



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 23, 2015

Ms. Jodie T. Kennemer
General Counsel
Pasadena Independent School District
1515 Cherrybrook Lane
Pasadena, Texas 77502

OR2015-07807

Dear Ms. Kennemer:

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# 561223.

The Pasadena Independent School District (the "district") received a request for (1) the surveillance video pertaining to a specified internal affairs report; (2) information pertaining to three other specified incidents; (3) information pertaining to complaints against a named officer, including two specified incident reports; and (4) information confirming the number of incidents in which a named officer deployed his baton during a specified time period. You state you do not have information responsive to category three of the request.¹ You claim the submitted information is excepted from disclosure under section 552.103 of the Government Code.² We have considered the exception you claim and reviewed the submitted information.

¹The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

²Although you also claim section 552.026 of the Government Code, we note section 552.026 is not an exception to disclosure. Rather, section 552.026 provides the Act does not require the release of information contained in education records except in conformity with FERPA. Gov't Code § 552.026.

You state you have withheld the requested surveillance video recording because it contains personally identifiable student information and redacted student-identifying information from the submitted documents pursuant to the Family Educational Rights and Privacy Act (“FERPA”), section 1232g of title 20 of the United States Code. We note the United States Department of Education Family Policy Compliance Office (the “DOE”) has informed this office 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 purposes of our review in the open records ruling process under the Act.³ See 20 U.S.C. § 1232g(d). We note FERPA is not applicable to law enforcement records maintained by the district’s police department (the “department”) that were created by the department for a law enforcement purpose. See 20 U.S.C. § 1232g(a)(4)(B)(ii); 34 C.F.R. §§ 99.3, .8. Upon review, we find report numbers 1201314, 1201446, and 1300985 are law enforcement records that relate to investigations by the department and are maintained by the department. Thus, these records are not subject to FERPA, and no portion of these records may be withheld on that basis. 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 but to order 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), .302. Thus, we will address the applicability of your claimed exception to the submitted information.

Section 552.101 of the Government Code excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.”⁴ *Id.* § 552.101. This section encompasses information protected by other statutes, such as section 58.007 of the Family Code. Juvenile law enforcement records relating to conduct that occurred on or after September 1, 1997, are confidential under section 58.007. Fam. Code § 58.007(c). The relevant language of section 58.007 reads as follows:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

(1) if maintained on paper or microfilm, kept separate from adult files and records;

³A 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>.

⁴The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

(2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and

(3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapters B, D, and E.

Id. For purposes of section 58.007(c), “child” means a person who is ten years of age or older and under seventeen years of age at the time of the reported conduct. *See id.* § 51.02(2). Report numbers 1201314 and 1201446 involve juvenile delinquent conduct that occurred on or after September 1, 1997. *See id.* § 51.03 (defining “delinquent conduct” and “conduct indicating a need for supervision” for purposes of Fam. Code § 58.007). Thus, this information is subject to section 58.007(c). In this instance, it does not appear any of the exceptions to confidentiality under section 58.007 apply. Accordingly, the district must withhold report numbers 1201314 and 1201446 in their entirety under section 552.101 of the Government Code in conjunction with section 58.007(c) of the Family Code.⁵

Section 552.103 of the Government Code provides as follows:

(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). A governmental body 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 (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, 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, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984,

⁵As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). *See* ORD 551.

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To establish litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* 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.⁶ 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. 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).

You state the district reasonably anticipated litigation prior to its receipt of the instant request for information. You explain the parent of a district student filed an internal affairs complaint with the department pertaining to the incident at issue in the specified internal affairs report. You further state the parent hired an attorney, who, in discussions with the district, stated he was evaluating the parent's claims against the district for potential litigation purposes. Based on your representations and our review, we agree the district reasonably anticipated litigation on the date the instant request was received. We also find the remaining information is related to the anticipated litigation for purposes of section 552.103(a). Therefore, the district may withhold the remaining information under section 552.103(a) of the Government Code.

Generally, 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. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to all parties to 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 or is no longer anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

⁶In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

In summary, the district must withhold report numbers 1201314 and 1201446 in their entirety under section 552.101 of the Government Code in conjunction with section 58.007(c) of the Family Code. The district may withhold the remaining information under section 552.103(a) of the Government Code.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read 'Kenny Moreland', written over a horizontal line.

Kenny Moreland
Assistant Attorney General
Open Records Division

KJM/som

Ref: ID# 561223

Enc. Submitted documents

c: Requestor
(w/o enclosures)