



March 23, 1999

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

OR99-0802

Dear Mr. Atkins:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 122930.

The Ector Independent School District (the "school district"), which your office represents, received an open records request for "a copy of [the requestor's] personal/employee file. . . . all pay time sheets and payroll records." In response to the request, you submit to this office for review the information at issue.¹ You contend that the submitted records are excepted from required public disclosure pursuant to sections 552.103, and 552.114 of the Government Code.² We have considered the exceptions and arguments you have raised and reviewed the submitted information.

Because section 552.103(a) is the most inclusive exception you raise, we will consider this exception first. Section 552.103(a) excepts from disclosure 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

¹We assume that you will release other responsive records to the extent they exist, since you have not raised any other exception nor submitted other records, such as payroll records.

²Although you refer to section 552.102, we understand from your brief that you are not raising this provision as an exception to release of the submitted records, since section 552.023 provides an individual with a limited special right of access to information about that individual and prevents a governmental body from asserting an individual's own privacy as a reason for withholding records from that individual. *See* Open Records Decision No. 481 (1987).

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

The school 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. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *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 at 4 (1990). The school district must meet both prongs of this test for information to be excepted under section 552.103(a). To demonstrate that litigation is reasonably anticipated, the school district must furnish evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 at 5 (1989).

Section 552.103 requires concrete evidence that litigation may ensue. 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. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 (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). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

You state that the school district "reasonably believes the employee who was placed on administrative leave and ultimately terminated, intends to sue." However, you have provided no evidence that there is pending or anticipated litigation at this time. Open Records Decision No. 518 at 5 (1989) (governmental body must show that litigation involving specific matter is realistically contemplated). In this instance, you have not made the requisite showing that the requested information relates to anticipated or pending litigation for purposes of section 552.103(a). Therefore, the requested records may not be withheld under section 552.103 of the Government Code.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section also encompasses information protected by other statutes. We next address your argument that some of the requested information is excepted from disclosure because it is an education record made confidential by the federal Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g, or sections 552.026 and 552.114 of the Government Code. In Open

Records Decision No. 634 (1995), this office 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.

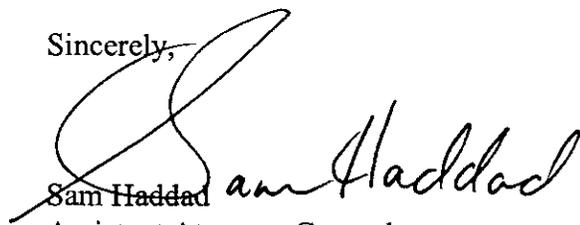
In this instance, however, you have submitted to this office de-identified information. "Education records" are records that

- (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 also* 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). You have indicated that the responsive information has been redacted to remove student identifying information, which generally must be withheld. Since the records that you have submitted are de-identified and do not personally identify any particular student, the material no longer contains information which is confidential under FERPA. Therefore, we do not believe that the submitted information may be withheld as student records under FERPA.

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.

Sincerely,


Sam Haddad
Assistant Attorney General
Open Records Division

SH/nc

Ref.: ID# 122930

cc: Mr. Harvey Enriquez
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(w/o enclosures)