



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

February 27, 1998

Mr. Raul Gonzalez
Assistant Counsel
State Board for Educator Certification
1001 Trinity
Austin, Texas 78701

OR98-0562

Dear Mr. Gonzalez:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 113487.

The State Board for Educator Certification (the "board") received a request for copies of all documents pertaining to the board's investigation of the requestor, all letters of complaint, and "the letter to Ms. Ullman." You inform this office that you have released the requestor's records and the initial complaint filed by Mr. Darryl Pruett.¹ You contend that the requested information is excepted from disclosure under sections 552.103, 552.107, 552.110 and 552.122 of the Government Code. We have considered the exceptions you claim and have reviewed the information at issue.

First, you state that the board does not have the requested "letter to Ms. Ullman." The Open Records Act does not require a governmental body to make available information which does not exist at the time of the request. Open Records Decision No. 362 (1983). Because the board does not have the requested letter, it does not have to comply with the request for the letter.

Second, you contend that the request for all documents pertaining to the investigation is a request for the attorney's entire work file. As such, you argue that the attorney's work file constitutes attorney work product that is excepted from public disclosure by section 552.111 of the Government Code. See *National Union Fire Ins. Co. v. Valdez*, 863 S.W.2d

¹We note that the requestor has informed this office that he never received a copy of the initial complaint.

458, 461 (Tex. 1993); Open Records Decision No. 647 (1996). Although you seek to withhold all of the requested information under the "entire litigation file" analysis discussed in Open Records Decision No. 647 (1996), you indicate that you have released some of the requested information from the attorney's work file. Thus, we conclude that the board is not entitled to the presumption that the entire litigation file is excepted from public disclosure under section 552.111.

Next, we note that the submitted documents include documents that appear to have been filed with a court. Documents filed with the court are public documents and must be released. *See Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54, 57-58 (Tex. 1992).

Lastly, section 552.103(a) excepts from disclosure information relating to litigation to which a governmental body is or may be a party. The governmental body has the burden of providing relevant facts and documents to show that section 552.103(a) is applicable in a particular situation. In order to meet this burden, the governmental body must show 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. To demonstrate that litigation is reasonably anticipated, the board must furnish evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 (1989) at 5.

This office considers contested cases conducted under the Administrative Procedure Act to be litigation under section 552.103(a). Open Records Decision No. 588 (1991) at 7. You explain that as the agency responsible for prosecuting certification actions, the board is presently investigating the requestor, a teacher certified by the board. You further assert that litigation related to the requested information is reasonably anticipated because "the next formal step for the [board] is to initiate contested-case proceedings against the request[o]r." We conclude that you have demonstrated that litigation is reasonably anticipated and that the requested information relates to the anticipated litigation. Therefore, you may withhold the requested information from public disclosure under section 552.103(a).²

We note that, generally, 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. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed.

²As we resolve this matter under section 552.103, we do not address your other arguments at this time.

You indicate that information that has already been seen by the potential opposing party has been disclosed. We also note that the applicability of section 552.103(a) ends once the litigation has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

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 any questions about this ruling, please contact our office.

Yours very truly,



Yen-Ha Le
Assistant Attorney General
Open Records Division

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Ref: ID# 113487

Enclosures: Submitted documents

cc: Mr. Greg R. Goodman
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(w/o enclosures)