



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 9, 2004

Ms. Ellen B. Huchital
McGinnis, Lochridge & Kilgore, L.L.P.
3200 One Houston Center
1221 Mckinney Street
Houston, Texas 77010

OR2004-7702

Dear Ms. Huchital:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 208800.

The Eanes Independent School District (the "district"), which you represent, received a request for information "submitted to the Office of Civil Rights by [district] staff, past staff, board of trustees, and legal counsel in response" to a specified complaint and information "received from the Office of Civil Rights by [district] staff, past staff, board of trustees, and legal counsel in response" to the complaint. You claim that the requested information is excepted from disclosure pursuant to sections 552.101, 552.103, and 552.107 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted representative sample documents.¹

Initially, we note that we previously addressed most of the submitted information in Open Records Letter No. 2004-6719 (2004). Specifically, we ruled in that decision that the district must withhold portions of the information submitted in that instance pursuant to the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g. We also ruled that the district may withhold portions of the submitted information pursuant to sections 552.103 and 552.107 of the Government Code. Finally, we concluded that the district must release

¹ We assume that the representative sample of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach and, therefore, does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

the remaining submitted information to the requestor. You do not inform us, nor are we aware, of any changes with regard to the law, facts, and circumstances on which that ruling was based. Accordingly, we conclude that the district must rely on our decision in Open Records Letter No. 2004-6719 (2004) with respect to a portion of the information that has been submitted to us in this instance.² *See* Gov't Code § 552.301(f); *see also* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

Next, we note that the remaining submitted information contains a copy of minutes of an open meeting of the district's Board of Trustees. Section 551.022 of the Government Code states in relevant part that "[t]he minutes and tape recordings of an open meeting are public records and shall be available for public inspection and copying on request[.]" Gov't Code § 551.022. Exceptions to disclosure under the Public Information Act (the "Act") do not generally apply to information that another statute specifically makes public. Therefore, the copy of the minutes of the open meeting that we have marked must be released to the requestor.

In addition, we note that some of the remaining submitted information comes within the scope of FERPA. *See* 20 U.S.C. § 1232g. FERPA is incorporated into chapter 552 of the Government Code under section 552.026 of the Government Code. *See* Open Records Decision No. 634 at 6-8 (1995). Section 552.026 provides that chapter 552

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. 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 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). Under FERPA, "education records" 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).

²Because we base our ruling with regard to this particular information on Open Records Letter No. 2004-6719 (2004), we need not address your claimed exceptions to disclosure concerning this information.

Under FERPA, a student's parents or guardians have an affirmative right of access to their child's education records. *See id.* § 1232g(a)(1)(A); *see also* 34 C.F.R. § 99.3 ("parent" includes legal guardian of student). As the requestor in this instance is the parent of the child at issue, the requestor has a right of access to the submitted records pertaining to her child under FERPA. Accordingly, the records at issue generally may not be withheld pursuant to an exception to disclosure under the Act. *See Equal Employment Opportunity Comm'n v. City of Orange, Texas*, 905 F. Supp 381, 382 (E.D. Tex. 1995) (federal law prevails over inconsistent provision of state law); *see also* Open Records No. 431 (1985) (information subject to right of access under FERPA may not be withheld pursuant to statutory predecessor to section 552.103). Accordingly, some of the submitted records that we have marked are not excepted from disclosure under section 552.103 of the Government Code, and must be released to this requestor pursuant to FERPA.

You claim that the remaining submitted information at issue is excepted from disclosure pursuant to section 552.103 of the Government Code. Section 552.103 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 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 on the date that the governmental body receives the request, and (2) the information at issue is related to that litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *see also 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 district must meet both prongs of this test for information to be excepted under 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably

anticipated must be determined on a case-by-case basis. *See id.* 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. *See* Open Records Decision No. 555 (1990); *see also* 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). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983).

In this instance, although you acknowledge that no lawsuit had been filed against the district at the time that the district received this request, you indicate that the requestor has filed complaints against the district with six different agencies, as well as an internal grievance. You state that these complaints and the internal grievance were filed prior to the date that the district received this request for information. Based upon these representations and the totality of the circumstances, we conclude that the district reasonably anticipated litigation on the date that it received this request for information. We also find that the remaining submitted information at issue relates to the anticipated litigation. Accordingly, we conclude that section 552.103 is applicable to the remaining submitted information at issue and that most of it may be withheld by the district on this basis.

Generally, however, once information has been obtained by all parties to the anticipated litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See* 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 must be disclosed.³ In this regard, we note that a portion of the remaining submitted information has been obtained by the potential opposing party in this matter. Accordingly, we conclude that the district may not withhold this particular information under section 552.103 of the Government Code and, thus, must release it to the requestor.

In summary, the district must rely on our decision in Open Records Letter No. 2004-6719 (2004) with respect to some of the information that has been submitted to us in this instance. The district must release to the requestor the copy of the minutes of the open meeting that we have marked pursuant to section 551.022 of the Government Code. The district must also release to the requestor the portions of the remaining submitted records at issue that we have marked to which the requestor has an affirmative right of access under FERPA. With the

³ Further, the applicability of section 552.103(a) ends once the litigation has been concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

exception of the remaining submitted documents that have been obtained by the potential opposing party in this matter and that also must be released to the requestor, the district may withhold the remaining submitted information at issue pursuant to 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 Dep't of Pub. 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,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/krl

Ref: ID# 208800

Enc. Marked documents

c: Ms. Dianna Pharr
2204 Westlake Drive
Austin, Texas 78746
(w/o enclosures)