



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

January 22, 1997

Mr. Yuri Calderón  
Assistant School Attorney  
Houston Independent School District  
Hattie Mae White Administration Building  
3830 Richmond Avenue  
Houston, Texas 77027-5838

OR97-0115

Dear Mr. Calderón:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 103217.

The Houston Independent School District ("HISD") received a request for a copy of a directive "which contained a reprimand" of a certain teacher within it. In her grievance against HISD, the teacher referred to the document requested as a "memo from legal." You state that HISD has provided the requestor with a copy of the official directive issued to the teacher.<sup>1</sup> However, HISD claims that communications to and from the legal services department are excepted from disclosure under sections 552.101, 552.103, and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. HISD 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 No. 551 (1990) at 4. HISD must meet both prongs of this test for information to be excepted under section 552.103(a).

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<sup>1</sup>We received correspondence dated November 1, 1996, from James T. Fallon III of the Houston Federation of Teachers in which he indicates that the directive had not been received. As the directive was not submitted to this office for review, we assume that HISD has turned that directive over to the requestor as you state in your October 22, 1996, correspondence to this office.

Litigation cannot be regarded as "reasonably anticipated" unless there is more than a "mere chance" of it--unless, in other words, we have concrete evidence showing that the claim that litigation may ensue is more than mere conjecture. Open Records Decision Nos. 452 (1986), 331 (1982), 328 (1982). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision Nos. 452 (1986), 350 (1982). 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. Open Records Decision Nos. 555 (1990), 551 (1990).

You state:

Ms. Fallon has made threats to both Ms. Cordray, principal of Horn Elementary School, and Ms. Caroline LaVois, Executive Director of the Southwest District, that she was preparing to sue the District over this incident between the teacher and the parent, and subpoena the documents in question. The District reasonably anticipates Ms. Fallon to follow through with her threat of litigation.

We do not believe that these statements establish reasonable anticipation of litigation. Therefore, HISD may not withhold the requested information under section 552.103 of the Government Code.

Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. Open Records Decision No. 574 (1990) at 5. Section 552.107(1) is waived by public disclosure of the information sought to be withheld. Open Records Decision No. 630 (1994). We have reviewed the submitted information and marked the information that HISD may withhold under section 552.107(1). HISD may not withhold the remainder of the submitted information from required public disclosure under section 552.107(1).

Some of the other records at issue that are not otherwise protected from disclosure under section 552.107(1) are protected from disclosure as "education records" under the federal Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g, or section 552.114 of the Government Code. "Education records" are records that

- (i) contain information directly related to a student; and

- (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

20 U.S.C. § 1232g(a)(4)(A); *see* Open Records Decision Nos. 462 (1987), 447 (1986). Information must be withheld from required public disclosure under FERPA only to the extent “reasonable and necessary to avoid personally identifying a particular student.” Open Records Decision Nos. 332 (1982), 206 (1978). Thus, you must redact the identifying information about students prior to releasing any documents.<sup>2</sup> We have marked the information that appears to be protected by FERPA.

Although the requestor represents a teacher in a grievance proceeding, we do not believe that she has a special right of access to these education records. Federal regulations governing the release of education records provide:

(a) An educational agency or institution *may* disclose personally identifiable information from an education record of a student without the consent [of the student or the student’s parent] if the disclosure meets one or more of the following conditions:

(1) The disclosure is to other school officials, including *teachers*, within the agency or institution *whom the agency or institution has determined to have legitimate educational interests*.

....

(b) This section does not forbid an educational agency or institution to disclose, nor does it require an educational agency or institution to disclose, personally identifiable information from the education records of a student to any parties under paragraph[] (a)(1) . . . of this section.

34 C.F.R. § 99.31 (emphasis added).

Thus, it is for HISD to decide whether the requestor representing a teacher has a “legitimate educational interest” in access to the student records at issue. Moreover, the above-quoted language indicates that HISD is permitted but not required to disclose the

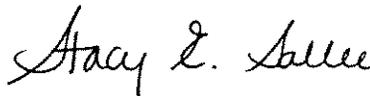
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<sup>2</sup>We note that this office issued Open Records Decision No. 634 (1995), which concluded: (1) an educational agency or institution may withhold from public disclosure information that is protected by FERPA and excepted from required public disclosure by sections 552.026 and 552.101 without the necessity of requesting an attorney general decision as to those exceptions, and (2) an educational agency or institution that is state-funded may withhold from public disclosure information that is excepted from required public disclosure by section 552.114 as a “student record,” insofar as the “student record” is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception.

student records to a requesting teacher who is seeking the records for a "legitimate educational interest." If HISD has already established a policy or promulgated a regulation on this matter, its action in this case must be consistent with the policy or regulation.<sup>3</sup> If you wish additional guidance on the application of FERPA, you should contact the Family Policy and Regulations Office directly.

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 on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Stacy E. Sallee  
Assistant Attorney General  
Open Records Division

SES/ch

Ref.: ID# 103217

Enclosures: Marked documents

cc: Ms. Gayle Fallon  
President  
Houston Federation of Teachers  
3202 Wesleyan, Suite 102  
Houston, Texas 77027  
(w/o enclosures)

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<sup>3</sup>This office assumes that none of the students' parents have given written consent to the release of their children's education records. See 20 U.S.C. § 1232g(b)(1).