



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 2, 2020

Ms. Christie Hobbs
General Counsel
Northwest Independent School District
2001 Texas Drive
Justin, Texas 76247

OR2020-22130

Dear Ms. Hobbs:

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# 842806 (NISD PIR# 20-106).

The Northwest Independent School District (the "district") received a request for communications involving various named individuals or categories of individuals pertaining to numerous specified topics.¹ The district states it has released some information to the requestor. The district claims the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code.² We have considered the exceptions the district claims and reviewed the submitted representative sample of information.³ We have also received and considered comments from the requestor. *See*

¹ The district states, and provides documentation showing, it 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 overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

² Although the district also raises Texas Rule of Evidence 503, Texas Disciplinary Rule of Professional Conduct 1.05, and Texas Rule of Civil Procedure 192.5, we note the proper exceptions to raise when asserting the attorney-client privilege and the attorney work product privilege 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 1-2 (2002).

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

Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note the United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code 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.⁴ 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"). Some of the information the district has submitted to this office for review may constitute education records. 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 requested information, except to note parents 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. Tex. 1995) (FERPA prevails over inconsistent provision of state law). Such determinations under FERPA must be made by the educational authority in possession of the education records. The DOE also has informed our office, however, a parent'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 and work product privileges. Accordingly, we will consider the district's claimed exceptions to the extent the requestor does not have a right of access to any of the information at issue under FERPA.

Next, we note the requestor states "[t]he [Act] is irrelevant in the requirement to provide [her] with [the requested] information." We understand the requestor to assert her request for information was not a request for public information under the Act. However, the instant request was submitted to the district in writing and seeks information that existed at the time the request was submitted to the district. Further, the district submitted information as responsive to the request and made arguments against its disclosure. Because the district has requested a decision on the submitted information and otherwise treated the request as having triggered its obligations under the Act, we will address the district's claimed exceptions to disclosure of the requested information under the Act.

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.

⁴ A copy of this letter may be found on the Office of the Attorney General's website at <https://www.texasattorneygeneral.gov/sites/default/files/files/divisions/open-government/20060725-USDOE-FERPA.pdf>.

Next, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) 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:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The submitted information includes a completed report that is subject to section 552.022(a)(1). The district must release this information pursuant to section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or is made confidential under the Act or other law. *See id.* The district seeks to withhold the information subject to section 552.022(a)(1) under section 552.103 of the Government Code. However, section 552.103 is discretionary in nature 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); *see also* 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 the information subject to section 552.022(a)(1) of the Government Code, which we have marked, under section 552.103 of the Government Code, and the city must release it.

Section 552.103 of the Government Code provides, in relevant 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). The governmental body claiming section 552.103 has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) litigation was pending or reasonably anticipated on the date of its receipt of 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

(Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. See Open Records Decision No. 551 at 4 (1990).

The district states, and provides documentation showing, prior to its receipt of the instant request, a lawsuit styled *Rhodes v. Northwest Independent School District*, Cause No. 153-315355-20, was filed and is currently pending against the district in the 153rd Judicial District Court of Tarrant County, Texas. Additionally, the district states the matter is also on appeal, styled *Northwest Independent School District v. K.R.*, Cause No. 02-20-00069-CV, and is currently pending in the Second Court of Appeals. Therefore, we agree litigation was pending on the date the district received the present request for information. The district explains the information at issue pertains to the substance of the lawsuit claims. Based on the district's representations and our review, we find the information at issue is related to the pending litigation. Therefore, section 552.103 is generally applicable to the remaining information.

We note, however, some of the remaining information was sent to or received by the opposing party to the pending litigation. 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). Accordingly, the district may not withhold the information the opposing party has seen or had access to, which we have marked. The district may withhold the remaining information under section 552.103 of the Government Code.⁵ We note the applicability of section 552.103 ends once the related litigation concludes. See Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the city must release the information we have marked pursuant to section 552.022(a)(1) of the Government Code. With the exception of the information we have marked, which must be released, 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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open

⁵ As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

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,

Gerald A. Arismendez
Assistant Attorney General
Open Records Division

GAA/mo

Ref: ID# 842806

Enc. Submitted documents

c: Requestor
(w/o enclosures)