



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

June 5, 1996

Mr. Darrell W. Corzine  
McMahon, Tidwell, Hansen, Atkins  
& Peacock, P.C.  
4001 East 42nd, Suite 200  
Odessa, Texas 79762

OR96-0882

Dear Mr. Corzine:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act. Your request was assigned ID# 39968.

The Ector County Independent School District (the "district"), which you represent, received a written request for information concerning an investigation into allegations made against an assistant coach at a junior high school. You have provided this office with copies of the requested information, and contend that this information is excepted from disclosure by sections 552.101, 552.103, and 552.114 of the Government Code.

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. The district has the burden of providing relevant facts and documents to show that 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, and (2) the information at issue is related to that litigation. *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 Nos. 638 (1996), 551 (1990). The district must meet both prongs of this test for information to be excepted under section 552.103(a). Open Records Decision No. 638 (1996).

Litigation cannot be regarded as "reasonably anticipated" unless there is concrete evidence showing that the claim that litigation may ensue is more than mere conjecture. Open Records Decision Nos. 452 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *Id.* This office has concluded that litigation

is reasonably anticipated when an attorney makes a written demand for disputed payments and promises further legal action if they are not forthcoming, and when a requestor hires an attorney who threatens to sue a governmental entity. *Id.*; *see also* Open Records Decision Nos. 555 (1990), 346 (1982). You state in your letter to this office that the assistant coach who was the subject of the investigation has hired an attorney who has threatened to sue the district under certain conditions. We therefore conclude that the district has established that litigation is reasonably anticipated. We also find that the requested information is related to the anticipated litigation, and that the district may therefore withhold the information under section 552.103.

In reaching this conclusion, however, we assume that the opposing party to the anticipated litigation has not previously had access to the records at issue. Section 552.103 is intended to protect the litigation interests of a governmental body by forcing parties that are or may be in litigation with a governmental body to obtain information relating to the litigation through the discovery process, if at all. Open Records Decision No. 551 (1990) at 3. The litigation exception was intended to prevent the use of the Open Records Act as a method to avoid discovery rules. *Id.* at 4. 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 and that information may not be withheld under this exception. *Id.*; *see also* Open Records Decision Nos. 454 (1986), 349 (1982), 320 (1982), 288 (1981). If the opposing party in this potential litigation has seen or had access to any of the information in these records, there would be no justification for now withholding that information from the requestor pursuant to section 552.103(a). We also note that the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982), Open Records Decision No. 350 (1982).

Because we have held that the district may not withhold under section 552.103 those documents that have previously been disclosed to the plaintiff, we must address your other claimed exceptions. You assert that any student identifying information is excepted from disclosure pursuant to the Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g. We agree that educational records must be withheld from required public disclosure under FERPA to the extent "reasonable and necessary to avoid personally identifying a particular student." Open Records Decision Nos. 332 (1982), 206 (1978).<sup>1</sup> We note that the district has redacted any student identifying information from the documents that were submitted to this office for review. *See* Open Records Decision No. 634 (1995) (educational institution may withhold from public disclosure information covered by FERPA and Gov't Code § 552.114 without requesting open records ruling).

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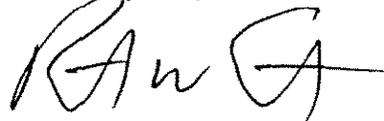
<sup>1</sup>*But see* 20 U.S.C. § 1232g(a)(1)(A), (d) (parent or adult student has affirmative right of access to that student's education records); Open Records Decision No. 431 (1985) (Open Records Act's exceptions to required public disclosure do not authorize withholding of "education records" from adult student).

In addition to information made confidential under FERPA, we believe that certain portions of the requested information may be excepted from disclosure under section 552.101 of the Government Code. Section 552.101 protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," including the common-law right to privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy protects information if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, *and* it is of no legitimate concern to the public. *Id.* at 683-85.

In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied), the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *Ellen*, 840 S.W.2d at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the public's interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held that "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.* Based on *Ellen*, we conclude that under section 552.101 the district must withhold the identities of witnesses or victims in sexual harassment matters.<sup>2</sup>

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Robert W. Schmidt  
Assistant Attorney General  
Open Records Division

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<sup>2</sup>We note that information that is confidential by law, including FERPA information and the identities of witnesses or victims in sexual harassment matters, must be withheld from disclosure, even if the information has been previously disclosed to the plaintiff in anticipated litigation and thus is not excepted from disclosure under section 552.103. See Open Records Decision No. 400 (1983) at 2 (information that is confidential by law may not be released even if previously disclosed).

RWS/rho

Ref.: ID# 39968

Enclosures: Submitted documents

cc: Mr. Ron West  
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(w/o enclosures)