



December 21, 1999

Ms. Jacqueline A. Strashun
State Board for Educator Certification
1001 Trinity
Austin, Texas 78701-2603

OR99-3700

Dear Ms. Strashun:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 130430.

The State Board for Educator Certification ("SBEC") received a request from the Ysleta Independent School District (the "district") for a copy of an investigative file regarding a named district employee (the "employee"). You claim that the documents you submitted are excepted from required public disclosure by section 552.103 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. To show that section 552.103(a) is applicable, the SBEC must demonstrate 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). Contested cases conducted under the Administrative Procedure Act are considered litigation under section 552.103. Open Records Decision No. 588 at 7 (1991). Section 552.103 requires concrete evidence that litigation may ensue. To demonstrate that litigation is reasonably anticipated, the SBEC 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).

In this instance, the SBEC has supplied this office with information which shows that there is an ongoing investigation with regard to the employee, and if a violation is found, SBEC will take enforcement action as authorized by statute. We conclude that litigation is reasonably anticipated. We additionally find that the documents submitted by the SBEC are related to the reasonably anticipated litigation for the purposes of section 552.103(a). We have marked the documents that are excepted from disclosure under section 552.103.

Generally, however, 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. Furthermore, information that has been previously released to the public may not be withheld under section 552.103. We have marked the documents which must be released. Finally, we 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).

We also note that some of the documents submitted to this office are student records which are excepted from disclosure by section 552.114(a) of the Government Code. In addition, section 552.026 of the Government Code provides as follows:

This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

The Family Educational Rights and Privacy Act of 1974 ("FERPA") provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information (other than directory information) contained in a student's education records to anyone but certain numerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1).

"Education records" are those records that contain information directly related to a student and 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). In the hands of the district, the documents at issue are "education records." However, we note that the SBEC is not "an educational agency or institution" for purposes of FERPA. *See* 20 U.S.C. § 1232g(a)(3) (defining "educational agency or institution" as public or private agency receiving federal funds "under any applicable program"). It does not appear that the district released the records at issue for one of the authorized purposes provided under FERPA. *See* 20 U.S.C.

§ 1232g(b)(1)(C), (b)(3). Consequently, it is unclear to this office the authority under which the SBEC received the records at issue.¹ Absent statutory authority indicating otherwise, we conclude that the SBEC was not entitled to obtain the education records at issue, and that the documents were released to the SBEC in error.² We note, however, that 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). We, therefore, suggest that the SBEC return these documents to the district for purposes of de-identification, where possible. We have marked the records which should be returned to the district.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body’s intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general’s Open Government Hotline, toll free, at 877/673-6839.

¹ Information that is excepted from public disclosure under the Act may be transferred between state agencies without destroying its confidential character if the agency to which the information is transferred has the authority to obtain it. *See* Open Records Decision Nos. 516 (1989), 490 (1988).

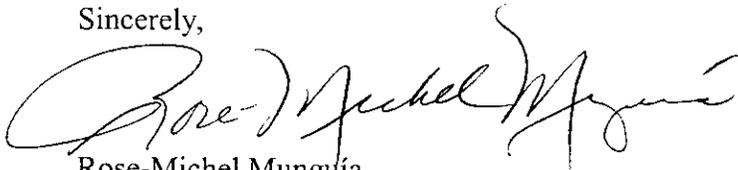
²We assume for purposes of this ruling that the district’s release of the education records at issue was not authorized by the parents of the students identified in these records. *See* 20 U.S.C. § 1232g(b)(1). In the future, we suggest that SBEC inform school districts of their responsibility to either obtain such parental authorization or to de-identify all education records prior to releasing them to the SBEC.

The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Rose-Michel Munguía". The signature is fluid and cursive, with a large initial "R" and "M".

Rose-Michel Munguía
Assistant Attorney General
Open Records Division

RMM/jc

Ref: ID# 130430

Encl. Submitted documents

cc: Mr. Luther Jones
303 Texas Avenue, Suite 701
El Paso, Texas 79901-1455
(w/o enclosures)