



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 29, 2005

Mr. Paul Lamp
Feldman & Rogers, L.L.P.
5718 Westheimer, Suite 1200
Houston, Texas 77057

OR2005-03712

Dear Mr. Lamp:

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# 223007.

The Pasadena Independent School District (the "district"), which you represent, received a request for "all written documentation regarding a teacher assault on [a specified] student" and related information. You state you have released some information but claim that the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

You claim that section 552.103 of the Government Code excepts all the submitted information from disclosure. Section 552.103 provides:

(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, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. 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 district must meet both prongs of this test for information to be excepted under section 552.103(a).

In order 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. Open Records Decision No. 452 at 4 (1986). In Open Records Decision No. 638 (1996), this office stated that a governmental body has met its burden of showing that litigation is reasonably anticipated when it received a notice of claim letter and the governmental body represents that the notice of claim letter is in compliance with the requirements of the Texas Tort Claims Act (“TTCA”), chapter 101 of the Texas Civil Practice & Remedies Code, or an applicable municipal ordinance. If a governmental body does not make this representation, the claim letter is a factor that this office will consider in determining whether a governmental body has established that litigation is reasonably anticipated based on the totality of the circumstances.

You assert that the district reasonably anticipates litigation relating to the subject of the present request. You state that the requestor is an attorney who represents the father of the student identified in the request at issue. You further state and provide documentation showing that, prior to receiving the present request for information, the district received a claim letter and a notice of claim for damages caused to the child of the requestor's client. You do not affirmatively represent to this office that the requestor's claim letter is in compliance with the TTCA. However, after having reviewed the submitted documentation and your arguments, we conclude, based on the totality of the circumstances, that litigation was reasonably anticipated on the date the district received this request for information. Furthermore, we find that the submitted information is related to the anticipated litigation for purposes of section 552.103(a).

However, we note that most of the submitted documents identify several district students. Therefore, we find that these documents are “education records” for purposes of the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g (“FERPA”). See Gov't Code § 552.026 (expressly incorporating the provisions of FERPA into the Act). 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).

"Education records" means 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. *Id.* § 1232g(a)(4)(A). "Education records" does not include records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement. *Id.* § 1232g(a)(4)(B)(ii). However, a record created by a law enforcement unit for a law enforcement purpose that is maintained by a component of the educational agency or institution other than the law enforcement unit is not a record of a law enforcement unit. *See* 34 C.F.R. § 99.8(b)(2) (2003) (excluding types of records from definition of law enforcement records). We note that the submitted documents include a report of the district's police department which also identifies several district students. Since, in this instance, this report is being maintained for purposes other than law enforcement, we conclude it also constitutes an "education record" for purposes of FERPA.

Under FERPA, a student's parents or guardians have an affirmative right of access to their child's education records. 20 U.S.C. § 1232g(a)(1)(A) (granting parents affirmative right of access to their child's education records). As a state statute, section 552.103 of the Government Code cannot abrogate that right. *See, e.g., Equal Employment Opportunity Comm'n v. City of Orange*, 905 F. Supp 381, 382 (E.D. Tex. 1995); *see also* Open Records Decision No. 431 (1985) (FERPA prevails when in conflict with state law). As previously noted, the requestor is an attorney who represents the father of the student identified in the request at issue. Thus, you must allow access to this student's education records by the requestor upon receipt of a proper written consent as required by section 1232g(b)(2). Such education records include those portions of the submitted documents that directly relate to this student. *See Belanger v. Nashua, New Hampshire, Sch. Dist.*, 856 F. Supp. 40 (D.N.H. 1994) (district records relating to student's juvenile court proceedings were "education records" which parent was entitled to access irrespective of state confidentiality law). However, FERPA grants a special right of access to parents only in regards to their own children. *See* 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.12(a). Therefore, the district may only allow the requestor access to the information in the marked FERPA documents which pertains to the student whose father the requestor represents.¹

¹ The district has submitted handwritten statements of students who are not the children of the requestor's client. These statements contain references to the student at issue in this request. In most instances, the requestor would be allowed access to those portions of these statements that pertain to the student at issue. However, this office has previously found that a student's handwritten comments would make the identity of the student easily traceable. *See* Open Records Decision No. 224 (1979) (student's handwritten comments that would make identity of student easily traceable through handwriting, style of expression, or particular incidents related in comments protected under FERPA). Accordingly, no portion of the handwritten statements of these other students may be released.

With the exception of the information to which the district must allow the requestor access under FERPA, the submitted documents may be withheld under section 552.103 of the Government Code. 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. Further, 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).

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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); *Tex. 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,



Ramsey A. Abarca
Assistant Attorney General
Open Records Division

RAA/jev

Ref: ID# 223007

Enc. Submitted documents

c: Mr. Steven Poock
P.O. Box 984
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(w/o enclosures)