



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 16, 2005

Mr. Jim Thompson  
General Counsel  
State Board of Educator Certification  
1701 N. Congress Ave.  
Austin, Texas 78701

OR2005-10353

Dear Mr. Thompson:

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# 235537.

The State Board of Educator Certification ("SBEC") received a request for all information relating to a complaint made against the requestor's client. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, and 552.114 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

As section 552.103 is potentially the broadest exception to disclosure you claim, we will address it first. Section 552.103 of the Government Code provides in relevant part as follows:

- (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). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable to the information that it seeks to withhold. To meet this burden, the governmental body must show that (1) litigation is pending or reasonably anticipated on the date that the request for information is received, 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 governmental body must meet both prongs of this test for information to be excepted under 552.103(a). *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). When the governmental body is the prospective plaintiff in litigation, the evidence of anticipated litigation must at least reflect that litigation involving a specific matter is “realistically contemplated.” *See* Open Records Decision No. 518 at 5 (1989); *see also* Attorney General Opinion MW-575 (1982) (investigatory file may be withheld if governmental body’s attorney determines that it should be withheld pursuant to Gov’t Code § 552.103 and that litigation is “reasonably likely to result”).

You explain that, as the agency responsible for certifying public school teachers and administrators, SBEC is presently investigating the requestor’s client. You assert that litigation related to the requested information is reasonably anticipated because, upon completion of the investigation, the investigator will refer the matter for litigation before the State Office of Administrative Hearings and will proceed according to the contested case procedures set out in the Texas Administrative Procedures Act (“APA”). We note that, for purposes of section 552.103(a), this office considers a contested case under the APA, chapter 2001 of the Government Code, to constitute “litigation.” *See* Open Records Decision No. 588 (1991). Based on your representations and our review, we determine that litigation in this matter was reasonably anticipated by SBEC prior to the date that SBEC received the present request. We further find that the submitted information relates to the anticipated litigation for purposes of section 552.103(a).

We note, however, that Exhibits 2 and 3 consist mostly of personnel records of the requestor’s client. The requestor’s client has either seen these personnel records or provided them to the employing districts, either directly or through his attorney. Absent special circumstances, 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 and it must be disclosed. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, SBEC may withhold any submitted records the requestor’s client has not seen or had access to. SBEC may withhold these documents during the pendency of the litigation under section 552.103(a). *See* Attorney General Opinion MW-575 (1982); Open Records Decision

No. 350 (1982) (stating that applicability of Gov't Code § 552.103(a) ends once litigation has been concluded). However, to the extent that the requestor's client has seen or had access to the submitted records, SBEC may not now withhold them from disclosure under section 552.103(a).

We note that some of the documents that the requestor's client has seen or had access to are his evaluations as a school administrator. Section 21.355 of the Education Code provides that "[a] document evaluating the performance of a teacher or administrator is confidential." This office has interpreted section 21.355 to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or an administrator. *See* Open Records Decision No. 643 (1996). In Open Records Decision No. 643, we determined that an "administrator" is a person who (1) is required to and does in fact hold an administrator's certificate under subchapter B of chapter 21 of the Education Code and (2) is performing the functions of an administrator, as that term is commonly defined, at the time of the evaluation. *Id.* In Attorney General Opinion GA-55 (2003), this office held that section 21.355 precluded a school district from releasing an appraisal to SBEC. *See* Attorney General Opinion GA-55 at 4 (2003); *see also* Educ. Code § 21.352 (release provision allowing district to give appraisal to other district where teacher seeks employment). As such, we conclude that SBEC was not entitled to obtain the appraisals at issue, and that the documents were released to SBEC in error. We, therefore, suggest that SBEC return these documents to the district. We have marked the records which should be returned to the district.

Finally, the requestor's client has seen and had access to a document in Exhibit 1 that is subject to Family Code section 261.201. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision" and encompasses information protected by Family Code section 261.201. Section 261.201(a) of the Family Code provides as follows:

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Exhibit 1 consists of documents created by the Texas Department of Family and Protective Services (the "department") in an investigation of child sexual abuse. You state that SBEC

received these documents from the department pursuant to section 261.406(b) of the Family Code in furtherance of its own disciplinary investigation of the requestor's client. Section 261.406(b) requires that the department send a written report of its investigation to SBEC and provides that release of such information is subject to section 261.201 of the Family Code. *See* Open Records Decision No. 440 at 2 (1986) (predecessor statute). Accordingly, SBEC must withhold this document from disclosure under section 552.101 of the Government Code as information made confidential by law.

In summary, SBEC should return the evaluations in Exhibit 2 to the district. SBEC may withhold any records that the requestor's client has not seen or had access to under section 552.103. We have marked a document in Exhibit 1 that SBEC must withhold from disclosure under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. The remaining records must be released.<sup>1</sup>

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

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<sup>1</sup>We note that while portions of this information may be excepted from disclosure under laws enacted to protect the privacy of the requestor's client, the requestor has a special right of access to this information pursuant to section 552.023 of the Government Code. Gov't Code § 552.023 (person or person's authorized representative has special right of access to information relating to person and protected from public disclosure by laws intended to protect that person's privacy interests). Because information to be released under section 552.023 is confidential with respect to the general public, if SBEC receives a future request for this information from an individual other than the person at issue or his authorized representative, SBEC should again seek our decision.

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 Office of the Attorney General 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. 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,



José Vela III  
Assistant Attorney General  
Open Records Division

JV/krl

Ref: ID# 235537

Enc. Submitted documents

c: Humberto Silva  
134 West Fifth Street  
Weslaco, TX 78596  
(w/o enclosures)