



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

September 28, 1998

Mr. S. Stephen Hilmy  
Gary, Thomasson, Hall & Marks  
P.O. Box 2888  
Corpus Christi, Texas 78403

OR98-2328

Dear Mr. Hilmy:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 118452.

The Aransas County Independent School District (the "district"), which you represent, received a request for all records relating to a sexual harassment investigation of the requestor's client, a former district employee. You contend that the requested documents are excepted from disclosure under sections 552.101, 552.103, and 552.114 of the Government Code. We have considered the exceptions you claim and have reviewed the documents at issue.

First, you assert that section 552.101 excepts from public disclosure the first paragraph in Attachment C because it contains "information relating to a protected communication during [a] closed session of a school board meeting." We note that the first paragraph in Attachment B is identical to the first paragraph in Attachment C. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Section 551.104(c) of the Government Code states that a "certified agenda or tape of a closed meeting is available for public inspection and copying only under a court order." Although the information at issue in Attachments B and C may reflect information discussed in a closed meeting, it is not information covered by section 551.104. Consequently, the information is governed by the Open Records Act. The Open Meetings Act does not authorize a governmental body to withhold records merely because they were discussed in or relate to an executive session. Open Records Decision Nos. 605 (1992), 485 (1987). Thus, you may not withhold the first paragraphs of Attachments B and C under section 551.104(c).

Section 552.103(a) of the Government Code reads as follows:

(A) Information is excepted from [required public disclosure] if it is information:

(1) relating to litigation of a civil or criminal nature or settlement negotiations, 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; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

To secure the protection of section 552.103(a), a governmental body must demonstrate that requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision No. 588 (1991). A governmental body has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. The test for establishing that section 552.103 applies is a two-prong 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 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.). Section 552.103 requires concrete evidence that litigation may ensue. To demonstrate that litigation is reasonably anticipated, the district must furnish evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 at 5 (1989). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.<sup>1</sup> Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). The fact that a potential opposing

---

<sup>1</sup>In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 at 2 (1983).

After reviewing your arguments, we conclude that you have not shown that litigation is reasonably anticipated. Therefore, you may not withhold the requested information under section 552.103.

You further contend that the submitted documents are excepted from disclosure as "student records." In Open Records Decision No. 634 (1995), this office concluded that (1) an educational agency or institution may withhold from public disclosure information that is protected by the Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g, and excepted from required public disclosure by sections 552.026 and 552.101 of the Government Code 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 of the Government Code 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. In this instance, however, you have submitted the documents at issue to this office for consideration. Therefore, we will consider whether these documents are excepted from disclosure under sections 552.026 and 552.114 of the Government Code.

"Education records" under FERPA 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 also* Open Records Decision Nos. 462 (1987), 447 (1986). The submitted documents pertain to sexual harassment complaints that students have lodged against a former district employee. Most of the information in the submitted documents identifies the complainants and other students who were contacted during the investigation of the complaints. The submitted documents are education records under FERPA, and, therefore, must be withheld from disclosure to the extent "reasonable and necessary to avoid personally identifying a particular student." *See* Open Records Decision Nos. 539 (1990), 332 (1982), 206 (1978). We have marked the types of personally identifying information that the district must withhold in order to satisfy the requirements of FERPA.

Lastly, you seek to withhold a particular log entry in Attachment B under the attorney-client privilege. Because you must withhold this information under FERPA, we need not address your attorney-client privilege claim.

Mr. S. Stephen Hilmy - Page 4

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,



Yen-Ha Le  
Assistant Attorney General  
Open Records Division

YHL/nc

Ref: ID# 118452

Enclosures: Marked documents

cc: Mr. Michael Stuart Lee  
Michael Stuart Lee & Associates  
Mercantile Bank Tower  
615 N. Upper Broadway, Suite 708  
Corpus Christi, Texas 78477  
(w/o enclosures)