



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 5, 2013

Ms. Leandra Costilla Ortiz
Staff Attorney
Brownsville Independent School District
1900 Price Road
Brownsville, Texas 78521

OR2013-15529

Dear Ms. Ortiz:

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# 498540 (BISD Req. No. 7291).

The Brownsville Independent School District (the "district") received a request for copies of any and all documents pertaining to a specified grievance filed by a named educator, as well as all violations or disciplinary actions taken against the same educator, copies submitted by the educator to change a named student's grade in a specified school year, and "any inconsequential reports, letters, or documents that contain [the educator's] signature." We understand you have redacted the home telephone number and address of a district employee under section 552.117(a)(1) of the Government Code as permitted by section 552.024(c) of the Government Code.¹ You state you have released some information to the requestor, including the submitted copies of board policy and a section of the Texas Education Code. You seek to withhold the remaining submitted information under sections 552.101, 552.103, and 552.114 of the Government Code.² We have considered the

¹Section 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. See Gov't Code § 552.117(a)(1). Section 552.024 of the Government Code authorizes a governmental body to withhold information subject to section 552.117 without requesting a decision from this office if the current or former employee or official timely chooses not to allow public access to the information. See *id.* § 552.024(c).

²Although you also claim section 552.026 of the Government Code, we note section 552.026 is not an exception to disclosure. Rather, section 552.026 provides the Act does not require the release of information contained in education records except in conformity with the Family Educational Rights and Privacy Act ("FERPA") of 1974. Gov't Code § 552.026.

exceptions you claim and reviewed the submitted representative sample of information.³ We have also received and 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 some of the submitted information, which we have marked, is not responsive to the request for information because it was created after the district received the request for information. This ruling does not address the public availability of any information that is not responsive to the request, and the district is not required to release that information in response to the request.

Next, we note the United States Department of Education Family Policy Compliance Office has informed this office that FERPA 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 assert FERPA applies to portions of the remaining responsive information. We note you have submitted redacted and unredacted education records for our review. Because our office is prohibited from reviewing these records to determine whether appropriate redactions under FERPA have been or should be 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. Likewise, we do not address your arguments under section 552.114 of the Government Code. *See* Gov't Code §§ 552.026 (incorporating FERPA into Act), .114 (excepting from disclosure "student records"); Open Records Decision No. 539 (1990) (determining same analysis applies under section 552.114 of Government Code and FERPA). However, we will consider your remaining arguments against disclosure of the remaining responsive information at issue.

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

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 that those records contain substantially different types of information than that submitted to this office.

⁴A 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>.

(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 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* Open Records Decision No. 551 at 4-5 (1990). A governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception applies in a particular situation. The test for meeting this burden is a showing (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, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); ORD 551 at 4. The governmental body must meet both parts of this test for information to be excepted under section 552.103(a). *See* ORD 551 at 4.

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 contend the responsive information is related to a grievance filed with the district by a district employee. You explain that grievances filed with the district are "litigation" in that the district follows administrative procedures in handling such disputes. You inform us the district's policy includes a three-level process wherein various administrators hear the grievance at Levels I and II, and the district's board of trustees hears the grievance if the grievant appeals to Level III. You also state during these hearings the grievant is allowed to be represented by counsel and present evidence to the district. We note a record of the

proceeding made by audio recording or a court reporter is required. We understand the grievant must complete the district's grievance process in order to exhaust her administrative remedies before she can file suit in court. Based on your representations and our review, we find the district's administrative procedure for disputes, as described above, is conducted in a quasi-judicial forum. Thus, the district's administrative procedure for disputes constitutes litigation for purposes of section 552.103. You state, and the responsive information reflects, the employee at issue filed her grievance prior to the district's receipt of this request for information. Thus, we determine the district was involved in pending litigation at the time it received the request for information. You state the responsive information relates to the pending litigation against the district. Upon review of your arguments and the information at issue, we find the remaining submitted information is related to litigation involving the district that was pending on the date the request was received. Accordingly, we find the district may withhold the remaining submitted information under section 552.103.

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

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,


Britni Fabian
Assistant Attorney General
Open Records Division

BF/dls

Ref: ID# 498540

Enc. Submitted documents

c: Requestor
(w/o enclosures)