



May 14, 2002

Mr. Ricardo R. Lopez
Feldman & Rogers, L.L.P.
5718 Westheimer, Suite 1200
Houston, Texas 77057

OR2002-2540

Dear Mr. Lopez:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 162881.

The Fort Bend Independent School District (the "district"), which you represent, received a request for information relating to a named student of the district, extracurricular activities, and district policy regarding cheerleaders. You state that the district has released some of the requested information. You claim that the remaining requested information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you raise and have reviewed the information you submitted.

We first note that virtually all of the submitted information comes within the scope of the federal Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g. Therefore, we must address the district's obligations with regard to this information under the federal law. 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, that is contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1); *see also* 34 C.F.R. § 99.3 (defining personally identifiable information).

Section 552.026 of the Government Code incorporates FERPA into chapter 552 of the Government Code. *See* Open Records Decision No. 634 at 6-8 (1995). Section 552.026 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.

Gov't Code § 552.026. "Education records" under FERPA are those records that contain information directly related to a student and that are maintained by an educational agency or institution or by a person acting for such agency or institution. *See* 20 U.S.C. § 1232g(a)(4)(A). Information must be withheld from required public disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." *See* Open Records Decision Nos. 332 at 3 (1982), 206 at 2 (1978). In the event of a conflict between FERPA and state law, FERPA takes precedence. *See* Gov't Code § 552.026; Open Records Decision No. 431 at 3 (1985). Thus, FERPA prevails over an exception to disclosure under chapter 552 of the Government Code. *See also* Open Records Decision No. 634 (1995).

We have marked the submitted information that is governed by FERPA. Most of that information pertains only to the requestor's child. FERPA gives a parent the right to inspect and review the education records of his or her child. *See* 20 U.S.C. § 1232g(a)(1)(A). Thus, under FERPA, the district must make available to the requestor those documents that pertain to the requestor's child. We note, however, that the documents to which the requestor has a right of access under FERPA also contain references to other students and parents. We also have marked that type of information. You do not inform us that the district has authority under FERPA to allow this requestor access to information that relates to other students and parents. Therefore, the district must not allow the requestor access to that information unless the district has been authorized under FERPA to do so.

Some of the information to which the requestor has a right of access under FERPA is subject to copyright law. In making that information available to the requestor, the district also must comply with the copyright law. The district is not required to furnish copies of copyrighted information. *See* Attorney General Opinion JM-672 (1987). A member of the public who wishes to make copies of copyrighted materials must do so unassisted by the governmental body. The member of the public thus assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 at 8-9 (1990). We note that FERPA does not entitle a parent to copy an education record to which the parent has a right of access, unless "circumstances effectively prevent the parent . . . from exercising the right to inspect and review the student's education records[.]" *See* 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.10(d).

Next, we address the district's claim with regard to the remaining information under section 552.103 of the Government Code. This exception provides in part:

- (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature 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.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) that the information at issue is related to that litigation. See *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App. – Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App. – Houston [1st Dist.] 1984, writ ref'd n.r.e.); see also Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *Id.*

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. See Open Records Decision No. 452 at 4 (1986). To establish that litigation is reasonably anticipated, a governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *Id.* Among other examples, this office has concluded that litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission (“EEOC”), see Open Records Decision No. 336 (1982); (2) 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 (3) threatened to sue on several occasions and hired an attorney, see Open Records Decision No. 288 (1981).

You assert that the district reasonably anticipated litigation when it received this request for information. You also state that the remaining information relates to the anticipated litigation. You explain that the requestor’s attorney has informed your law firm of the requestor’s intent to sue the district. You note that the requestor threatened litigation on another occasion. You also inform us that a petition has been filed to take the pre-suit depositions of employees of the district. Based on your representations, we find that litigation was reasonably anticipated when the district received this request for information. We also find that the remaining information is related to the anticipated litigation. Therefore, the district may withhold that information at this time under section 552.103.

In reaching this conclusion with respect to the remaining information, we assume that the opposing party in the anticipated litigation has not seen or had access to that information. The purpose of section 552.103 is to enable a governmental body to protect its position in

litigation by forcing parties seeking information relating to that litigation to obtain it through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). If the opposing party has seen or had access to information relating to anticipated litigation, through discovery or otherwise, then there is no interest in withholding that information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Furthermore, the applicability of section 552.103 ends once the related litigation concludes or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the requestor has a right of access to most of the submitted information under FERPA. However, the district must not permit access to the information that relates to other students and parents unless the district has authority under FERPA to do so. In providing access to the information that is subject to FERPA, the district must comply with copyright law. The district may withhold the remaining information at this time under section 552.103 of the Government Code.

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).

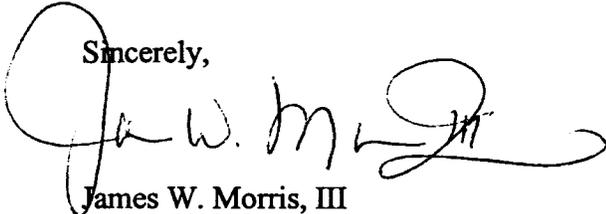
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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. 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).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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 "J.W. Morris, III". The signature is fluid and cursive, with a large initial "J" and "W" and a stylized "M".

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 162881

Enc: Marked documents

c: Mr. Rhea H. Laws
61 The Oval
Sugar Land, Texas 77479
(w/o enclosures)