



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 29, 2014

Mr. Jeffrey L. Rogers
Counsel for the Fort Bend Independent School District
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5718 Westheimer Road, Suite 1200
Houston, Texas 77057

OR2014-07119

Dear Mr. Rogers:

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# 521094 (Reference No. 2013-14-575).

The Fort Bend Independent School District (the "district"), which you represent, received a request for (1) information pertaining to investigations of misconduct by, or complaints against, certain district staff members at a specified school for a specified period of time, and (2) all records pertaining to a specified type incident involving the requestor's client for a specified period of time. You inform us the district has withheld certain information pursuant to sections 552.024(c) and 552.130(c) of the Government Code.¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103,

¹Section 552.024 of the Government Code authorizes a governmental body to redact from public release a current or former employee's home address and telephone number, emergency contact information, social security number, and family member information excepted from disclosure under section 552.117(a)(1) of the Government Code without the necessity of requesting a decision from this office under the Act, if the employee timely elected to withhold such information. See Gov't Code §§ 552.024(a)-(c), .117(a)(1). Section 552.130(c) of the Government Code allows a governmental body to redact the information described in subsection 552.130(a) without the necessity of seeking a decision from the attorney general. *Id.* § 552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). See *id.* § 552.130(d), (e).

552.107, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative samples of information.²

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.³ 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 address the applicability of FERPA to any of the submitted records, except to note the requestor has a right of access under FERPA to her client’s education records and her right of access prevails over a claim under sections 552.101, 552.102, 552.103, and 552.108 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, the right of access of a parent under FERPA to information about the parent’s child does not prevail over an educational institution’s right to assert the attorney-client privilege. Accordingly, we will consider your argument under section 552.107 for the submitted information. We will consider the district’s claims under sections 552.101, 552.102, 552.103, and 552.108 to the extent the requestor does not have a right of access to the submitted information under FERPA.

Next, you note some of the submitted information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2014-05076 (2014). We have no indication the law, facts, and circumstances on which the prior ruling

²We 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.

³A 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>.

was based have changed. Accordingly, to the extent the requested information is identical to the information previously requested and ruled upon by this office, we conclude the district must continue to rely on Open Records Letter No. 2014-05076 as a previous determination and withhold or release the identical information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes information is or is not excepted from disclosure). To the extent the submitted information was not subject to the prior ruling, we will address your arguments against its disclosure.

We must address the district's obligations under section 552.301 of the Government Code, which prescribes the procedural obligations that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(b) requires that a governmental body ask for a decision from this office and state which exceptions apply to the requested information by the tenth business day after receiving the request. Gov't Code § 552.301(b). While you raised sections 552.101, 552.102, 552.103, and 552.108 within the ten-business-day time period as required by section 552.301(b), you did not raise section 552.107 within that time. Thus, the district failed to comply with the requirements mandated by subsection 552.301(b) as to its argument under section 552.107 of the Government Code. Generally, if a governmental body fails to timely raise an exception, that exception is waived. *See generally id.* § 552.302; Open Records Decision No. 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions). Section 552.107 is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See id.* § 552.007; Open Records Decision Nos. 676 at 11-12 (2002) (attorney-client privilege under section 552.107 subject to waiver), 665 at 2 n.5 (2000) (discretionary exceptions in general). Therefore, in failing to timely raise section 552.107 for the requested information, the district has waived its argument under this section and may not withhold any of the submitted information on this basis. However, we will consider your timely-raised arguments under sections 552.101, 552.102, 552.103, and 552.108.

Next, we note Exhibit C contains completed evaluations subject to section 552.022 of the Government Code. Section 552.022(a)(1) provides for the required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body," unless it is excepted by section 552.108 of the Government Code or made confidential under the Act or other law. Gov't Code § 552.022(a)(1). Although you raise section 552.103 for this information, this section is a discretionary exception to disclosure and does not make information confidential under the Act. *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); *see also* Open Records Decision Nos. 665 at 2 n.5 (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Thus, the district may not withhold the information we have marked in Exhibit C under

section 552.103 of the Government Code. However, because section 552.101 makes information confidential under the Act, we will address the applicability of this section to the information subject to section 552.022 in Exhibit C. Additionally, we will consider your arguments for the remaining information not subject to section 552.022 of the Government Code.

Section 552.101 of the Government Code excepts “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses section 21.355 of the Education Code, which provides that “[a] document evaluating the performance of a teacher or administrator is confidential.” 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, “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, or a school district teaching permit under section 21.055 and who is engaged in the process of teaching, as that term is commonly defined, at the time of the valuation. *See id.* at 4. We have also determined that “administrator,” for purposes of section 21.355, means a person who is required to and does in fact hold an administrator’s certificate under subchapter B of chapter 21 of the Education Code and is performing the functions of an administrator, as that term is commonly defined, at the time of the evaluation. *Id.* 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 state some of the documents in Exhibit C evaluate the performance of certified teachers and administrators. You inform us the teachers and administrators were acting in their respective capacities as teachers or administrators when the evaluative documents were created. Based on your representations and our review, we find the information subject to section 552.022 in Exhibit C constitutes evaluations of teachers and administrators for purposes of section 21.355. Accordingly, the district must withhold the information we have marked in Exhibit C under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.

Section 552.101 of the Government Code also encompasses section 261.201 of the Family Code, which provides, in part, 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 [Texas 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.

(l) Before a child or a parent, managing conservator, or other legal representative of a child may inspect or copy a record or file concerning the child under Subsection (k), the custodian of the record or file must redact:

...

(2) any information that is excepted from required disclosure under [the Act], or other law[.]

Fam. Code § 261.201(a), (k), (l)(2). You state the information in Exhibit B was used or developed in an investigation of alleged or suspected child abuse. *See id.* § 261.001 (defining “abuse” for purposes of chapter 261 of the Family Code); *see also id.* § 101.003(a) (defining “child” for purposes of chapter 261). 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). However, Exhibit B pertains to an investigation of alleged or suspected abuse conducted by the district’s police department, which is an agency authorized to conduct investigations under chapter 261. Accordingly, we find Exhibit B is generally confidential under section 261.201 of the Family Code. We note the requestor is the attorney of a parent of the child victim listed in the information at issue, and the parent is not alleged to have committed the suspected abuse. Thus, pursuant to section 261.201(k), Exhibit B may not be withheld from this requestor under section 552.101 of the Government Code on the basis of section 261.201(a). *See id.* § 261.201(k). However,

section 261.201(1)(2) states any information that is excepted from required disclosure under the Act or other law must still be withheld from disclosure. *Id.* § 261.201(1)(2). Accordingly, we will consider your remaining arguments against disclosure.

You claim the remaining information is excepted from disclosure under section 552.103 of the Government Code. Section 552.103 provides, in relevant part, the following:

(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 section 552.103(a) 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, 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.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs 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 an 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, and provide documentation showing, prior to the district's receipt of the request for information, the requestor's client filed a complaint under Board Policy FNG (LOCAL), alleging suspected abuse of a child. You provide documentation showing the district's

complaint process consists of three levels, wherein district administrators hear the complaint at Levels I and II, and the district's board of trustees, or its designee, hears the complaint at Level III. You explain that during these hearings, the complainant has the right to be represented by counsel, present evidence, and participate in the hearings. The district's policy also requires an individual to exhaust the district's remedies for resolving a complaint before the individual can file suit against professional employees. Further, you state the remaining information is related to the district's investigation of alleged abuse, which is the subject of the requestor's complaint. Based on your representations and our review, we find you have demonstrated the district's complaint process is conducted in a quasi-judicial forum and therefore constitutes litigation for purposes of section 552.103 of the Government Code. Moreover, we find the remaining information is related to the pending litigation. Therefore, we agree section 552.103 is applicable to the remaining information.

However, the information at issue in Exhibit B involves alleged criminal activity. Information normally found on the front page of an offense or incident report is generally considered public. *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976); *see* Open Records Decision No. 127 (1976). This office has determined basic information about a crime may not be withheld under section 552.103, even if it is related to the litigation. Open Records Decision No. 362 (1983). Therefore, with the exception of basic information, which you state has been released, the district may withhold the remaining information under section 552.103 of the Government Code.⁴

We note, however, the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to that litigation to obtain it through discovery procedures. *See* ORD 551 at 4-5. Thus, if the opposing parties have seen or had access to information relating to the anticipated litigation, through discovery or otherwise, 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 also note the applicability of section 552.103 ends once the related litigation concludes or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the district must withhold the information subject to section 552.022, which we have marked in Exhibit C, under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. With the exception of basic information, which

⁴As our ruling is dispositive, we need not address your remaining arguments against disclosure.

you state has been released, the district may withhold the remaining information under section 552.103 of the Government Code.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.

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,



Paige Lay
Assistant Attorney General
Open Records Division

PL/som

Ref: ID# 521094

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁵Because the requestor in this instance has a special right of access to the information being released pursuant to section 261.201(k) of the Family Code, if the district receives another request for this information from a different requestor, the district must again seek a ruling from this office. See Gov't Code §§ 552.301, .302; Open Records Decision No. 673 (2001).