



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 1, 2013

Ms. Ellen H. Spalding
Rogers, Morris & Grover, L.L.P.
5718 Westheimer Road, Suite 1200
Houston, Texas 77057

OR2013-05176

Dear Ms. Spalding:

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# 484385 (EISD Request No. 3426).

The Eanes Independent School District (the "district"), which you represent, received a request for all information with the requestor's name on it. You state the district is redacting some information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.¹ You claim the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.137 of the Government Code.² We have considered the exceptions you claim and reviewed the

¹The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office FERPA 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. The DOE has determined FERPA determinations must be made by the educational authority in possession of the education records. We have posted a copy of the letter from the DOE to this office on the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

²Although you also raise section 552.101 of the Government Code in conjunction with rule 503 of the Texas Rules of Evidence, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 677 (2002), 676 (2002). Furthermore, although you raise Texas Rule of Evidence 503, we note the proper exception to raise when asserting the attorney-client privilege for information not subject to section 552.022 of the Government Code is section 552.107 of the Government Code. *See* ORD 676 at 1-2.

submitted representative sample of information.³ We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note portions of the requested information were the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2013-02342 (2013). In Open Records Letter No. 2013-02342, we determined the district must release the submitted information that the district had previously provided to the requestor, but may withhold the remaining information under section 552.103 of the Government Code. You now seek to withhold the information at issue under section 552.103 of the Government Code. Section 552.007 of the Government Code provides if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential by law. *See* Gov't Code § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, the district may not now withhold any previously released information unless its release is expressly prohibited by law or the information is confidential by law. Although you raise section 552.103, section 552.103 does not prohibit the release of information or make information confidential. *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 Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Accordingly, to the extent the district released any portion of the requested information in accordance with Open Records Letter No. 2013-02342, the district may not now withhold such information under section 552.103. To the extent the information was not previously ordered released in this prior ruling, we will address your arguments under section 552.103.

Next, you acknowledge, and we agree, the district did not raise section 552.137 of the Government Code in compliance with section 552.301(e) of the Government Code. Generally, a governmental body's failure to comply with section 552.301 results in the waiver of the claimed exceptions. *See generally id.* § 552.302. However, section 552.137 of the Government Code cannot be waived. Therefore, we will consider whether the submitted information is excepted from disclosure under section 552.137.

Section 552.103 of the Government Code provides in relevant part the following:

³We assume the "representative sample" of records 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 that submitted to this office.

(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). 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 district 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).

This office has long held that "litigation," for purposes of section 552.103, includes "contested cases" conducted in a quasi-judicial forum. *See* Open Records Decision Nos. 474 (1987), 368 (1983), 336 (1982), 301 (1982). In determining whether an administrative proceeding is conducted in a quasi-judicial forum, some of the factors this office considers are whether the administrative proceeding provides for discovery, evidence to be heard, factual questions to be resolved, the making of a record, and whether the proceeding is an adjudicative forum of first jurisdiction with appellate review of the resulting decision without a re-adjudication of fact questions. *See* Open Records Decision No. 588 (1991).

You state the submitted information is related to a grievance filed with the district by the requestor. You state complaints filed with the district are "litigation" in that the district follows administrative procedures in handling such disputes in which, under the district's public grievance policy, the grievant proceeds through a three-level process. You explain hearing officers investigate the complaint at level one and level two, and the grievant is allowed to be represented by counsel, present favorable evidence to the district, and present witness statements or witnesses to testify on the grievant's behalf. You further explain the district's board of trustees hears the grievance if the grievant appeals to level three. Based on your representations, we find you have demonstrated the district's administrative

procedures for public grievances are conducted in a quasi-judicial forum, and thus, constitute litigation for purposes of section 552.103.

You state, and provide supporting documentation demonstrating, the requestor filed an appeal of the district's level two decision regarding her grievance, and the appeal was pending at the time of the district's receipt of the present request for information. Thus, we determine the district was a party to pending litigation at the time it received the present request for information. We also find the submitted information is related to the pending litigation.

However, once information has been obtained by all parties to the anticipated litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, 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). We note the requestor, who is the opposing party to the anticipated litigation at issue, has seen or had access to some of the submitted information. Therefore, the district may not withhold this information from release pursuant to section 552.103. However, we agree the district may withhold the remaining information, which we have marked, under section 552.103.⁴ 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).

To conclude, the district may withhold the submitted information we have marked under section 552.103 of the Government Code; however, the district may not withhold any of this information if the district previously released it in accordance with Open Records Letter No. 2013-02342. The district must release the remaining information.⁵

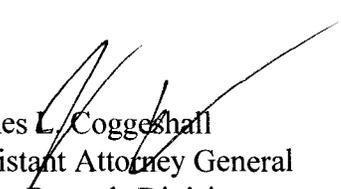
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

⁴As our ruling is dispositive, we do not address your other arguments to withhold this information.

⁵We note the information being released contains an e-mail address to which the requestor has a right of access under section 552.137(b) of the Government Code. *See* Gov't Code § 552.137(b). However, Open Records Decision No. 684 (2009) is a previous determination authorizing all governmental bodies to withhold specific categories of information without the necessity of requesting an attorney general decision, including e-mail addresses of members of the public under section 552.137 of the Government Code. Thus, if the district receives another request for this same information from a person who does not have a right of access to it, Open Records Decision No. 684 authorizes the district to redact the requestor's e-mail address without the necessity of requesting an attorney general decision.

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,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/tch

Ref: ID# 484385

Enc. Submitted documents

c: Requestor
(w/o enclosures)