



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 5, 2016

Mr. W. Montgomery Meitler
Senior Counsel
Office of Legal Services
Texas Education Agency
1701 North Congress Avenue
Austin, Texas 78701-1494

OR2016-15228

Dear Mr. Meitler:

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# 617526 (TEA PIR# 26891).

The Texas Education Agency (the "agency") received a request for information pertaining to a named individual. You state you have released some information to the requestor. You indicate the agency will redact dates of birth of living persons pursuant to the previous determination issued to the department in Open Records Letter No. 2016-04398 (2016).¹ You also state you will redact information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code,²

¹Open Records Letter No. 2016-04398 is a previous determination authorizing the agency to withhold the dates of birth of public citizens under section 552.101 of the Government Code in conjunction with common-law privacy without requesting a decision from this office. *See* Gov't Code § 552.301(a); Open Records Decision No. 673 (2001) (listing elements of second type of previous determination under section 552.301(a) of the Government Code).

²The 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 or student 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. A copy of this letter may be found on the Office of the Attorney General's website: <http://www.texasattorneygeneral.gov/files/og/20060725usdoe.pdf>.

sections 552.130(c) and 552.147(b) of the Government Code,³ and section 552.137 of the Government Code in accordance with Open Records Decision No. 684 (2009).⁴ You claim the submitted information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.⁵

Initially, you state some of the requested information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2016-07759 (2016). We also note some of the requested information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2015-14716 (2015). In Open Records Letter No. 2016-07759, we concluded the agency (1) may withhold the marked information under section 552.103 of the Government Code and (2) may withhold the marked information under 552.116 of the Government Code. In Open Records Letter No. 2015-14716, we concluded the agency (1) must withhold the marked information pursuant to section 552.101 of the Government Code in conjunction with section 21.048(c-1) of the Education Code, (2) may withhold the marked information under section 552.116 of the Government Code, and (3) must release the remaining information. There is no indication the law, facts, and circumstances on which the prior rulings were based have changed. Accordingly, for the requested information that is identical to the information previously requested and ruled upon by this office, we conclude the agency must continue to rely on Open Records Letters Nos. 2016-07759 and 2015-14716 as previous determinations and withhold or release the identical information in accordance with those rulings. *See* ORD 673.

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 chapter 411 of the Government Code, which pertains to criminal history record information (“CHRI”). Chapter 411 authorizes the Texas Department of Public Safety (“DPS”) to compile and maintain CHRI from law enforcement

³Section 552.130(c) of the Government Code allows a governmental body to redact the information described in section 552.130(a) without the necessity of seeking a decision from the attorney general. *See* Gov’t Code § 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). 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 id.* § 552.147(b).

⁴Open Records Decision No. 684 serves as a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including personal e-mail addresses under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision. *See* ORD 684 (2009).

⁵We assume that 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.

agencies throughout the state and to provide access to authorized persons to federal criminal history records. *See id.* §§ 411.042, .087. Section 411.0845 of the Government Code provides in relevant part:

(a) The [DPS] shall establish an electronic clearinghouse and subscription service to provide [CHRI] to a particular person entitled to receive [CHRI] and updates to a particular record to which the person has subscribed under this subchapter.

(b) On receiving a request for [CHRI] from a person entitled to such information under this subchapter, the [DPS] shall provide through the electronic clearinghouse:

(1) the [CHRI] reported to the [DPS] or the Federal Bureau of Investigation relating to the individual who is the subject of the request; or

(2) a statement that the individual who is the subject of the request does not have any [CHRI] reported to the [DPS] or the Federal Bureau of Investigation.

...

(d) The [DPS] shall ensure that the information described by Subsection (b) is provided only to a person otherwise entitled to obtain [CHRI] under this subchapter. Information collected under this section is confidential and is not subject to disclosure under [the Act].

Id. § 411.0845(a)-(b), (d). Pursuant to section 411.0901 of the Government Code, the agency is authorized to obtain this CHRI from DPS. *See id.* § 411.0901; *see also* Educ. Code § 22.0831 (agency shall review CHRI of certified educators). You state the information you have indicated consists of CHRI that was obtained through the DPS criminal history clearinghouse pursuant to section 411.0901. You also state the circumstances under which the release of this information is permitted under section 411.0901(b)(2) do not exist in this instance. *See Gov't Code* § 411.0901(b)(2). Based on your representations and our review, we agree the information you have indicated is confidential under section 411.0845 of the Government Code and the agency must withhold it under section 552.101 of the Government Code.

Section 552.103 of the Government Code 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.

Id. § 552.103(a), (c). A governmental body claiming section 552.103 has the burden of providing relevant facts and documents to show that 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, 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 under section 552.103(a).

To establish litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). In the context of anticipated litigation in which the governmental body is the prospective plaintiff, the concrete evidence must at least reflect that litigation is "realistically contemplated." *See* Open Records Decision No. 518 at 5 (1989); *see also* Attorney General Opinion MW-575 (1982) (finding that investigatory file may be withheld from disclosure if governmental body attorney determines that it should be withheld pursuant to section 552.103 and that litigation is "reasonably likely to result"). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* ORD 452 at 4.

You state the remaining information is related to an open investigation into allegations that an educator engaged in inappropriate conduct. You also state the alleged misconduct may require the agency to file a petition for sanctions against the educator pursuant to provisions of the Education Code and title 19 of the Texas Administrative Code. *See* Educ. Code §§ 21.031(a) (agency shall regulate and oversee standards of conduct of public school educators), .041(b) (agency shall propose rules providing for disciplinary proceedings); 19 T.A.C. §§ 247.2, 249.15(c). You explain that if the educator files an answer to the petition, the matter will be referred to the State Office of Administrative Hearings for a contested case proceeding. *See* 19 T.A.C. § 249.18. You state such proceedings are governed by the Administrative Procedure Act (the "APA"), chapter 2001 of the Government Code. *See* Educ. Code § 21.041(b)(7); 19 T.A.C. § 249.4(a)(1); Open Records Decision No. 588 (1991) (contested case under APA constitutes litigation for purposes of statutory predecessor to section 552.103). Based on your representations and our review, we find the agency

reasonably anticipated litigation when it received the instant request. Further, you explain the information at issue was compiled for the purpose of investigating the educator's alleged misconduct. Upon review, we agree the information relates to the anticipated litigation. Therefore, we conclude the agency may withhold the remaining information under section 552.103 of the Government Code.

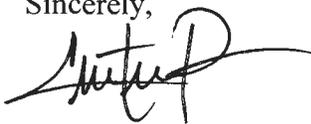
We note, however, once information has been obtained by all parties to the anticipated litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends when the litigation has concluded. *See* Attorney General Opinion MW-575 at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

In summary, for the requested information that is identical to the information previously requested and ruled upon by this office, we conclude the agency must continue to rely on Open Records Letters Nos. 2016-07759 and 2015-14716 as previous determinations and withhold or release the identical information in accordance with those rulings. The agency must withhold the information you have indicated under section 552.101 of the Government Code in conjunction with section 411.0845 of the Government Code. The agency may withhold the remaining information under section 552.103 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,



Cristian Rosas-Grillet
Assistant Attorney General
Open Records Division

CRG/bw

Ref: ID# 617526

Enc. Submitted documents

c: Requestor
(w/o enclosures)