



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

March 13, 2009

Mr. W. Montgomery Meitler  
Assistant Counsel  
Office of Legal Services  
Texas Education Agency  
1701 North Congress Avenue  
Austin, Texas 78701-1494

OR2009-03363

Dear Mr. Meitler:

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# 337166 (TEA PIR# 10582).

The Texas Education Agency (the "agency") received a request for all information regarding the investigation and findings pertaining to allegations of a TAKS testing security breach by one or more staff members in the Eagle Mountain-Saginaw Independent School District. You state the agency will provide some of the requested information to the requestors. You also state the agency will redact social security numbers from the information provided pursuant to section 552.147 of the Government Code.<sup>1</sup> You claim the submitted notes and investigative plan memorandum are excepted from disclosure under sections 552.103 and 552.122 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>2</sup>

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<sup>1</sup>Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

<sup>2</sup>We assume 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 those records contain substantially different types of information than that submitted to this office.

Initially, you inform us the agency has withheld a portion of the requested information because it was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2008-13248 (2008). In that ruling, we concluded the agency may withhold the information under section 552.116 of the Government Code. You state the law, facts, and circumstances on which the prior ruling was based have not changed; thus, we agree the agency must continue to rely on that ruling as a previous determination and withhold the previously requested information in accordance with Open Records Letter No. 2008-13248. *See* 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).

You claim the submitted information is excepted under section 552.103, which 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 agency has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date of the receipt of the request for information and (2) the information at issue is related to the pending or anticipated 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 agency must meet both prongs of this test for information to be excepted under section 552.103(a).

To establish 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). In the context of anticipated

litigation by a governmental body, the concrete evidence must at least reflect that litigation is "realistically contemplated." *See* Open Records Decision No. 518 at 5 (1989); *see also* Attorney General Opinion MW-575 (1982) (finding that investigatory file may be withheld from disclosure if governmental body attorney determines that it should be withheld pursuant to section 552.103 and that litigation is "reasonably likely to result"). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986).

You inform us the agency is investigating allegations an educator "engaged in inappropriate conduct." You state "[d]ue to the alleged misconduct, [the agency] filed a petition for sanctions against the educator pursuant to the provisions of the Education Code and title 19 of the . . . Administrative Code." *See* Educ. Code § 21.031(a) (the agency shall regulate and oversee standards of conduct of public school educators); 19 T.A.C. § 249.15(c) (agency staff may commence contested case to sanction teacher's certificate). You also inform us the educator filed an answer to the petition, and the matter was referred to the State Office of Administrative Hearings for a contested case proceeding. Furthermore, you state the agency's contested cases are governed by the Administrative Procedure Act (the "APA"), chapter 2001 of the Government Code. This office has concluded a contested case under the APA constitutes litigation for purposes of the statutory predecessor to section 552.103. Open Records Decision No. 588 (1991). Based on your representations and our review, we determine the agency reasonably anticipated litigation on the date it received the request for information. Furthermore, upon review of the submitted notes and investigative plan memorandum, we find the information relates to the anticipated litigation because it helps form the basis for the anticipated litigation. Accordingly, the submitted information may be withheld under section 552.103 of the Government Code.<sup>3</sup>

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 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 information 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 information or any other circumstances.

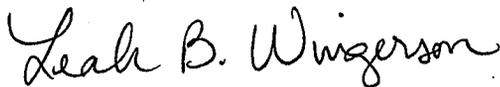
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and

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<sup>3</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure.

responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Leah B. Wingerson  
Assistant Attorney General  
Open Records Division

LBW/cc

Ref: ID# 337166

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)