the anticipated litigation. Accordingly, the information not subject to section 552.022(a)(18) is generally subject to section 552.103 of the Government Code.

However, we note the opposing party in the anticipated litigation or her representative has seen or had access to most 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, then there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, the information we have marked is not protected by section 552.103 and may not be withheld on that basis. 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). Accordingly, except for the information subject to section 552.022(a)(18) and the information we have marked, the district may withhold the remaining information under section 552.103 of the Government Code.

We note some of the information the potential opposing party or her representative has seen or accessed may be subject to sections 552.117 and 552.137 of the Government Code.⁴ Section 552.117 of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *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 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. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee who did not timely request

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

under section 552.024 the information be kept confidential. We note section 552.117 also encompasses a personal cellular telephone number, unless the cellular or pager service is paid for by a governmental body. *See* Open Records Decision No. 506 at 5-7 (1988) (statutory predecessor to section 552.117 not applicable to cellular telephone numbers provided and paid for by governmental body and intended for official use). We have marked a cellular telephone number. To the extent the employee at issue timely requested confidentiality under section 552.024, and the cellular service is not paid for by a governmental body, the district must withhold the marked cellular telephone number under section 552.117(a)(1) of the Government Code. To the extent the employee at issue did not make a timely election under section 552.024 or the cellular service is paid for by a governmental body, the district may not withhold the marked information under section 552.117(a)(1).

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 at issue are not a type specifically excluded by section 552.137(c). Accordingly, the district must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owner of the e-mail addresses has affirmatively consented to their disclosure.

In summary, except for the information subject to section 552.022(a)(18) of the Government Code and the information we have marked, the district may withhold the remaining information under section 552.103 of the Government Code. To the extent the employee at issue timely requested confidentiality under section 552.024, and the cellular service is not paid for by a governmental body, the district must withhold the marked cellular telephone number under section 552.117(a)(1) of the Government Code. The district must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owner of the e-mail addresses has affirmatively consented to their disclosure. The information subject to section 552.022(a)(18) of the Government Code and the remaining information the potential opposing party and her representative has seen or accessed 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,

A handwritten signature in black ink that reads "Jennifer Luttrall". The signature is written in a cursive, flowing style.

Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/som

Ref: ID# 454817

Enc. Submitted documents

c: Requestor
(w/o enclosures)