ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 13, 2006

Ms. Debra G. Rosenberg
Atlas & Hall, P.C.
Attorney for McAllen Independent School District
P.O. Box 3725
McAllen, Texas 78502-3725

OR2006-12018

Dear Ms. Rosenberg:

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# 261977.

The McAllen Independent School District (the "district"), which you represent, received a request for the requestor's client's personnel file and all documents pertaining to the requestor's client that were sent to the Texas Education Agency or the State Board for Educator Certification. You state that the district has released some information to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.135 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Recently, the United States Department of Education Family Policy Compliance Office (the "DOE") informed this office that the Family Education Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g, does not permit state and local educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable

information contained in education records for the purposes of our review in the open records ruling process under the Act. Consequently, state and local educational authorities that receive a request for education records from a member of the public under the Act must not submit education records to this office in unredacted form, that is, in a form in which "personally identifiable information" is disclosed. *See* 34 C.F.R. § 99.3 (defining "personally identifiable information"). You have submitted, among other things, redacted education records for our review. You state you will withhold the identifying information of students from the requested documents pursuant to FERPA. Accordingly, we will address the applicability of your claimed exceptions to the remainder of the submitted information.

We first note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides in relevant part:

> the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:
>
> > (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The information submitted as Exhibit 3 consists of a completed investigation made of, for, or by the district. The district must release this information unless it is expressly confidential under other law. Although you claim this information is excepted from disclosure under section 552.103 of the Government Code, this is a discretionary exception that protects the governmental body's interests and may be waived. *See id.* § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 is not other law that makes information confidential for the purposes of section 552.022. Therefore, the district may not withhold any part of Exhibit 3 under section 552.103. However, we will consider the applicability of sections 552.101 and 552.135 of the Government Code, which are other laws for purposes of section 552.022, for this information.

You raise section 552.101 of the Government Code for the information submitted as Exhibit 3. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information made confidential by statute. 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.

Fam. Code § 261.201(a). We note that the district is not an agency authorized to conduct a chapter 261 investigation. *See id.* §§ 261.301, 261.406. However, you state that Exhibit 3 consists of the report of an investigation conducted under chapter 261 of the Family Code by the Texas Department of Family and Protective Services (the "department"). *See id.* § 241.406(a). Furthermore, you explain and the documents reflect that this information was provided to the district by the department. We therefore conclude that Exhibit 3 is confidential in its entirety under section 261.201 of the Family Code and must be withheld under section 552.101 as information made confidential by law.[1]

We now turn to your arguments for the remaining submitted information. Section 552.103 of the Government Code provides in relevant 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

---

[1]As our ruling on this issue is dispositive, we need not address your claim under section 552.135 of the Government Code for this information.

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. *Id.* 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. 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, and provide documentation showing that, prior to receiving the present request for information, the district received a claim letter from an attorney who represents a student of the district. The attorney represents that he has been retained by the student to brings causes of action against the district for various civil rights violations, sexual harassment, negligent training of the requestor's client, negligent hiring of the requestor's client, and negligent retention of the requestor's client. You do not affirmatively represent to this office that the 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 remaining submitted information is related to the anticipated litigation for purposes of section 552.103(a). Therefore, the district may generally withhold the submitted information under section 552.103.[2]

We note, 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. 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. Further, the applicability of section 552.103(a) ends once the litigation has been

---

[2]As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the district must withhold Exhibit 3 under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. The district may withhold the remaining submitted information 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).

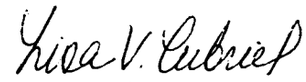
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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); *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,



Lisa V. Cubriel
Assistant Attorney General
Open Records Division

LVC/eb

Ref: ID# 261977

Enc. Submitted documents

c: Mr. Greg Johnson
Deats, Durst, Owen & Levy
1204 San Antonio Street, Suite 203
Austin, Texas 78701
(w/o enclosures)