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ATTORNEY GENERAL OF TEXAS

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OR2016-14445

Dear Mr. Decker:

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# 615595.

The Northside Independent School District (the "district"), which you represent, received a request for information pertaining to a named student, including incident reports, waivers signed by the student's parents, all correspondence involving the named student and a named district employee, and information pertaining to a specified investigation.¹ You state you will withhold social security numbers pursuant to section 552.147(b) of the Government Code and certain information pursuant to the previous determination in Open Records Decision No. 684 (2009).² You claim the submitted information is excepted from disclosure

¹We note the district sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

²We note 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 a decision from this office. *See* Gov't Code § 552.147(b). Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain categories of information without the necessity of requesting an attorney general decision.

under sections 552.101, 552.103, and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the information we have marked is not responsive to the instant request for information because it was created after the date the district received the request for information. This ruling does not address the public availability of non-responsive information, and the district is not required to release non-responsive information in response to this request.

Next, you have redacted student-identifying information from the submitted documents pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code. The United States Department of Education Family Policy Compliance Office has informed this office 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.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 redacted education records for our review. Because our office is prohibited from reviewing these education records to determine whether appropriate redactions under FERPA have been made, we will not address the applicability of FERPA to any of the submitted records, except to note parents have a right of access under FERPA to their children's education records. *See* 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.3. This statutory federal right of access prevails over a conflict state law. *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) (FERPA prevails over inconsistent provision of state law). The DOE has informed us, however, that 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 the district's assertions of this privilege under section 552.107 of the Government Code. We also will consider the district's claim for the responsive information under sections 552.101 and 552.103 of the Government Code to the extent the requestor does not have a right of access to the information under FERPA.

We note portions of the responsive information are subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

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

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or 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]

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(1), (3). The responsive information includes completed evaluations subject to subsection 552.022(a)(1). The district must release the completed evaluations pursuant to subsection 552.022(a)(1) unless they are excepted from disclosure under section 552.108 of the Government Code or are made confidential under the Act or other law. *See id.* § 552.022(a)(1). The responsive information also consists of information in a contract relating to the expenditure of funds by a governmental body subject to section 552.022(a)(3). The information subject to section 552.022(a)(3), which we have marked, must be released unless it is made confidential under the Act or other law. *See id.* § 552.022(a)(3). Although you raise section 552.103 of the Government Code for the information at issue, 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); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the information subject to section 552.022 may not be withheld under section 552.103 of the Government Code. As no other exceptions are raised for the information subject to section 552.022(a)(3), which we have marked, it must be released. However, because section 552.101 makes information confidential under the Act, we will address the applicability of this exception to the remaining information at issue. Further, we will address your argument under section 552.103 for the information not subject to section 552.022.

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 261.201(a) of the Family Code, which provides:

(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.

Fam. Code § 261.201(a). You state portions of the information at issue are confidential under section 261.201 of the Family Code. *See id.* §§ 101.003(a) (defining "child" for purposes of this section as person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes), 261.001(1) (defining "abuse" for purposes of chapter 261 of the Family Code). Upon review, we find the information you have indicated consists of e-mails regarding student-teacher interactions that appear to have been generated by the district for its administrative investigation. We note the district is not an agency authorized to conduct an investigation under chapter 261 of the Family Code. Fam. Code § 261.103 (listing agencies that may conduct child abuse investigations). You do not explain, and we cannot discern, whether the information you have indicated was used by the district's police department or the Child Protective Services Division of the Texas Department of Family and Protective Services in an investigation under chapter 261. *See id.* § 261.201(a)(2). Thus, we conclude you have failed to demonstrate the information you have indicated constitutes information used or developed in an investigation under chapter 261. We also find none of the information at issue reveals the identity of a person making a report of child abuse or neglect under chapter 261. *See id.* § 261.201(a)(1). Consequently, the district may not withhold any of the information at issue under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code.

Section 552.101 of the Government Code also encompasses section 21.355 of the Education Code. Section 21.355(a) of the Education Code provides that "[a] document evaluating the performance of a teacher or administrator is confidential." Educ. Code § 21.355(a). In addition, the Third Court of Appeals has concluded a written reprimand constitutes an evaluation for purposes of section 21.355 because "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.). 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 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 in the process of teaching, as that term is commonly defined, at the time of the evaluation. *See id.* at 4.

You contend the information you have indicated is confidential because it consists of evaluative documents of a certified teacher under Chapter 21. You inform us, and have submitted documentation reflecting, the individual at issue held the appropriate teacher certification at the time of the evaluations. We note the individual at issue was certified as a teacher and was acting as a teacher when the evaluations at issue were prepared. Upon

review, we find some of the information at issue, which we have marked, consists of confidential evaluations under section 21.355 of the Education Code. Accordingly, the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. However, we find the district has failed to demonstrate the remaining information at issue consists of documents evaluating the performance of an educator or administrator for purposes of section 21.355. Consequently, we find none of the remaining information at issue may be withheld under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.

Section 552.107(1) of the Government Code protects information coming 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. Open Records Decision No. 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 “to facilitate 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). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). 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, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit 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).

The district states the information it has indicated consists of communications involving district attorneys, district representatives, and other district employees and officials. The

district states the communications were made for the purpose of facilitating the rendition of professional legal services to the district and these communications have remained confidential. Upon review, we find the district has demonstrated the applicability of the attorney-client privilege to the information at issue. Therefore, the district may generally withhold the information at issue under section 552.107(1) of the Government Code. However, we note some of the e-mail strings include e-mails received from or sent to non-privileged parties. Furthermore, if these e-mails are removed from the e-mail strings and stand alone, they are responsive to the request for information. Therefore, to the extent the district maintains these non-privileged e-mails, which we have marked, separate and apart from the otherwise privileged e-mail strings in which they appear, the district may not withhold these non-privileged e-mails under section 552.107(1) of the Government Code.

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

(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 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 governmental body 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, 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).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To demonstrate litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Concrete evidence to support a claim that litigation is reasonably anticipated

may include, for example, an attorney for a potential opposing party making a demand for payment and asserting an intent to sue if such payments are not made. Open Records Decision Nos. 555 at 3 (1990), 346 (1982). In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party threatened to sue on several occasions and hired an attorney. *See* Open Records Decision No. 288 at 2 (1981). However, an individual publicly threatening to bring suit against a governmental body, but who does not actually take objective steps toward filing suit, is not concrete evidence that litigation is reasonably anticipated. *See* Open Records Decision No. 331 at 1-2 (1982).

The district states it reasonably anticipated litigation when it received the request for information because the requestor, who is an attorney, previously threatened to pursue claims against the district and has filed a temporary restraining order, temporary injunction, and permanent injunction against the named district employee. Thus, we find the district reasonably anticipated litigation when it received the request for information. We also find the district has established the remaining responsive information is related to the anticipated litigation for purposes of section 552.103(a). Therefore, we agree section 552.103(a) is applicable to the remaining responsive information.

However, once the information has been obtained by all parties to the anticipated litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (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 opposing party to the anticipated litigation has seen or had access to some of the information at issue. Therefore, the district may not withhold this information, which we have marked, under section 552.103(a). However, we agree the district may withhold the remaining responsive information under section 552.103(a) of the Government Code. We also note the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

In summary, we do not address the applicability of FERPA to any of the submitted records, other than to note parents have a right of access to their own child's education records and their federal right of access prevails over a conflicting state claim. The district must release the information subject to section 552.022(a)(3) of the Government Code, which we have marked. The district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. The district may withhold the information you have indicated under section 552.107(1) of the Government Code; however, if the non-privileged e-mails we have marked are maintained by the district separate and apart from the otherwise privileged e-mail strings in which they appear, the district must release the non-privileged e-mails. With the exception of the information we have marked for release, the district may withhold the remaining responsive information under section 552.103(a) of the Government Code.

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,



Katelyn Blackburn-Rader
Assistant Attorney General
Open Records Division

KB-R/bw

Ref: ID# 615595

Enc. Submitted documents

c: Requestor
(w/o enclosures)