



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 24, 2009

Ms. Ellen H. Spalding  
Feldman, Rogers, Morris & Grover, L.L.P.  
5718 Westheimer Road, Suite 1200  
Houston, Texas 77057

OR2009-11887

Dear Ms. Spalding:

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# 353335.

The Klein Independent School District (the "district"), which you represent, received a request for a copy of the complete district police department file pertaining to a specified investigation, as well as a list of names of all government personnel who responded or assisted at the scene of the incident. You state that the district does not have a portion of the requested information.<sup>1</sup> You claim that the submitted information is excepted from disclosure under sections 552.103, 552.108, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note you have redacted a portion of the information from the submitted documents. You state that you have redacted this information pursuant to the Family Educational Rights and Privacy Act ("FERPA"). Recently, the United States Department of Education Family Policy Compliance Office informed this office that FERPA, 20 U.S.C. § 1232(a), 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 purpose of our review in the open records ruling process under the Act.<sup>2</sup> However, FERPA is not applicable to law enforcement records maintained by the district police department that were created by the department for a law enforcement purpose.

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<sup>1</sup>The Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.-San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

<sup>2</sup>We have posted a copy of the letter on the Attorney General's website at <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

See 20 U.S.C. § 1232g(a)(4)(B)(ii); 34 C.F.R. §§ 99.3, 99.8. A portion of the submitted information consists of law enforcement records prepared by the district police department. Thus, pages 1 to 16 of the submitted information are not subject to FERPA and no portion of the information on those pages may be withheld on that basis.<sup>3</sup> Because we can discern the nature of the information that has been redacted, being deprived of this information does not inhibit our ability to make a ruling in this instance. Nevertheless, be advised a failure to provide this office with requested information generally deprives us of the ability to determine whether information may be withheld and leaves this office with no alternative other than ordering the redacted information be released. See Gov't Code §§ 552.301(e)(1)(D) (governmental body must provide this office with copy of "specific information requested" or representative sample), 552.302. However, records created by a law enforcement unit for a law enforcement purpose that are maintained by a component of an educational agency or institution other than the law enforcement unit or that are used exclusively for a non-law enforcement purpose such as a disciplinary proceeding are not records of the law enforcement unit and, therefore, are education records subject to FERPA. See *id.* § 99.8(b)(2). Because our office is prohibited from reviewing education records to determine whether appropriate redactions under FERPA have been made, we will not address the applicability of FERPA to any of the remaining submitted information, other than to note parents have a right of access to their own child's education records and FERPA prevails over inconsistent provisions of state law.<sup>4</sup> See *Equal Employment Opportunity Comm'n v. City of Orange, Tex.*, 905 F.Supp. 381, 382 (E.D. Tex. 1995); 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.3; Open Records Decision No. 431 (1985) (information subject to right of access under FERPA may not be withheld pursuant to statutory predecessor to Gov't Code § 552.103). Such determinations under FERPA must be made by the educational authority in possession of the education records.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101.<sup>5</sup> This section encompasses information made confidential by other statutes. We note the submitted information contains medical records, to which access is governed by the Medical Practice Act ("MPA"), chapter 159 of the Occupations Code. Section 159.002 of the Occupations Code provides in pertinent part:

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<sup>3</sup>You inform us that the police report and supporting documentation in pages 1 through 16 of the submitted Exhibit B consist of the written documentation of the police department's investigation.

<sup>4</sup>In 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.

<sup>5</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(b), (c). This office has concluded the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Further, information that is subject to the MPA also includes information that was obtained from medical records. *See* Occ. Code § 159.002(a), (b), (c); *see also* Open Records Decision No. 598 (1991).

When medical records pertain to minors, such records may only be released upon the parents' or legal guardians' signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. Any subsequent release of medical records must be consistent with the purposes for which the governmental body obtained the records. *See id.* § 159.002(c); Open Records Decision No. 565 at 7 (1990). We have marked the medical records in the submitted information. In this instance, the requestor appears to be the legal representative of the parent and the minor whose medical records are at issue. Thus, the requestor may have a right of access to the marked medical records. The district may only disclose this information in accordance with the MPA.

Section 552.101 also encompasses section 261.201 of the Family Code, which provides in pertinent part:

(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, audiotapes, videotapes, 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). A portion of the submitted information relates to an investigation of alleged or suspected child abuse conducted by the district's police department and is therefore subject to section 261.201. *See id.* § 261.001(1) (defining "abuse" for the purposes of chapter 261 of the Family Code); *see also id.* § 101.003(a) (defining "child" for purposes of section 261.201 as "person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes"). You do not indicate that the district's police department has adopted a rule that governs the release of this type of information. We therefore assume no such rule exists. Given that assumption, we conclude the district's police department investigation information, pages 1 through 16 of the submitted documents, is confidential under section 261.201 of the Family Code. *See* Open Records Decision No. 440 at 2 (1986) (predecessor statute). Accordingly, with the exception of the information marked under the MPA, the district must withhold pages 1 through 16 under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code.<sup>6</sup> As our ruling is dispositive with respect to this information, we need not address your remaining arguments against the disclosure of that information.

Next, we address your arguments against the disclosure of the remaining submitted information. You claim that the remaining information is excepted in its entirety under section 552.103 of the Government Code. 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*

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<sup>6</sup>We note that if the Texas Department of Family and Protective Services has created a file on this case, the child's parent may have the statutory right to review the file. *See* Fam. Code § 261.201(g).

*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 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. ORD 452 at 4. 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).

In this instance, you state that the parent of a district student alleges that the student was injured at school as a result of the actions of a district employee. You further note that the parent has retained an attorney, who has made the information request at issue in this matter. You note that in his request for information, the attorney asks "[p]lease preserve this crucial information for trial," and that the district considers this to be an explicit threat of litigation. Upon review of your arguments and the submitted information, we agree the district reasonably anticipated litigation on the date it received the present requests for information. You also argue that the submitted information is related to the anticipated litigation. Upon review, we agree that the submitted information is related to the anticipated litigation for purposes of section 552.103.

We note, however, that the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information that is related to litigation through discovery procedures. *See* ORD 551 at 4-5. If the opposing party has provided, obtained, or otherwise been given access to the information, then there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Portions of the submitted information, which we have marked, were obtained from the potential opposing party. Therefore, with the exception of the documents that were obtained from the potential opposing party, the district may withhold the remaining submitted information under section 552.103 of the Government Code. We note that the applicability of section 552.103(a) ends once the litigation has concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

We note that the information obtained from the opposing party contains e-mail addresses subject to section 552.137 of the Government Code. Section 552.137 excepts from

disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov’t Code § 552.137(a)-(c). In this instance, however, the requestor is the authorized representative of the owners of the marked e-mail addresses and therefore has a statutory right of access to this information. *See id.* § 552.023 (“A person or a person’s authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person’s privacy interests.”). Therefore, the district may not withhold the e-mail addresses you have marked.

In summary, the marked medical records may only be released in accordance with the MPA. The district must withhold pages 1 through 16 of the submitted documents under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. With the exception of the information we have marked for release, the district may withhold the remaining submitted information under section 552.103.<sup>7</sup>

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 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,

  
Michael A. Pearle  
Assistant Attorney General  
Open Records Division

MAP/cc

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<sup>7</sup>We note that the information being released contains confidential information to which the requestor has a right of access. *See* Gov’t Code § 552.023(a); ORD 481 at 4. Therefore, if the district receives another request for this particular information from a different requestor, then the district must again seek a decision from this office.

Ref: ID# 353335

Enc. Submitted documents

c: Requestor  
(w/o enclosures)