



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

October 18, 2016

Ms. Melisa E. Meyler  
Counsel for the Irving Independent School District  
Thompson & Horton, LLP  
3200 Southwest Freeway, Suite 2000  
Houston, Texas 77027-7554

OR2016-23378

Dear Ms. Meyler:

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# 630962.

The Irving Independent School District (the "district"), which you represent, received two requests for information related to a specified student and incident.<sup>1</sup> You state you will release some information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, 552.114, 552.117, and 552.137 of the

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<sup>1</sup>We 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).

Government Code.<sup>2</sup> We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>3</sup>

Initially, we note 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.<sup>4</sup> 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, or their authorized representative, 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 conflicting 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.

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<sup>2</sup>We note although you raise section 552.026 of the Government Code as an exception to disclosure, this section is not an exception to public disclosure under the Act. Rather, section 552.026 provides the Act does not require the release of information contained in education records except in conformity with the Family Educational Rights and Privacy Act of 1974. Gov’t Code § 552.026. Further, although you raise section 552.101 of the Government Code in conjunction with rule 26 of the Federal Rules of Civil Procedure, rule 192.5 of the Texas Rules of Civil Procedure, and rule 503 of the Texas Rules of Evidence, this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Furthermore, in this instance, we note the proper exceptions to raise when asserting the attorney-client and attorney work product privileges for information not subject to section 552.022 of the Government Code are sections 552.107 and 552.111 of the Government Code, respectively. *See* Open Records Decision Nos. 677 (2002), 676 at 6. Additionally, although you raise sections 552.108 and 552.135 of the Government Code, you make no arguments to support these exceptions. Therefore, we assume you have withdrawn your claim these sections apply to the submitted information. *See* Gov’t Code §§ 552.301, .302.

<sup>3</sup>We 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.

<sup>4</sup>A copy of this letter may be found on the Office of the Attorney General’s website at <http://www.texasattorneygeneral.gov/files/og/20060725usdoe.pdf>.

Tex. 1995) (FERPA prevails over inconsistent provision of state law). Likewise, we do not address your argument under section 552.114 of the Government Code. *See* Gov't Code §§ 552.026 (incorporating FERPA into the Act), 552.114 (excepting from disclosure "student records"); Open Records Decision No. 539 (1990) (determining the same analysis applies under section 552.114 of the Government Code and FERPA). The DOE has informed us, however, that a parent's, or his authorized representative'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 remaining arguments to the extent the requestor does not have a right of access to the information under FERPA.

Next, 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. 2016-00095 (2016). In Open Records Letter No. 2016-00095, we determined (1) the district may generally withhold the information we had marked under section 552.107(1) of the Government Code; however, if the non-privileged e-mails we indicated were maintained by the district separate and apart from the otherwise privileged e-mail strings in which they appear, then the district may not withhold the non-privileged e-mails under section 552.107(1) of the Government Code; (2) the district must withhold the e-mail addresses we indicated under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure; and (3) release the remaining information. The district now seeks to withhold some of the information that may have been ordered released in Open Records Letter No. 2016-00095 under sections 552.103 and 552.111 of the Government Code. Section 552.007 of the Government Code provides if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential under law. *See* Gov't Code § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, the district may not now withhold the submitted information previously ordered released in Open Records Letter No. 2016-00095 unless its release is expressly prohibited by law or the information is confidential under law. Although the district raises sections 552.103 and 552.111 of the Government Code for some of the information at issue, these sections do not prohibit the release of information or make information confidential. *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. 677 at 8-10 (governmental body may waive attorney work product privilege under section 552.111 and Texas Rule of Civil Procedure 192.5), 663 at 5 (1999) (waiver of discretionary exceptions). Thus, to the extent the requested information was previously ordered released in Open Records Letter No. 2016-00095, the district may not now withhold it under section 552.103 or

section 552.111. We will consider your arguments for the requested information to the extent it was not released in accordance with the prior ruling.

Additionally, we note some of the requested information may have been the subject of another previous request for information, as a result of which this office issued Open Records Letter No. 2016-12447 (2016). In response to Open Records Letter No. 2016-12447, the district has filed a lawsuit against our office. *See Irving Indep. Sch. Dist. v. Ken Paxton*, D-1-GN-16-002518 (250th Dist. Ct., Travis County, Tex.). Accordingly, because some of the requested information may be at issue in the pending litigation, we will allow the trial court to resolve the issue of whether the information at issue in the pending litigation must be released to the public. However, to the extent the information at issue is not identical to the information at issue in the pending litigation, we will address your arguments against disclosure.

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 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 was pending or reasonably anticipated on the date of the receipt of the request for information and (2) the information at issue is related to the pending or anticipated 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). A governmental body must meet both prongs of this test for information to be excepted from disclosure 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.” *See* Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim litigation is reasonably anticipated may include, for example, the governmental body’s receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. *See* Open Records Decision No. 555 (1990); *see also* Open Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”). In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, or when an individual threatened to sue on several occasions and hired an attorney. *See* Open Records Decision Nos. 346 (1982), 288 (1981). On the other hand, this office has determined if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983).

You state, and provide documentation showing, prior to the date the district received the present requests for information, the district received a demand letter from an attorney claiming the district violated her client’s son’s civil rights. We note in this letter, which the district has submitted to this office for review, the client’s attorney demands, in part, “five million dollars as compensation for the damages [redacted] suffered at the hands of the Irving ISD and its employees.” Further, the attorney states that if the district does not “comply with the above demands within sixty days from the date of this letter, [the district] should expect that we will file a civil action[.]” Based on your representations and our review, we find the district reasonably anticipated litigation on the date it received the present requests for information. Further, we find the information at issue is related to the anticipated litigation. Therefore, the district may withhold the remaining information under section 552.103 of the Government Code.<sup>5</sup>

However, 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. Therefore, once the information at issue has been obtained by all parties to the anticipated litigation through discovery or otherwise, a section 552.103(a) interest no longer exists as to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). We also note the applicability of section 552.103(a) ends once the litigation has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

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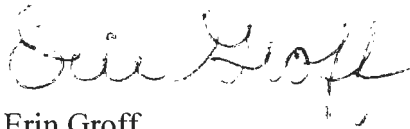
<sup>5</sup>As our ruling is dispositive, we need not address the district’s remaining arguments against disclosure of the information at issue.

In summary, to the extent the submitted information was previously ordered released in Open Records Letter No. 2016-00095, it must now be released. To the extent the submitted information is the subject of Cause No. D-1-GN-16-002518, we will allow the trial court to resolve the issue of whether that information must be released to the public. The district 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](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,



Erin Groff  
Assistant Attorney General  
Open Records Division

EMG/som

Ref: ID# 630962

Enc. Submitted documents

c: Requestor  
(w/o enclosures)