



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 20, 2019

Ms. Katheryne Ellison
Assistant General Counsel
Houston Independent School District
4400 West 18th Street
Houston, Texas 77092-8501

OR2019-36128

Dear Ms. Ellison:

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# 802906 (File Nos. B092619B, C, D, E, and F).

The Houston Independent School District (the "district") received five requests from the same requestor for e-mails to and from named district employees regarding specified topics during a certain date range. You state you have redacted information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g(a).¹ You claim some of the submitted information is excepted from disclosure under section 552.103 of the

¹ The 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/files/og/20060725usdoe.pdf>.

Government Code.² We have considered the exception the district claims and reviewed the submitted representative sample of information.³

Section 552.103 of the Government Code provides, in relevant part, as follows:

(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 section 552.103(a) 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. *See 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). *See* ORD 551.

This office has long held “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).

² Although you also raise section 552.101 of the Government Code, you have not provided any arguments to support this exception. Therefore, we assume you have withdrawn the claim this section applies to the submitted information. *See* Gov't Code §§ 552.301, .302.

³ 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.

You state, and provide documentation showing, prior to its receipt of the instant request, the requestor filed a grievance with the district. You explain grievances filed with the district are “litigation” in that the district follows administrative procedures in handling such disputes. You state the district’s policies include a three-level process wherein district administrators and or independent hearing officers hear the grievance at Levels I and II, and the district’s board of trustees hears the grievance if the grievant appeals to Level III. You state during these hearings, the grievant is allowed to present evidence and be represented by counsel. You also state at Levels II and III, a record of the proceeding made by audio recording or a court reporter is required. Based on these representations and our review, we find the district’s administrative procedure for grievances, as described above, is conducted in a quasi-judicial forum. Thus, the district’s administrative procedure for grievances constitutes litigation for purposes of section 552.103.

You state the requestor filed the grievance prior to the district’s receipt of this request for information and the matter is still pending in the district’s administrative grievance process. Thus, we find the district was involved in pending litigation at the time it received the request for information. You state the information at issue relates to the pending litigation against the district. Upon review of these arguments and the information at issue, we find the information at issue is related to litigation involving the district that was pending on the date the request was received. Accordingly, the district may withhold the information you marked under section 552.103 of the Government Code.

We note once the 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. Open Records Decision No. 349 at 2 (1982). We also note the applicability of section 552.103(a) ends when the litigation is concluded. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

In summary, the district may withhold the information you marked under section 552.103 of the Government Code. The district must release the remaining information.⁴

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.

⁴ We note the requestor has a special right of access to his e-mail address pursuant to section 552.137(b) of the Government Code. *See* Gov’t Code § 552.137(b) (personal e-mail address of member of public may be disclosed if owner of address affirmatively consents to its disclosure). Open Records Decision No. 684 (2009) 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. Accordingly, if the district releases the requestor’s e-mail address, and if the district receives another request for this information from a requestor who does not have such a right of access, Open Records Decision No. 684 authorizes the district to redact the requestor’s e-mail address under section 552.137 of the Government Code without the necessity of requesting a decision under the Act.

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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read 'Deborah Southerland', written in a cursive style.

Deborah Southerland
Assistant Attorney General
Open Records Division

DS/mo

Ref: ID# 802906

Enc. Submitted documents

c: Requestor
(w/o enclosures)