



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 15, 2016

Mr. John M. Muñiz
Counsel for Northside Independent School District
Walsh, Gallegos, Trevino, Russo, & Kyle, P.C.
P.O. Box 460606
San Antonio, Texas 78246

OR2016-13608

Dear Mr. Muñiz:

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# 614553.

The Northside Independent School District (the "district"), which you represent, received a request for multiple categories of information pertaining to a specified student, information pertaining to teacher in-service training, and any peer-reviewed studies showing the "efficacy" of school programs. You claim the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.

You claim the present request is not a request for information under the Act. You inform us the requested information relates to a due process hearing involving the requestor's client. You state discovery in a due process hearing is "limited to those [methods] 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 argue because legal authority already exists that governs the production of documents, the request is not subject to the Act. Section 552.0055 of the Government Code provides, "[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 [the Act]." Gov't Code § 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) (stating in interpreting statutes, goal of discerning legislature's intent is served by beginning with statute's plain language because it is assumed 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 the request the district received is 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.” Gov’t Code § 552.0055. Furthermore, you have not demonstrated, and the request does not indicate, the request for information constitutes a discovery request issued in compliance with a statute or a rule of civil or criminal procedure. In the request, the requestor lists the “Texas Open Records Act” as a basis for requesting the information. Although discovery in a contested case is conducted under the Texas Rules of Civil Procedure, nothing prevents the requestor from also submitting a request for information under the Act. Therefore, we find the district received a request for information under the Act. Consequently, we will consider your claimed exception to disclosure for the information at issue.

The United States Department of Education Family Policy Compliance Office 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 parental or an adult student’s consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act.¹ 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 redacted education records for our review. Because our office is prohibited from reviewing these education records to determine whether appropriate redactions under FERPA have been made, we will not address the applicability of FERPA to any of the submitted records, except to note the requestor’s clients have a right of access under FERPA to their child’s education records and their right of access prevails over a claim under section 552.103 of the Government Code. See 20 U.S.C. § 1232g(a)(1)(A) (no funds shall be made available to educational agency that prevents parents of students, who have been in attendance at school, review of student’s

¹ A copy of this letter may be found on the Office of the Attorney General’s website at <http://www.texasattorneygeneral.gov/files/og/20060725usdoe.pdf>.

education records); 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); *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). Such determinations under FERPA must be made by the educational authority in possession of the education records. Therefore, to the extent the requestor's clients do not have a right of access to the submitted information under FERPA, we will address your argument under section 552.103 of the Government Code.

You claim Exhibit B is excepted from disclosure under section 552.103 of the Government Code, which provides, in relevant part, 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 section 552.103(a) 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 the governmental body received the request for information, and (2) the information at issue is related to that litigation. *See 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). *See* ORD 551.

You inform us, and the request reflects, simultaneously with the submission of the request for information, the requestor requested a due process hearing involving the district before the Texas Education Agency. You explain the due process hearing is a contested case hearing, which is governed by 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 litigation involving the district was

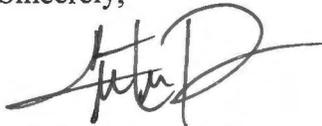
pending on the date the district received the request for information. Furthermore, upon review of Exhibit B, we find this information relates to the pending litigation because it pertains to the basis of the litigation. Accordingly, the district may withhold Exhibit B under section 552.103 of the Government Code.

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 pending or 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 concluded. *See* Attorney General Opinion MW-575 (1982); *see also* 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 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,



Cristian Rosas-Grillet
Assistant Attorney General
Open Records Division

CRG/bw

Ref: ID# 614553

Enc. Submitted documents

c: Requestor
(w/o enclosures)