



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 15, 2019

Ms. Elizabeth Nelson
Counsel for the Bonham Independent School District
Walsh, Gallegos, Trevino, Russo, & Kyle P.C.
P.O. Box 168046
Irving, Texas 75016

OR2019-19148

Dear Ms. Nelson:

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# 775291.

The Bonham Independent School District (the "district"), which you represent, received a request for (1) curricula approved by the district's board for a specified time period, (2) specified district policies, (3) specified communications between certain individuals or concerning a specified topic, and (4) specified reports during a specified time period.¹ You state the district redacted information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g(a).² You state the district will withhold information pursuant to section 552.024 of the Government Code, section 552.136(c) of the Government Code, and pursuant to Open Records Decision No. 684 (2009). You claim the submitted information is excepted from disclosure under sections 552.103 and 552.107 of the

¹We note the district sent the requestor an estimate of charges pursuant to section 552.2615 of the Government Code. *See* Gov't Code § 552.2615. The estimate of charges required the requestor to provide a deposit for payment of anticipated costs under section 552.263 of the Government Code. *See id.* § 552.263(a). You inform us the district received the required deposit on April 23, 2019. *See id.* § 552.263(e) (if governmental body requires deposit or bond for anticipated costs pursuant to section 552.263, request for information is considered to have been received on date governmental body receives bond or deposit).

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 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. The DOE has determined FERPA determinations must be made by the educational authority in possession of the educational records. We have posted a copy of the letter from the DOE on the Attorney General's website at <https://www.texasattorneygeneral.gov/sites/default/files/files/divisions/open-government/20060725-USDOE-FERPA.pdf>.

Government Code.³ We have considered the exceptions you claim and reviewed the submitted representative sample of information.⁴

Initially, we note the some of the submitted information was the subject of a previous request for a ruling, as a result of which this office issued Open Records Letter No. 2019-18294 (2019). In that ruling, we determined that, to the extent the information we marked pertains to employees who made timely elections under section 552.024 of the government code, the district must withhold the information marked under section 552.117(a)(1) of the Government Code, but must release the remaining information. We have no indication the law, facts, or circumstances on which the prior ruling was based have changed. Thus, the district must continue to rely on Open Records Letter No. 2019-18294 as a previous determination and withhold or release the information at issue in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). As we are able to make this determination, we need not address your submitted arguments for this information. However, we will consider your arguments for the submitted information not subject to the previous ruling.

Next, you indicate some of the submitted information is non-responsive to the present request. However, we note the information at issue consists of attachments to communications specified by the requestor. Therefore, we find the information at issue is responsive to the instant request, and we will address your argument against its disclosure.

³Section 552.117 of the Government Code excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body. *See* Gov't Code § 552.117(a)(1). Section 552.024 of the Government Code authorizes a governmental body to withhold information subject to section 552.117 without requesting a decision from this office if the current or former employee or official chooses not to allow public access to the information. *See id.* § 552.024(c). Section 552.136(c) of the Government Code authorizes a governmental body to redact, without the necessity of requesting a decision from this office, the information described in section 552.136(b). *Id.* § 552.136(c); *see also id.* § 552.136(d)-(e) (requestor may appeal governmental body's decision to withhold information under section 552.136(c) to attorney general and governmental body withholding information pursuant to section 552.136(c) must provide certain notice to requestor). Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

⁴We 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.

Next, we note the remaining information includes the notices and minutes from public meetings. The notices and minutes of a governmental body's public meetings are specifically made public under provisions of the Open Meetings Act, chapter 551 of the Government Code. *See* Gov't Code §§ 551.022 (minutes and tape recordings of open meeting are public records and shall be available for public inspection and copying on request to governmental body's chief administrative officer or officer's designee), .041 (governmental body shall give written notice of date, hour, place, and subject of each meeting). Although you raise section 552.103 of the Government Code for this information, the exceptions to disclosure found in the Act do not apply to information made public by other statutes. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Accordingly, the district must release the submitted notice and minutes from the public meetings, which we marked, pursuant to sections 551.022 and 551.041 of the Government Code.

Next, we note some of the submitted information is subject to section 552.022 of the Government Code, which provides, in relevant part:

(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:

...

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

...

(15) information regarded as open to the public under an agency's policies[.]

Gov't Code § 552.022(a)(3), (15). Some of the remaining information consists of information in an account, contract, or voucher relating to the receipt or expenditure of funds by the district that is subject to section 552.022(a)(3). Further, Exhibit C consists of district policies, which we note the district posts on its website. Thus, we find the district considers this information to be open to the public under the district's policies, and therefore, is subject to section 552.022(a)(15). The information subject to sections 552.022(a)(3) and 552.022(a)(15) must be released unless it is made confidential under the Act or other law. *See id.* § 552.022(a)(3), (15). Although you raise section 552.103 of the Government Code for the submitted information, 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 district may not withhold any of the information subject to section 552.022, which we marked, under section 552.103 of the Government Code. However, we will consider your submitted arguments for the information not subject to section 552.022.

Section 552.103 of the Government Code provides, in 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.

Id. § 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 (1) litigation was 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *See* Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See id.* Concrete evidence to support a claim that 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.⁵ Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be

⁵In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

“realistically contemplated”). On the other hand, this office has determined that 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 that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

You contend the district reasonably anticipates litigation because it is currently in a dispute with the LaDainian Tomlinson Academy (“LTA”). You state, and provide documentation demonstrating, prior to the district’s receipt of the instant request, the district received a letter from the requestor, who is an attorney for LTA. In that letter, the requestor states “[LTA] has authorized me to pursue legal action against [the district.]” You assert the remaining information, which relates to the district’s relationship with LTA, is related to the anticipated litigation. Based upon these representations and our review, we find you demonstrated the district reasonably anticipated litigation on the date it received the instant request and that the remaining information relates to the anticipated litigation. Therefore, the district may generally withhold the remaining information under section 552.103(a) of the Government Code.

We note, however, the opposing party has seen or had access to some of the information at issue. 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 the opposing party in pending litigation has seen or had access to information that is related to the litigation, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, the district may not withhold the information the opposing party has seen or had access to, which we marked for release, under section 552.103 of the Government Code. However, the district may withhold the remaining information not seen by an opposing party under section 552.103(a) of the Government Code.⁶ We note the applicability of section 552.103(a) ends once the litigation has been concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 at 3 (1982).

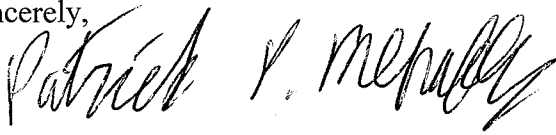
In summary, the district must continue to rely on Open Records Letter No. 2019-18294 as a previous determination and withhold or release the information in accordance with that ruling. The district must release the information we marked under sections 551.022 and 551.041 of the Government Code. The district must release the information we marked under section 552.022 of the Government Code. With the exception of the information seen by an opposing party, which we marked for release, the district may withhold the remaining information under section 552.103 of the Government Code.

⁶As our ruling is dispositive, we need not address your remaining arguments against disclosure of this 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,



Patrick P. Mehaffy
Assistant Attorney General
Open Records Division

PPM/gw

Ref: ID# 775291

Enc. Submitted documents

c: Requestor
(w/o enclosures)