



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

April 22, 1997

Mr. S. Anthony Safi  
Mounce, Green, Myers, Safi & Galatzan  
P.O. Box 1977  
El Paso, Texas 79950-1977

OR97-0909

Dear Mr. Safi:

On behalf of the El Paso Independent School District (the "school district"), you ask whether certain information is subject to required public disclosure under the Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 106035.

The school district received a request for "any formal complaints filed against individual school board members and/or Superintendent Stan Paz between Aug. 1, 1994, and Feb. 26, 1997." You state that two grievances are responsive to the request. You assert that these grievances are excepted from required public disclosure based on Government Code sections 552.026, 552.101, 552.102, 552.103, and 552.111.

Section 552.103(a) of the Government Code reads as follows:

(a) Information is excepted from [required public disclosure] if it is information:

(1) relating to litigation of a civil or criminal nature or settlement negotiations, 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; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

To secure the protection of section 552.103(a), a governmental body must demonstrate that requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision No. 588 (1991). A governmental body has the

burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. The test for establishing that section 552.103 applies is a two-prong showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.).

You aver that the requested information relates to reasonably anticipated litigation. Section 552.103 requires concrete evidence that the claim that litigation may ensue is more than mere conjecture. Open Records Decision No. 518 (1989). A mere threat to sue is not sufficient to establish that litigation is reasonably anticipated. *See* Open Records Decision No. 331 (1982). There must be some objective indication that the potential party intends to follow through with the threat. *See* Open Records Decision No. 452 (1986) at 5.

You state that "it is possible that either one of the grievants could seek further review of these matters after they have been presented to the Board of Trustees, to include the filing of proceedings before the Commissioner of Education, in which the EPISD would be the Respondent." We do not believe you have demonstrated that litigation is reasonably anticipated in this case. Consequently, the school district may not withhold the requested information from the requestor based on section 552.103.

Section 552.101 excepts from public disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. Section 552.102 excepts from required public disclosure information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. You have not explained why either of these exceptions apply to the requested information. Both of these exceptions cover information that is protected from disclosure under the common-law right to privacy. *See Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.). You do not specifically raise the privacy of the parties involved in the grievances. Nor do we believe the release of the grievances implicates the common-law privacy rights of any of the parties involved. *See Indus. Found. of the S. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The school district may not withhold the requested information from the requestor based on section 552.101 or section 552.102.

Section 552.111 of the Government Code excepts from required public disclosure:

An interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.

This exception applies to a governmental body's internal communications consisting of advice, recommendations, or opinions reflecting the policy making process of the governmental body at issue. *See* Open Records Decision No. 615 (1993). A governmental body's policy making functions do not encompass internal administrative and personnel matters. *See id.* We do not believe the grievances pertain to the school district's policy making process. Rather, they pertain to personnel matters. Thus, the school district may not withhold the grievances from the requestor based on section 552.111.

Section 552.026 of the Government Code incorporates the Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g, into the Open Records Act. FERPA prohibits, in most circumstances, the release of student records without a parent's consent. *See* 20 U.S.C. § 1232g(b)(1). FERPA does not protect information other than "personally identifiable information in education records." *See id.* § 1232g(b)(2). Therefore, *only the information which identifies the student or student's parents is protected from disclosure.* *See* Open Records Decision No. 332 (1982) at 3. We agree that FERPA covers portions of one of the grievances. We have marked the portions that FERPA requires the school district to withhold from public disclosure.

We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Kay Guajardo  
Assistant Attorney General  
Open Records Division

KHG/rho

Ref.: ID# 106035

Enclosures: Marked documents

cc: Ms. Tammy D. Fonce  
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(w/o enclosures)

