



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 23, 2007

Ms. LeAnne Lundy
Feldman & Rogers, L.L.P.
5718 Westheimer Road, Suite 1200
Houston, Texas 77057

OR2007-13827

Dear Ms. Lundy:

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 #292541.

The Tomball Independent School District (the "district") received a request for one hundred six categories of information pertaining to a specified incident between a district teacher and the requestor's child, the district's special education programs, certain special education teachers, recent special education department budgets, and various district policies and procedures. You inform this office that the requestor subsequently withdrew fifty-four categories of information from her present request. You state that information responsive to the remaining requested categories will be made available to the requestor. You claim that the submitted information pertaining to the specified incident and a specified district Structured Learning Lab program is excepted from disclosure under the Family Education Rights and Privacy Act ("FERPA") and sections 552.101, 552.102, 552.103, and 552.114 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the United States Department of Education Family Policy Compliance Office has informed this office that FERPA, section 1232g of title 20 of the United States Code, 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.¹ 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 for our review, among other information, redacted and unredacted education records. Because our office is prohibited from reviewing these education records, we will not address the applicability of FERPA to the information at issue.² Such determinations under FERPA must be made by the educational authority in possession of the education record. We will, however, address the applicability of the claimed exceptions to the submitted information; we begin with section 552.103, as it is potentially the most encompassing of your claimed exceptions to disclosure.

Section 552.103 of the Government Code 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.*, 684S.W.2d 210, 212 (Tex. App.—Houston [1st

¹A copy of this letter may be found on the attorney general’s website, available at http://www.oag.state.tx.us/opinopen/og_resources.shtml.

²In the future, if the district does obtain parental consent to submit unredacted education records, and the district seeks a ruling from this office on the proper redaction of those education records in compliance with FERPA, we will rule accordingly.

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. Open Records Decision No. 452 at 4 (1986). 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. Open Records Decision No. 555 (1990); *see* 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. Open Records Decision No. 361 (1983).

In this instance, you state that the requestor first threatened the district with litigation in a conference with the district's special education director on April 19, 2007. You inform us that on May 21, 2007 the requestor filed internal complaints with the district concerning an incident involving a district special education teacher and the requestor's child. You state that this complaint led to an unsuccessful attempt to mediate this dispute. With her complaints still unresolved, you state that the requestor alleged that the district's special education director was violating the IDEA and other laws, and that she threatened to file a complaint against the district with the Texas Education Agency ("TEA"). All of these complaints and grievances were filed or threatened prior to the district's receipt of the present request for information on August 3, 2007. You inform us that TEA complaints are administrative proceedings with their own discovery mechanisms and their own decision-makers. *See* 19 T.A.C. § 89.1170 (in resolving disputes between parents and school districts, each due process hearing shall be conducted by an impartial hearing officer selected by the TEA); *see also* 19 T.A.C. § 89.1180(f) (discovery methods for these disputes shall be limited to those specified in the Administrative Procedure Act ("APA")); *see also* Open Records Decision No. 588 at 7 (1991) (ruling that, for purposes of the Act, litigation includes a contested case under the predecessor to the APA). Based upon your representations and the totality of the circumstances presented, we conclude that the district reasonably anticipated litigation on the date that it received this request for information. Furthermore, you explain that the submitted information relates to the teacher against whom the requestor filed her original May 21 grievance. Accordingly, we conclude that the district may withhold the submitted information under section 552.103 of the Government Code.

However, once the information at issue has been obtained by all parties to the anticipated litigation through discovery or otherwise, no section 552.103(a) interest exists with respect

to the information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, any submitted information that has either been obtained from or provided to all other parties 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 concluded or is no longer anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982). As our ruling under section 552.103 is dispositive, we need not address your remaining arguments against disclosure.

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,

A handwritten signature in black ink, appearing to read "Reg Hargrove", with a long, sweeping horizontal line extending to the right.

Reg Hargrove
Assistant Attorney General
Open Records Division

RJH/eeg

Ref: ID# 292541

Enc. Submitted documents

c: Ms. Aimee Burns
16110 Lakegrove Forest
Tomball, Texas 77377
(w/o enclosures)