



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 12, 2012

Ms. Leticia D. McGowan  
School Attorney  
Dallas Independent School District  
3700 Ross Avenue, Box 74  
Dallas, Texas 75204-5491

OR2012-09023

Dear Ms. McGowan:

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# 455975 (ORR # 11045).

The Dallas Independent School District (the "district") received a request for information regarding the requestor or his position as a former teacher in the district, including (1) investigations or other records involving the Texas Education Agency, the district's Office of Professional Responsibility, or the Dallas County District Attorney's Office (the "district attorney's office") and (2) e-mail or written exchanges, reports, or narratives from a specified time period involving the requestor, twenty-five other named individuals, or the district attorney's office. You claim the requested information is excepted from disclosure under sections 552.103 and 552.107(1) of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the information you submitted.

We first note you have submitted unredacted education records for our review. The United States Department of Education Family Policy Compliance Office has informed us 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 our office, without parental or an adult student's consent, unredacted, personally identifiable

---

<sup>1</sup>Although you assert the attorney-client privilege in conjunction with section 552.101 of the Government Code, we note section 552.101 does not encompass discovery privileges. *See* Open Records Decision No. 676 at 1-3 (2002). In this instance, section 552.107(1) of the Government Code is the appropriate exception to claim.

information contained in education records for the purpose of our review in the open records ruling process under the Act.<sup>2</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 our 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”). Thus, because our office is prohibited from reviewing 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.<sup>3</sup> We will consider the district’s exceptions to disclosure of the submitted information.

We next note most 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 made confidential under the Act or other law. Gov’t Code § 552.022(a)(1). In this instance, most of the submitted information is contained in a completed investigation, which we have marked, that was made for or by the district. You do not claim an exception to disclosure under section 552.108 of the Government Code. Although you do seek to withhold the district’s investigation 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 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 does not make information confidential for purposes of section 552.022(a)(1). Therefore, the district may not withhold any of the information in the completed investigation under section 552.103 of the Government Code. We note sections 552.102, 552.117, 552.136, and 552.137 of the Government Code are or may be applicable to some of the investigative information.<sup>4</sup> As these sections are confidentiality provisions for purposes of section 552.022(a)(1), we will address sections 552.102, 552.117, 552.136, and 552.137. We also will consider your claims under sections 552.103 and 552.107(1) of the Government Code for the submitted information that is not subject to section 552.022(a)(1).

---

<sup>2</sup>A copy of this letter may be found on the Office of the Attorney General’s website at <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

<sup>3</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 records in compliance with FERPA, we will rule accordingly.

<sup>4</sup>This office will raise sections 552.102, 552.117, 552.136, and 552.137 on behalf of a governmental body, as these sections are mandatory exceptions to disclosure. *See* Gov’t Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

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). The Texas Supreme Court has 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. *See Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336, 348 (Tex. 2010). We have marked birth dates the district must withhold under section 552.102(a) of the Government Code.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who timely request confidentiality for these types of information under section 552.024 of the Government Code. *See* Gov’t Code §§ 552.117(a)(1), .024. We note section 552.117(a)(1) encompasses an official’s or employee’s personal cellular telephone or pager number if the official or employee pays for the telephone or pager service with his or her personal funds. *See* Open Records Decision No. 506 at 5-6 (1988) (statutory predecessor to Gov’t Code § 552.117 not applicable to numbers for cellular mobile phones installed in county officials’ and employees’ private vehicles and intended for official business). 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). Information may only be withheld under section 552.117(a)(1) 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. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who did not timely request confidentiality under section 552.024. We have marked information the district must withhold under section 552.117(a)(1) of the Government Code to the extent the information consists of the home address, home or personal cellular telephone number, or other personal information of a current or former official or employee of the district who timely requested confidentiality for the information under section 552.024 of the Government Code.<sup>5</sup>

Section 552.136 of the Government Code states that “[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). We have marked an account number the district must withhold under section 552.136 of the Government Code.

---

<sup>5</sup>We note the requestor has a right of access to any information the district would be required to withhold from the public under section 552.117(a)(1) of the Government Code to protect his privacy. *See* Gov’t Code § 552.023(a); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself). Should the district receive another request for the submitted information from a different requestor, section 552.024(c) of the Government Code authorizes a governmental body to redact information protected by section 552.117(a)(1) without the necessity of requesting a decision under the Act if the current or former employee to whom the information pertains timely chooses not to allow public access to the information. *See* Gov’t Code § 552.024(c)(2).

Section 552.137 of the Government Code states “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act],” unless the owner of the e-mail address has affirmatively consented to its public disclosure or the e-mail address falls within the scope of section 552.137(c). *Id.* § 552.137(a)-(c). We note section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address a governmental entity maintains for one of its officials or employees. We have marked an e-mail address the district must withhold under section 552.137 of the Government Code unless the owner has affirmatively consented to its public disclosure.<sup>6</sup>

Lastly, we address your claim under section 552.103 of the Government Code for the submitted information that is not subject to section 552.022(a)(1) of the Government Code. Section 552.103 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.

*Id.* § 552.103(a), (c). A governmental body claiming section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information at issue. To meet this burden, a 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).*

---

<sup>6</sup>We note Open Records Decision No. 684 (2009) is a previous determination issued by this office to all governmental bodies authorizing them to withhold ten categories of information without the necessity of requesting an attorney general decision, including an e-mail address of a member of the public under section 552.137 of the Government Code.

You inform us the requestor filed an employment lawsuit against the district, alleging retaliation, and the litigation is currently on appeal. You have provided documentation demonstrating the litigation was pending on the date of the district's receipt of the request for the information at issue. You contend the information at issue is related to the pending litigation. Based on your representations and documentation and our review, we conclude the district may withhold the submitted information that is not subject to section 552.022(a)(1) under section 552.103 of the Government Code.<sup>7</sup>

In reaching this conclusion, we assume the requestor, 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 related to litigation through discovery procedures. *See* ORD 551 at 4-5. If the opposing party has seen or had access to information related to pending 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). We note the applicability of this exception 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 withhold the marked birth dates under section 552.102(a) of the Government Code; (2) must withhold the information we have marked under section 552.117(a)(1) of the Government Code to the extent it consists of the home address, home or personal cellular telephone number, or other personal information of a current or former official or employee of the district who timely requested confidentiality for the information under section 552.024 of the Government Code; (3) must withhold the marked account number under section 552.136 of the Government Code; (4) must withhold the marked e-mail address under section 552.137 of the Government Code unless the owner has consented to its disclosure; (5) must release the remaining information that is subject to section 552.022(a)(1) of the Government Code; and (6) may withhold the rest of the 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.

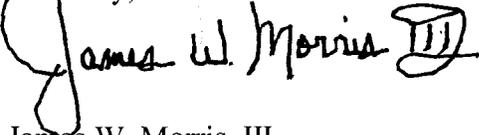
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and

---

<sup>7</sup>As we are able to make this determination, we need not address your claim under section 552.107(1) of the Government Code.

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 initial "J" and a stylized "III" at the end.

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

JWM/

Ref: ID# 445975

Enc: Submitted documents

c: Requestor  
(w/o enclosures)