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ATTORNEY GENERAL OF TEXAS

February 25, 2016

Ms. Annabel Canchola
Counsel for Atlanta Independent School District
Powell & Leon, L.L.P.
115 Wild Basin Road, Suite 106
Austin, Texas 78746

OR2016-04542

Dear Ms. Canchola:

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# 599451.

The Atlanta Independent School District (the "district"), which you represent, received a request for the video recording of a specified football game. You claim the submitted information is excepted from disclosure under section 552.103 of the Government Code.¹ We have considered the exception you claim and reviewed the submitted information.

Initially, we note the United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office the Family Educational Rights and Privacy Act ("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 the 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. 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

¹Although you raise section 552.107 of the Government Code, you make no arguments to support this exception. Accordingly, we find the district has waived its claim under this exception. *See* Gov't Code § 552.301(e) (governmental body must provide comments stating why exceptions raised should apply to information requested).

for our review unredacted education records. The requestor has identified himself as an authorized representative of the named student to whom the records pertain. Because our office is prohibited from reviewing education records, we will not address the applicability of FERPA to the information at issue, other than to note an adult student has a right of access to his own education records and this right of access prevails over a claim under section 552.103 of the Government Code. *See* 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 section 552.103). These determinations under FERPA must be made by the educational authority in possession of the education record. Therefore, to the extent you determine the requestor does not have a right of access under FERPA to the information at issue, 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.

Gov't Code § 552.103(a), (c). The 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 that (1) litigation is 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, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). *See* ORD 551 at 4.

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 demonstrate that 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

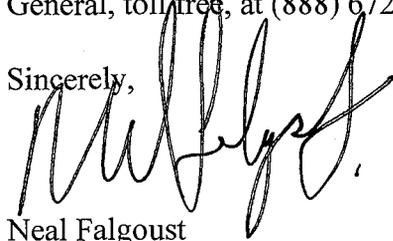
may include the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.² See Open Records Decision No. 555 (1990); see also Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). However, the fact 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's assertion of section 552.103 is based upon its receipt of the requestor's December 1, 2015, letter stating he represents a client who sustained injuries during the specified football game. The letter also contains the request for information and an authorization for the release of medical information. However, you provide no concrete evidence the potential opposing party has taken any objective steps toward litigation. We conclude the district has failed to demonstrate litigation was reasonably anticipated on the date the district received the request for information. Accordingly, the district may not withhold the submitted information under section 552.103 of the Government Code. As you raise no other exceptions, the district must release the submitted information.

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,



Neal Falgoust
Assistant Attorney General
Open Records Division

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²This office also has concluded that 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).

Ref: ID# 599451

Enc. Submitted documents

c: Requestor
(w/o enclosures)