



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 18, 2010

Mr. Joe R. Tanguma
Walsh, Anderson, Brown, Gallegos and Green P.C.
P.O. Box 2156
Austin, Texas 78768

OR2010-12541

Dear Mr. Tanguma:

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# 390774.

The Highland Park Independent School District (the "district"), which you represent, received three requests from the same requestors for the criteria the district uses to determine the need to initiate an evaluation of a student for special education services and their child's education records. You state that some of the submitted information has been redacted pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.¹ You claim the requests are not requests for information under the Act. Alternatively, you claim the submitted information is excepted from disclosure under section 552.103 of the Government Code.² We have also received and considered comments from the authorized representative of the requestors. *See Gov't Code*

¹The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that FERPA 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. The DOE has determined that FERPA determinations must be made by the educational authority in possession of the education records. We have posted a copy of the letter from the DOE to this office on the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

²Although you also raised sections 552.101, 552.102, and sections 552.104 through 552.151 of the Government Code and asserted the applicability of Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5, you have not submitted any arguments regarding the applicability of these exceptions and rules nor have you identified any information you seek to withhold under these exceptions and rules. Therefore, we assume you do not assert these exceptions to disclosure or rules are applicable to the information at issue. *See Gov't Code §§ 552.301, .302.*

§ 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the exception you claim and reviewed the submitted information.³

We begin by addressing your claim that the present requests are not requests for information under the Act. You state that discovery in a due process hearing is “limited to those specified in the Administrative Procedure Act (“APA”), Texas Government Code, Chapter 2001 . . . [and] discovery between parties engaged in a contested case such as the one at issue here is conducted under the Texas Rules of Civil Procedure.” You further state that because legal authority already exists which governs the production of documents, the request is not subject to the Act. Section 552.0055 of the Government Code provides that “[a] subpoena duces tecum or a request for discovery that is issued in compliance with a statute or a rule of civil or criminal procedure is not considered to be a request for information under this chapter.” *Id.* § 552.0055. This section does not apply in all instances in which a governmental body could have received such a subpoena or discovery request. *See Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 865-66 (Tex. 1999) (in interpreting statutes, goal of discerning legislature’s intent is served by beginning with statute’s plain language because it is assumed that legislature tried to say what it meant and its words are therefore surest guide to its intent); *see also City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 324 (Tex. App.—Austin 2002, no pet.) (citing *Sorokolit v. Rhodes*, 889 S.W.2d 239, 241 (Tex.1994)) (“In applying the plain and common meaning of a statute, [one] may not by implication enlarge the meaning of any word in the statute beyond its ordinary meaning, especially when [one] can discern the legislative intent from a reasonable interpretation of the statute as it is written.”).

You do not assert that the requests the district received are in fact a “subpoena duces tecum or a request for discovery that is issued in compliance with a statute or a rule of civil or criminal procedure.” Nothing in the request reflects that it meets the elements of a subpoena duces tecum. *See* Code Crim. Proc. arts. 24.02 (defining subpoena duces tecum), .03 (describing procedures for obtaining subpoenas, including subpoena duces tecum). Furthermore, you have not demonstrated, and the requests do not indicate, that the information was otherwise requested pursuant to the authority of a statute or a rule of civil or criminal procedure. The requestors state that they are requesting the information under the “Texas Open Records Act.” Although discovery in a contested case is conducted under the Texas Rules of Civil Procedure, there is nothing that prevents the requestors from also submitting requests for information under the Act. Therefore, we find the district received requests for information under the Act, and we will address whether the district is required to release the submitted information pursuant to chapter 552 of the Government Code.

³We assume that 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 that those records contain substantially different types of information than that submitted to this office.

Next, we understand the authorized representative of the requestors to assert the requestors have a right of access to the responsive information pursuant to FERPA, 20 U.S.C § 1232g. Open Records Decision No. 634 at 5 (1995). We note that the United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that FERPA does not permit state and local educational authorities to disclose to this office, without parental or an adult student's consent, unredacted, personally identifiable information contained in education records for the purposes of our review in the open records ruling process under the Act.⁴ 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"). The documents you have submitted to this office appear to be redacted education records. Because our office is prohibited from reviewing education records, we will not address the applicability of FERPA to the information at issue. Such determinations under FERPA must be made by the educational authority in possession of the education records. We must note, however, that the requestors, as the parents of the minor student whose education records are at issue, may have a right of access to the submitted records, and that right prevails over a claim under section 552.103 of the Government Code. *See* 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 Section 552.103); *see also Equal Employment Opportunity Comm'n v. City of Orange, Tex.*, 905 F. Supp. 381, 382 (E.D. Tex. 1995) (holding FERPA prevails over inconsistent provision of state law). However, because we can make no determinations under FERPA, we will address your claim 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.

⁴As noted above, a copy of this letter may be found on the Office of the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

Gov't Code § 552.103(a), (c). The district 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 district must meet both prongs of this test for information to be excepted under section 552.103(a).

You claim the submitted information pertains to pending litigation. You inform us, and provide documentation showing, that on June 9, 2010, the requestors requested a due process hearing before the Texas Education Agency. We note, however, that the district received the requests for information on June 8, 2010, one day before the requestors requested the due process hearing. Therefore, we determine you have failed to demonstrate that litigation was pending on the date the requests were received. Furthermore, we find that you have failed to demonstrate that the district reasonably anticipated litigation on the date the requests were received. We therefore conclude that the district may not withhold the submitted information under section 552.103 of the Government Code. Accordingly, the submitted information must be released to these requestors.

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, 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, toll free, at (888) 672-6787.

Sincerely,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/dls

Ref: ID# 3990774

Enc. Submitted documents

c: Requestors
(w/o enclosures)