



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 6, 2014

Mr. Benjamin Castillo
Counsel for Manor Independent School District
O'Hanlon, McCollom & Demerath
808 West Avenue
Austin, Texas 78701

OR2014-17774

Dear Mr. Castillo:

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# 538420.

The Manor Independent School District (the "district"), which you represent, received a request for 19 categories of information pertaining to email correspondence. You state you will release some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.114 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

We note some of the requested information may have been the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2014-06799 (2014). We have no indication the law, facts, and circumstances on which the prior ruling was based have changed. Accordingly, to the extent the requested information is identical

¹Although you raise sections 552.104 and 552.105 of the Government Code against disclosure of the submitted information, you provide no arguments explaining how these exceptions are applicable. Therefore, we assume you no longer assert these exceptions. *See* Gov't Code §§ 552.301, .302.

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.

to the information previously requested and ruled upon by this office, we conclude the district must continue to rely on Open Records Letter No. 2014-06799 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 requested information is not encompassed by the previous ruling, we address your arguments against disclosure.

Additionally, we note the United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g, 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.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 records to determine the applicability of FERPA, we will not address its applicability to any of the submitted information. Such determinations under FERPA must be made by the district. Likewise, we do not address your argument 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 address your remaining arguments against disclosure of the submitted 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 other statutes, such as 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). This office has concluded that a "teacher" for purposes of section 21.355 means a person who is required to, and does in fact, hold a certificate or permit required under chapter 21 of the Education Code, and is teaching at the time of the evaluation. *See id.* This office has also concluded that an "administrator" for purposes of section 21.355 means a person who is required to, and does in fact, hold an administrator's certificate under

³A copy of this letter may be found on the Office of the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

subchapter B of chapter 21 of the Education Code, and is performing the functions as an administrator, as that term is commonly defined, at the time of the evaluation. *See id.*

You assert the information in Exhibits 5 and 5a consists of written evaluations that are confidential under section 21.355. You inform us the teacher and administrator at issue held the appropriate certifications, and were teaching or performing the functions of an administrator, respectively, at the time of the evaluations. Based on your representations and our review, we agree the information we have marked in Exhibits 5 and 5a constitute evaluations as contemplated by section 21.355. Accordingly, the district must withhold the information we have marked in Exhibits 5 and 5a under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. However, we find you have failed to demonstrate how any of the remaining information consists of documents evaluating the performance of a teacher or administrator for purposes of section 21.355 of the Education Code. Accordingly, none of the remaining information may be withheld under section 552.101 of the Government Code on that basis.

Section 552.101 of the Government Code also encompasses article 15.27 of the Code of Criminal Procedure, which provides in pertinent part:

(a) A law enforcement agency that arrests any person or refers a child to the office or official designated by the juvenile board who the agency believes is enrolled as a student in a public primary or secondary school, for an offense listed in Subsection (h), shall attempt to ascertain whether the person is so enrolled. If the law enforcement agency ascertains that the individual is enrolled as a student in a public primary or secondary school, the head of the agency or a person designated by the head of the agency shall orally notify the superintendent or a person designated by the superintendent in the school district in which the student is enrolled of that arrest or referral within 24 hours after the arrest or referral is made, or before the next school day, whichever is earlier. If the law enforcement agency cannot ascertain whether the individual is enrolled as a student, the head of the agency or a person designated by the head of the agency shall orally notify the superintendent or a person designated by the superintendent in the school district in which the student is believed to be enrolled of that arrest or detention within 24 hours after the arrest or detention, or before the next school day, whichever is earlier. If the individual is a student, the superintendent or the superintendent's designee shall immediately notify all instructional and support personnel who have responsibility for supervision of the student. All personnel shall keep the information received in this subsection confidential. The State Board of Educator Certification may revoke or suspend the certification of personnel who intentionally violate this subsection. Within seven days after the date the oral notice is given, the head of the law enforcement agency or the person designated by the head of the agency shall mail written notification, marked "PERSONAL and CONFIDENTIAL" on

the mailing envelope, to the superintendent or the person designated by the superintendent.

...

(f) A person who receives information under this article may not disclose the information except as specifically authorized by this article. A person who intentionally violates this article commits an offense. An offense under this subsection is a Class C misdemeanor.

...

(i) A person may substitute electronic notification for oral notification where oral notification is required by this article.

Crim. Proc. Code art. 15.27(a), (f), (i). You state the information in Exhibits 7-7e and 8 was provided to the district in accordance with article 15.27 of the Code of Criminal Procedure. It appears from the submitted information that the information at issue is maintained by the appropriate school personnel, and the requestor in this matter is a private citizen and is not authorized under article 15.27 to receive a copy of the documents at issue. Because subarticles 15.27(a) and 15.27(f) make information confidential in the hands of school personnel who receive the information pursuant to article 15.27(a), we agree the district must withhold the information we have marked in Exhibits 7-7e and 8 under section 552.101 of the Government Code in conjunction with article 15.27 of the Code of Criminal Procedure. However, we find you have failed to demonstrate how any of the remaining information consists of information received by district personnel in accordance with article 15.27 of the Code of Criminal Procedure. Accordingly, none of the remaining information at issue may be withheld under section 552.101 of the Government Code in conjunction with article 15.27 of the Code of Criminal Procedure..

Section 552.103 of the Government Code provides in pertinent 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 that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate that (1) litigation is pending or reasonably anticipated on the date the governmental body receives the request for information, and (2) the information at issue is related to the pending or anticipated 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). The governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a). *See* ORD 551 at 4.

This office has long held that for the purposes of section 552.103, "litigation" includes "contested cases" conducted in a quasi-judicial forum. *See* Open Records Decision Nos. 474 (1987), 368 (1983), 336 (1982), 301 (1982). Likewise, "contested cases" conducted under the Texas Administrative Procedure Act, chapter 2001 of the Government Code, constitute "litigation" for purposes of section 552.103. *See* Open Records Decision Nos. 588 (1991) (concerning former State Board of Insurance proceeding), 301 (concerning hearing before Public Utilities Commission). 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* ORD 588.

In this instance, you state the information in Exhibits 6 and 6a is related to a grievance filed with the district prior to the date the district received the request for information. You explain grievances filed with the district are "litigation" because the district follows administrative procedures in handling such disputes. You state the district's grievance process is a multi-level hearing process wherein various administrators initially hear the grievance, and the district's Board of Trustees ultimately hears the grievance. You explain during these hearings the grievant is allowed to be represented by counsel and present evidence to the district. You state the grievant must complete the district's grievance process in order to exhaust his administrative remedies before he can appeal to either the Texas Commissioner of Education or a court of competent jurisdiction. Based on your representations and our review, we find you have demonstrated the district's administrative procedure for grievances is conducted in a quasi-judicial forum and, thus, constitutes litigation for purposes of section 552.103. Therefore, we determine the district was involved in pending litigation at the time it received the instant request for information. Further, upon review, we find the information in Exhibits 6 and 6a is directly related to litigation that was pending at the time the district received the request for information. Therefore, the district

may withhold the information in Exhibits 6 and 6a under section 552.103 of the Government Code.

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. Thus, 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. Open Records Decision Nos. 349 (1982), 320 (1982). Further, the applicability of section 552.103(a) ends when the litigation has concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

Section 552.101 also encompasses the common-law right to privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be met. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). Upon review, we find the information we have marked in Exhibit 8a satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the district must withhold the information we have marked in Exhibit 8a under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee or official of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former employee or official who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Therefore, to the extent the employee whose information is at issue in Exhibit 8a timely elected confidentiality under section 552.024, the district must withhold the information we have marked in Exhibit 8a under section 552.117(a)(1) of the Government Code. To the extent the employee at issue did not make a timely election under section 552.024, this information may not be withheld under section 552.117(a)(1) of the Government Code.

In summary, the district must withhold the information we have marked in Exhibits 5 and 5a under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. The district must also withhold the information we have marked in Exhibits 7-7e and 8 under section 552.101 of the Government Code in conjunction with article 15.27 of the Code of Criminal Procedure. The district may withhold the information in Exhibits 6 and 6a under section 552.103 of the Government Code. The district must withhold the information we have marked in Exhibit 8a under section 552.101 of the Government Code in conjunction with common-law privacy. If the employee whose information is at issue in Exhibit 8a timely elected confidentiality under section 552.024, the district must also withhold the information we have marked in Exhibit 8a under section 552.117(a)(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.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,



Alley Latham
Assistant Attorney General
Open Records Division

AKL/eb

Ref: ID# 538420

Enc. Submitted documents

c: Requestor
(w/o enclosures)