



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 2, 2012

Ms. Merri Schneider-Vogel
Thompson & Horton, LLP
3200 Southwest Freeway, Suite 2000
Houston, Texas 77027

OR2012-12126

Dear Ms. Vogel:

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# 460771.

The Galena Park Independent School District (the "district"), which you represent, received a request for information related to a specified incident and a named teacher. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the United States Department of Education Family Policy Compliance Office has informed this office 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 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. § 99.3 (defining "personally identifiable information"). You have

¹A 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>.

submitted redacted education records for our review. 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, except to note the requestor's client has a right of access under FERPA to their child's education records and their right of access prevails over a claim under section 552.103 of the Government Code. *See* 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.3; Open Records Decision No. 431 (1985) (information subject to right of access under FERPA may not be withheld pursuant to statutory predecessor to Gov't Code § 552.103); *see also Equal Employment Opportunity Comm'n v. City of Orange, Tex.*, 905 F. Supp. 381, 382 (E.D. Tex. 1995) (holding FERPA prevails over inconsistent provision of state law). Such determinations under FERPA must be made by the educational authority in possession of the education records. Therefore, to the extent the requestor's client does not have a right of access to the submitted information, we will address your argument under section 552.103 of the Government Code for this information.

Next, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or 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; [and]

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(1), (3). Portions of the submitted information, which we have indicated, consist of completed evaluations that are subject to subsection 552.022(a)(1). The district must release the completed evaluations pursuant to subsection 552.022(a)(1) unless they are excepted from disclosure under section 552.108 of the Government Code or are expressly made confidential under the Act or other law. *See* Gov't Code § 552.022(a)(1). Further, a portion of the remaining information consists of completed contracts relating to the receipt or expenditure of funds by a governmental body. These documents, which we have marked, are subject to subsection 552.022(a)(3) and must be released unless they are made confidential under the Act or other law. *See id.* § 552.022(a)(3). You raise section 552.103 of the Government Code for the information subject to section 552.022 of the Government Code. However, section 552.103 is a discretionary exception to disclosure

and does not make information confidential under the Act. *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 section 552.103); Open Records Decision Nos. 665 at 2 n.5 (discretionary exceptions generally), 663 (1999) (governmental body may waive section 552.103). Accordingly, the information subject to section 552.022 may not be withheld under section 552.103 of the Government Code. As you raise no further exceptions against disclosure of the completed contracts, the district must release this information, which we have marked, pursuant to section 552.022(a)(3) of the Government Code. However, you raise section 552.101 for the completed evaluations. As this section can make information confidential under the Act, we will address its applicability to this information.

Section 552.101 of the Government Code 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 made confidential by statute, such as section 21.355 of the Education Code, which provides in part that “[a] document evaluating the performance of a teacher or administrator is confidential.” *See* Educ. Code § 21.355(a). This office has interpreted section 21.355 to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or an administrator. *See* Open Records Decision No. 643 (1996). We have determined that for purposes of section 21.355, the word “teacher” means a person who is required to and does in fact hold a teaching certificate under subchapter B of chapter 21 of the Education Code and who is engaged in the process of teaching, as that term is commonly defined, at the time of the evaluation. *See* ORD 643 at 4.

You contend the completed evaluations subject to section 552.022 are confidential under section 21.355. We understand the information at issue pertains to an individual who was employed by the district as a teacher when his performance was evaluated. You do not inform us, however, whether the teacher at issue held the appropriate certificate under chapter 21 of the Education Code when the information at issue was created. Therefore, we must rule conditionally. Thus, the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code to the extent the teacher at issue held the appropriate certificate under chapter 21 of the Education Code and was functioning as a teacher at the time the information at issue was created. However, to the extent the teacher at issue did not hold the appropriate certificate under chapter 21 or was not functioning as a teacher at the time the information at issue was created, this information is not confidential under section 21.355. In that instance, this information may not be withheld under section 552.101 on that basis and must be released.

We next address your arguments against the remaining information, which is not subject to section 552.022 of the Government Code. Section 552.101 of the Government Code also encompasses section 261.201 of the Family Code, which provides as follows:

(a) [T]he following information is confidential, is not subject to public release under [the Act] and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

...

(k) Notwithstanding Subsection (a), an investigating agency, other than the [Department of Family and Protective Services] or the Texas Youth Commission, on request, shall provide to the parent, managing conservator, or other legal representative of a child who is the subject of reported abuse or neglect, or to the child if the child is at least 18 years of age, information concerning the reported abuse or neglect that would otherwise be confidential under this section. The investigating agency shall withhold information under this subsection if the parent, managing conservator, or other legal representative of the child requesting the information is alleged to have committed the abuse or neglect.

Fam. Code § 261.201(a), (k). You raise section 552.101 in conjunction with section 261.201 for a portion of the remaining information. We note the district is not an agency authorized to conduct a chapter 261 investigation. *See id.* §§ 261.103 (listing agencies that may conduct child abuse investigations), .406. However, the information we have marked reflects it was used or developed in an investigation by the Texas Department of Family Services' Child Protective Services Division ("CPS") of alleged abuse of a child. *See id.* § 261.001(1)(A) (defining "abuse" for purposes of chapter 261 of the Family Code); *see also id.* § 101.003(a) (defining "child" for purposes of chapter 261). Based on your representations and our review of the information at issue, we find the information we have marked is confidential under section 261.201(a) of the Family Code. We note section 261.201(k) permits the investigating agency to release information relating to an investigation under chapter 261 to a parent of the child who was the subject of the alleged or suspected abuse or neglect, unless the parent is alleged to have committed the abuse or neglect. *See id.* § 261.201(k). However, although the requestor is the authorized representative of the parents of the child concerned, section 261.201(k) is not applicable because the district is not the agency that conducted the investigation. We therefore conclude the district must withhold the information we have

marked under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code.

You raise section 552.103 of the Government Code for the remaining information. Section 552.103 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.

...

(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 applies 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 requested information 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 parts 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 that 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.* In Open Records Decision No. 638 (1996), this office stated that, when a governmental body receives a notice of claim letter, it can meet its burden of showing that litigation is reasonably anticipated by representing that the notice of claim letter is in compliance with the requirements of the Texas Tort Claims Act, Civil Practice and Remedies Code, chapter 101, or an applicable municipal ordinance. If that representation is not made, the receipt of the claim letter is a factor we will consider in determining, from the totality of the circumstances presented, whether the governmental body has established litigation is reasonably anticipated. *See* ORD 638 at 4. Concrete evidence to support a claim that litigation is reasonably anticipated may also 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.² 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).

You note the instant request for information indicates the requestor's clients have a claim against the district. You further note the requestor is an attorney who states he represents the claimants in the claim at issue. You do not affirmatively represent to this office that the notice of claim complies with the TTCA or an applicable ordinance; therefore, we will only consider the claim as a factor in determining whether the district reasonably anticipated litigation. Nevertheless, after reviewing the submitted documentation and your arguments, we conclude, based on the totality of the circumstances, the district reasonably anticipated litigation when it received the request for information. You further state, and we agree, the remaining information is related to the anticipated litigation for purposes of section 552.103(a). Accordingly, to the extent the requestor does not have a right of access under FERPA to the remaining information, the district may withhold the information at issue under section 552.103 of the Government Code.³

We note, however, once the information has been obtained by all parties to the anticipated litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note the applicability of section 552.103(a) ends when the litigation has concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

In summary, the district must release the completed contracts, which we have marked, pursuant to section 552.022(a)(3) of the Government Code. The district must withhold the completed evaluations we have marked in under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code to the extent the teacher at issue held the appropriate certificate under chapter 21 of the Education Code and was functioning as a teacher at the time the information at issue was created. However, to the extent the teacher at issue did not hold the appropriate certificate under chapter 21 or was not

²In 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).

³As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

functioning as a teacher at the time the information at issue was created, the district may not withhold the marked evaluations subject to section 552.022 under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code, and they must be released pursuant to section 552.022(a)(1). The district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. To the extent the requestor does not have a right of access under FERPA to the remaining information, the district may withhold the remaining information at issue under section 552.103 of the Government Code.

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,



Vanessa Burgess
Assistant Attorney General
Open Records Division

VB/akg

Ref: ID# 460771

Enc. Submitted documents

c: Requestor
(w/o enclosures)