ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 24, 2012

Mr. Christopher B. Gilbert
Counsel for the Humble Independent School District
Thompson & Horton LLP
Phoenix Tower, Suite 2000
3200 Southwest Freeway
Houston, Texas 77027

OR2012-13486

Dear Mr. Gilbert:

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# 463262.

The Humble Independent School District (the "district"), which you represent, received a request for seven categories of information pertaining to the bullying and harassment of two named students.[1] You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, and 552.107 of the Government Code.[2] We have

[1]You state the district sought and received clarification of the request for information. *See* Gov't Code § 552.222(b) (stating that if information requested is unclear to governmental body or if a large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding that when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date the request is clarified or narrowed).

[2]Although you also raise section 552.101 of the Government Code in conjunction with Texas Rule of Evidence 503, this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision No. 676 at 1-2 (2002). We further note the proper exception to raise when asserting the attorney-client privilege in this instance is section 552.107 of the Government Code. *See id.*

considered the exceptions you claim and reviewed the submitted representative sample of information.[3]

We note the district has redacted information from the submitted information. Pursuant to section 552.301 of the Government Code, a governmental body that seeks to withhold requested information must submit to this office a copy of the information, labeled to indicate which exceptions apply to which parts of the copy, unless the governmental body has received a previous determination for the information at issue. Gov't Code §§ 552.301(a), (e)(1)(D). We understand the district has redacted social security numbers under section 552.147(b) of the Government Code. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting an attorney general decision under the Act. *See id.* § 552.147(b). However, you do not assert, nor does our review of the records indicate, you have been authorized to withhold any of the remaining redacted information without seeking a ruling from this office. *See Id.* § 552.301(a); Open Records Decision No. 673 (2001). Therefore, information must be submitted in a manner that enables this office to determine whether the information comes within the scope of an exception to disclosure. In this instance, we can discern the nature of the redacted information; thus, being deprived of that information does not inhibit our ability to make a ruling. In the future, however, the district should refrain from redacting any information it is not authorized to withhold in seeking an open records ruling. Failure to do so may result in the presumption the redacted information is public. *See* Gov't Code § 552.302.

Next, 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.[4] 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 unredacted education records for our review. Because our office is prohibited from reviewing these education records to determine the applicability of FERPA, we will not

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[3]We assume the "representative sample" of information submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than those submitted to this office.

[4]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.

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 his child's education records and his 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. The DOE also has informed our office, however, a parent's right of access under FERPA to information about the parent's child does not prevail over an educational institution's right to assert the attorney-client privilege. Therefore, we will address your assertion of the attorney-client privilege under section 552.107 of the Government Code to the submitted information. In addition, to the extent the requestor's client does not have a right of access to the submitted information under FERPA, we will address your argument under section 552.103 for this information.

We also note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides in relevant part:

> [T]he following categories of information are public information and not excepted from required disclosure under [the Act] 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; [and]
> >
> > . . .
> >
> > (15) information regarded as open to the public under an agency's policies[.]

Gov't Code § 552.022(a)(1), (15). The submitted information includes completed evaluations that are subject to section 552.022(a)(1). The submitted information also includes pages from the district's (1) Parent/Student handbook, which is published on the district's website; (2) policies and procedures manual, which is also published on the district's website; and (3) police department's website. Because the information at issue is published and available to the public, we find its contents are regarded as open to the public under the district's policies and are therefore subject to section 552.022(a)(15). You seek to withhold this information 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 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. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 does not make information confidential under the Act. Therefore, the district may not withhold any of the information subject to section 552.022 under section 552.103 of the Government Code. As you raise no other exceptions to disclosure of Tabs 1, 2, and 19 in Exhibit F, they must be released to the requestor. However, because section 552.101 of the Government Code makes information confidential under the Act, we will address its applicability to the marked evaluations in Exhibit I. We will also consider your argument under section 552.103 of the Government Code for the remaining information in Exhibit F, which is not subject to section 552.022 of the Government Code.

Next, we address your claim for the remaining information in Exhibit F under section 552.103 of the Government Code. 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). The 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 is pending or reasonably anticipated, 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 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "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. *Id.* Concrete evidence to support a claim that 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* 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 that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

In this instance, you inform us that, prior to the district's receipt of the request, a complaint was filed with the United States Department of Education Office for Civil Rights (the "OCR"). You inform us, and submit a letter from the OCR to the district demonstrating, that the OCR is currently investigating the complaint. Based on your representations and our review of the information at issue, we conclude you have shown that litigation was reasonably anticipated at the time the district received the present request. Further, you explain the information at issue is related to the anticipated litigation because it directly pertains to the subject matter of the complaint. Thus, we find that the district has demonstrated the remaining information in Exhibit F is related to the anticipated litigation for purposes of section 552.103(a). Therefore, the district may generally withhold the remaining information in Exhibit F under section 552.103.

We note, however, that the opposing party in the anticipated litigation has seen or had access to some 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, to the extent that the opposing party in the anticipated litigation has seen or had access to any portion of the information at issue, such information is not protected by section 552.103 and may not be withheld on that basis. As you raise no further exceptions for the information the opposing party has seen or accessed, it must be released. We also note that the applicability of section 552.103 ends once the related litigation concludes or is no longer anticipated. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). Accordingly, with the exception of the information the opposing party to the anticipated litigation has seen or accessed, which we have marked, the district may withhold the remaining information in Exhibit F pursuant to section 552.103 of the Government Code.

We will now consider your claims under sections 552.101, 552.102, and 552.107 of the Government Code for Exhibits H and I. 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. This section encompasses

information protected by other statutes, 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. Additionally, the Third Court of Appeals has concluded that a written reprimand constitutes an evaluation for purposes of section 21.355, as it "reflects the principal's judgment regarding [a teacher's] actions, gives corrective direction, and provides for further review." *Abbott v. North East Indep. Sch. Dist.*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.).

You contend the marked evaluations in Exhibit I consist of evaluations that are confidential under section 21.355. We understand the information at issue pertains to individuals who were employed by the district as teachers when their performance was evaluated. You do not inform us, however, whether the teachers at issue held the appropriate certificates under chapter 21 of the Education Code when the information at issue was created. Therefore, we must rule conditionally. The district must withhold the information we have marked in Exhibit I under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code to the extent the teachers at issue held the appropriate certificates under chapter 21 of the Education Code and were functioning as teachers at the time the information at issue was created. However, to the extent the teachers at issue did not hold the appropriate certificates under chapter 21 or were not functioning as teachers at the time the information at issue was created, this information at issue is not confidential under section 21.355 and may not be withheld under section 552.101 on that basis.

You claim the submitted college transcripts in Exhibit I are subject to 552.102(b) of the Government Code, which excepts from disclosure all information in transcripts of a professional public school employee other than the employee's name, the courses taken, and the degree obtained. Gov't Code § 552.102(b); Open Records Decision No. 526 (1989). Thus, with the exception of the employee's name, courses taken, and degree obtained, the district must withhold the transcripts under section 552.102(b) of the Government Code. We find you have failed to demonstrate the remaining information at issue consists of a transcript of am professional public school employee. Accordingly, the district may not withhold the remaining information at issue under section 552.102(b) of the Government Code.

Section 552.107(1) protects information that comes within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. ORD 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7.

Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. Tex. R. Evid. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* TEX. R. EVID. 503(b)(1). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, meaning it was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." *Id.* 503(a)(5). Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state Exhibit H consists of communications between individuals you have identified as attorneys for the district and district employees. You also state these communications were made in furtherance of the rendition of legal services to the district. You inform this office these communications were intended to be and remain confidential. Based on your representations and our review, we agree the e-mails contained in Exhibit H constitute privileged attorney-client communications. Accordingly, the district may withhold Exhibit H under section 552.107(1) of the Government Code.

In summary, the district must release Tabs 1, 2, and 19 in Exhibit F pursuant to section 552.022 of the Government Code. With the exception of the information the opposing party to the anticipated litigation has seen or accessed, which we have marked, the district may withhold the remaining information in Exhibit F pursuant to section 552.103 of the Government Code. The district must withhold the information we have marked in Exhibit I under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code to the extent the teachers at issue held the appropriate certificates under chapter 21 of the Education Code and were functioning as teachers at the time the information at issue was created. With the exception of the individual's name, courses taken, and degrees obtained, the district must withhold the submitted college transcripts in Exhibit I pursuant to section 552.102(b) of the Government Code. The district may withhold Exhibit

H under section 552.107(1) of the Government Code. The remaining information 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,

Sean Opperman

Sean Opperman
Assistant Attorney General
Open Records Division

SO/som

Ref: ID# 463262

Enc. Submitted documents

c: Requestor
(w/o enclosures)