



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 8, 2016

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

OR2016-02982

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# 598151 (TEA PIR# 25874).

The Texas Education Agency (the "agency") received a request for all records related to a named individual. You state you will release some information to the requestor. You also state the agency will redact information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.¹ You further state the agency will redact a driver license number under section 552.130(c) of the Government Code and a social security number under section 552.147(b) of the Government

¹The 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.oag.state.tx.us/open/20060725usdoe.pdf>.

Code.² You claim the remaining requested information is excepted from disclosure under sections 552.101, 552.102, and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.³

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

...

²Section 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).

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

(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 marked 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 marked 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 552.102(b) of the Government Code excepts from disclosure “a transcript from an institution of higher education maintained in the personnel file of a professional public school employee[.]” *Id.* § 552.102(b). However, this section further provides that “the degree obtained or the curriculum on a transcript in the personnel file of the employee” is not excepted from disclosure. *Id.* You state the submitted transcripts are maintained in an educator’s personnel file at Corpus Christi Independent School District, and the agency has possession of these transcripts via a special right of access in chapter 249 of title 19 of the Texas Administrative Code. *See* 19 T.A.C. § 249.14 (agency may obtain and investigate information concerning alleged improper conduct by an educator). In *Texas Education Agency v. Abbott*, the district court held that transcripts obtained by the agency from a school district during its investigation of an educator are considered to be maintained in the personnel files of employees of the district and are thus subject to section 552.102(b). *Tex. Educ. Agency v. Abbott*, No. 07-002656 (250th Dist. Ct., Travis County, Tex., Sept. 2, 2008). Thus, with the exception of the educator’s name, courses taken, and degree obtained, the agency must withhold the transcripts you have marked under section 552.102(b) 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.

Gov't Code § 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 information you have marked 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 id.* § 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, and is thus related to the anticipated litigation. Upon review, we agree the information at issue is related to the anticipated litigation at issue. Therefore, we conclude the agency may withhold the information you have marked 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.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) 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 satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. In considering whether a public citizen's date of birth is private, the Third Court of Appeals looked to the supreme court's rationale in *Texas Comptroller of Public Accounts v. Attorney General of Texas*, 354 S.W.3d 336 (Tex. 2010). *Paxton v. City of Dallas*, No. 03-13-00546-CV, 2015 WL 3394061, at *3 (Tex. App.—Austin May 22, 2015, pet. denied) (mem. op.). The supreme court concluded public employees' dates of birth are private under section 552.102 of the Government Code because the employees' privacy interest substantially outweighed the negligible public interest in disclosure.⁴ *Texas Comptroller*, 354 S.W.3d at 347-48. Based on *Texas Comptroller*, the court of appeals concluded the privacy rights of public employees apply equally to public citizens, and thus, public citizens' dates of birth are also protected by common-law privacy pursuant to section 552.101. *City of Dallas*, 2015 WL 3394061, at *3. Thus, the agency must withhold the date of birth you have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

In summary, the agency must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 411.0845 of the Government Code. With the exception of the educator's name, courses taken, and degree obtained, the agency must withhold the transcripts you have marked under

⁴Section 552.102(a) excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a).

section 552.102(b) of the Government Code. The agency may withhold the information you have marked under section 552.103 of the Government Code. The agency must withhold the date of birth you have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The agency must release the remaining information.

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,

A handwritten signature in dark ink, appearing to read 'JB' followed by a stylized flourish.

Joseph Behnke
Assistant Attorney General
Open Records Division

JB/sb

Ref: ID# 598151

Enc. Submitted documents

c: Requestor
(w/o enclosures)