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ATTORNEY GENERAL OF TEXAS

September 20, 2017

Ms. Rebecca Bailey Weimer
Counsel for Stafford Municipal School District
Thompson & Horton, L.L.P.
3200 Southwest Freeway, Suite 2000
Houston, Texas 77027

OR2017-21556

Dear Ms. Weimer:

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# 675879 (Stafford ID# 66026718).

The Stafford Municipal School District (the "district"), which you represent, received a request for specified e-mails. You claim the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (permitting interested third party to submit to attorney general reasons why requested information should or should not be released).

Initially, we note some of the submitted information does not consist of the specified e-mails. This ruling does not address the public availability of any information that is not responsive to the request and the district is not required to release such information in response to this request.

The United States Department of Education Family Policy Compliance Office has informed this office that the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code, does not permit a state educational agency or institution 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.¹ Consequently, state and local education 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”). In this instance, you have submitted unredacted education records for our review. Because our office is prohibited from reviewing education records, we will not address the applicability of FERPA to any of the submitted records. Such determinations under FERPA must be made by the educational authority in possession of such records.² We will, however, address the applicability of the district’s claimed exception for the responsive information.

Next, we must address the requestor’s claim the district failed to comply with the procedural requirements of section 552.301(b) of the Government Code in asking this office to decide whether requested information is excepted from public disclosure. *See* Gov’t Code § 552.301(b). Pursuant to section 552.301(b), within ten business days after receiving a written request the governmental body must request a ruling from this office and state the exceptions to disclosure that apply. *See id.* Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request: (1) written comments stating the reasons why the claimed exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *Id.* § 552.301(e). The district received the initial request on March 29, 2017. Multiple requests for clarification were made by the district and the requestor responded to the requests for clarification, modifying her request. *See id.* § 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). The district received the last modification on June 24, 2017, which was a Saturday. The district informs us it was closed June 24, 2017, through July 9, 2017. The district also informs us it was closed for business on Fridays during the month of July. This office does not count the date the request was received for the purpose of calculating a governmental body’s deadlines

¹A copy of this letter may be found on the Office of the Attorney General’s website: <https://www.texasattorneygeneral.gov/files/og/20060725usdoe.pdf>

²In the future, if the district does obtain consent to submit unredacted education records from the student at issue, who is eighteen or attending a postsecondary educational institution, and the district seeks a ruling from this office on the proper redaction of those education records in compliance with FERPA, we will rule accordingly.

under the Act. Accordingly, we consider the request received on the next business day, July 10, 2017. Therefore, the ten-business day deadline for the modified request was July 26, 2017. The envelope in which the district submitted to this office the information required by section 552.301(b) bears a meter-mark of July 18, 2017. *See* Gov't Code § 552.308(a)(1) (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Thus, the district timely requested a decision from this office pursuant to section 552.301(b).

Nevertheless, we note the district has submitted some of the information in a format we are unable to review. The district must submit information in a manner that enables this office to determine whether the information comes within the scope of an exception to disclosure. As this office cannot review the information at issue, we conclude the district has failed to comply with the requirements of section 552.301(e) of the Government Code with respect to this information. *See id.* § 552.301(e)(1)(D). Under section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the presumption the information is public and must be released, unless there is a compelling reason to withhold the information. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ); Open Records Decision No. 319 (1982). We find the district failed to establish a compelling reason to address its argument under section 552.103 with respect to this information. Thus, we have no choice but to order the information at issue, which we have indicated, released pursuant to section 552.302. We will address the district's arguments for the responsive information it has submitted in a discernable format.

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). 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 under section 552.103(a).

This office has long held that “litigation,” for purposes of section 552.103, includes “contested cases” conducted in a quasi-judicial forum. *See* Open Records Decision Nos. 474 (1987), 368 (1983), 336 (1982), 301 (1982). 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* Open Records Decision No. 588 (1991).

You assert litigation against the district is currently pending because, prior to the district’s receipt of this request, the requestor filed multiple internal grievances with the district, including a pending level one grievance at the time of the instant request. You explain grievances filed with the district are “litigation” in that the district follows administrative procedures in handling such disputes. You also explain that, under the district’s grievance policy, the grievant proceeds through a three-level process wherein the district’s superintendent or his designee and the district’s board of trustees hear the grievance if the grievant appeals all the way to a level three. You explain during the hearings, the grievant is allowed to be represented by counsel, present evidence, and present witnesses. You further state the grievant can appeal grievance decisions to the Texas Education Agency. Based on your representations, we find you have demonstrated the district’s administrative procedures for grievances are conducted in a quasi-judicial forum, and thus, constitute litigation for purposes of section 552.103. Further, we find the district was a party to pending litigation on the date it received the request for information and the information at issue relates to the pending litigation. Accordingly, section 552.103 of the Government Code is applicable to the responsive information the district indicated.

We note, however, the requestor, who is the opposing party to the pending litigation at issue, has seen or had access to some of the information and it may not be withheld under section 552.103. The purpose of section 552.103 of the Government Code is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to the litigation to obtain such information through discovery procedures. *See* ORD 551 at 4-5. Thus, once information has been obtained by all parties to the 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). Therefore, the information the requestor has seen or had access to may not be withheld under

section 552.103(a). Further, 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.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.”³ Gov’t Code § 552.101. Section 552.101 encompasses the doctrine of common-law privacy. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Under the common-law right of privacy, an individual has a right to be free from the publicizing of private affairs in which the public has no legitimate concern. *Id.* at 682. The court of appeals has concluded public citizens’ dates of birth are protected by common-law privacy pursuant to section 552.101. *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.). Thus, the district must withhold the public citizen’s date of birth we marked under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body,” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). Gov’t Code § 552.137(a)-(c). We note, however, the requestor has a right to her own e-mail address under section 552.137(b). *Id.* § 552.137(b). Further, we are unable to determine whether the submitted personal e-mail addresses, some of which are located within e-mails communicating official business of the district, belong to district officials or employees. Thus, we must rule conditionally. To the extent the remaining personal e-mail addresses are the personal e-mail addresses of district officials or employees, this information is not subject to section 552.137 and may not be withheld on that basis. *See Austin Bulldog v. Leffingwell*, 490 S.W.3d 240 (Tex. App.—Austin 2016, no pet.) (holding personal e-mail addresses of government officials used to conduct official government business are not e-mail addresses of “members of the public” for purposes of Gov’t Code § 552.137(a)). To the extent the remaining personal e-mail addresses are not the personal e-mail addresses of the district officials or employees, this information is subject to section 552.137 and must be withheld under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their release or subsection (c) applies.

In summary, the district must release the information we indicated pursuant to section 552.302 of the Government Code. With the exception of the information the opposing party has seen or had access to, the district may withhold the responsive information it indicated under section 552.103(a) of the Government Code. The district must

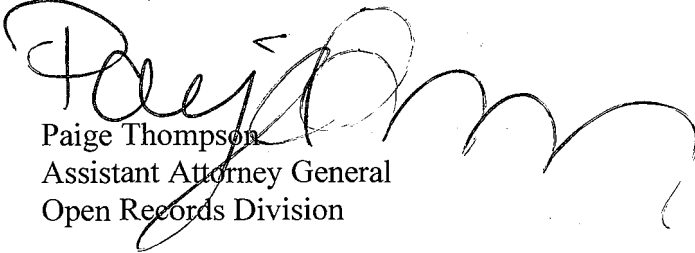
³The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

withhold the public citizen's date of birth we marked under section 552.101 of the Government Code in conjunction with common-law privacy. With the exception of the requestor's e-mail address, to the extent the remaining personal e-mail addresses are not the personal e-mail addresses of the district officials or employees, the district must withhold this information under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their release or subsection (c) applies. The district must release the remaining responsive 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,



Paige Thompson
Assistant Attorney General
Open Records Division

PT/eb

Ref: ID# 675879

Enc. Submitted documents

c: Requestor
(w/o enclosures)