



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

October 1, 1997

Mr. Robert S. Johnson
Chappell & McGartland
1800 City Center Tower II
301 Commerce Street
Fort Worth, Texas 76102-4118

OR97-2207

Dear Mr. Johnson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your requests were assigned ID#s 108862.

The Fort Worth Independent School District (the "district"), which you represent, has received a request for the attorney fee bills your firm has billed the district for the six months of June, July, and August 1996, as well as for March, April, and May 1997. You indicate that some of the documents responsive to the request have previously been ruled upon by this office.¹ You indicate that the previous ruling, Open Records Letter No. 97-1019 (1997), will guide your withholding and release of that information. However, to the extent that the information was excepted from disclosure under section 552.103 and that litigation is no longer pending, you are now enclosing representative samples of that information for our review under previously asserted exceptions. You have provided this office with a sample of the requested information and have marked the information that you seek to withhold.² You claim that the marked information is excepted from disclosure by sections 552.101, 552.103, 552.107, 552.111, and 552.114 of the Government Code. We have considered the exceptions you claim and have reviewed the documents at issue.

You assert that some of the requested information is excepted from disclosure because it contains education records made confidential by the federal Family Educational

¹Open Records Letter No. 97-1019 (1997).

²In reaching our conclusion here, we 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.

Rights and Privacy Act of 1974 (“FERPA”), 20 U.S.C. § 1232g, or section 552.114 of the Government Code. In Open Records Decision No. 634 (1995), this office concluded: (1) an educational agency or institution may withhold from public disclosure information that is protected by FERPA and excepted from required public disclosure by sections 552.026 and 552.101 without the necessity of requesting an attorney general decision as to those exceptions, and (2) an educational agency or institution that is state-funded may withhold from public disclosure information that is excepted from required public disclosure by section 552.114 as a “student record,” insofar as the “student record” is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception.

We note that this ruling applies only to “education records” under FERPA. “Education records” are records that

- (i) contain information directly related to a student; and
- (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

20 U.S.C. § 1232g(a)(4)(A). *See also* Open Records Decision Nos. 462 (1987), 447 (1986). Information must be withheld from required public disclosure under FERPA only to the extent “reasonable and necessary to avoid personally identifying a particular student.” Open Records Decision Nos. 332 (1982), 206 (1978).³ The information which we have marked for disclosure does not appear to personally identify a particular student. If you have further questions as to the applicability of FERPA to information that is the subject of an open records request, you may consult with the United States Department of Education’s Family Policy Compliance Office. *See* Open Records Decision No. 634 (1995) at 4, n.6, 8.⁴

You also contend that you must withhold certain criminal history record information (“CHRI”) under section 552.101. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses information protected by other statutes. You explain that the district obtains CHRI from law enforcement officials pursuant to chapter 411 of the Government Code. You contend that you must maintain the confidentiality of these records. We agree. Gov’t Code § 411.084, .087(b). Thus, the district must withhold any CHRI in the records to the extent that the information was obtained through chapter 411 of the Government Code.

³*But see* 20 U.S.C. § 1232g(a)(1)(A), (d) (parent or adult student has affirmative right of access to that student’s education records). *See also* Open Records Decision No. 431 (1985) (Open Records Act’s exceptions to required public disclosure do not authorize withholding of “education records” from adult student).

⁴The district is not required to submit copies of education records to this office. *See* Open Records Decision No. 634 (1995) at 10 (if district does not make a determination but seeks determination from this office, district must first obtain parental consent to disclose personally identifiable information or must edit records to protect personally identifiable information).

You next argue that some of the information is protected from disclosure by section 552.103 of the Government Code. Section 552.103(a) excepts from disclosure 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.

The district has the burden of providing relevant facts and documents to show that 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, and (2) the information at issue is related to that litigation. *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 (1990) at 4. The district must meet both prongs of this test for information to be excepted under 552.103(a). After reviewing the submitted materials, we find that you have shown that litigation is pending or reasonably anticipated in the documents submitted except for two documents. The information also relates to the pending litigation in the matters in which you have established that litigation is pending or reasonably anticipated. We, therefore, conclude that the district may withhold those marked portions that you seek to withhold based on "litigation," except for the two matters previously mentioned. It also appears from your proposed redactions that you are releasing the hourly billed amounts in all the instances you assert section 552.103.

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. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Additionally, you contend that some of the marked information may be withheld under an attorney-client privilege. To the extent that the documents are not excepted under section 552.103, we observe that section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client

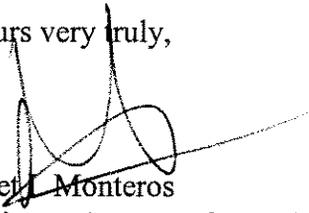
information held by a governmental body's attorney. *Id.* at 5. When communications from attorney to client do not reveal the client's communications to the attorney, section 552.107 protects them only to the extent that such communications reveal the attorney's legal opinion or advice. *Id.* at 3. In addition, basically factual communications from attorney to client, or between attorneys representing the client, are not protected. *Id.* Based upon your arguments and representations, we find that the information revealed in the two documents at issue do not reveal information coming within the "attorney-client privilege" or information which reveals the client's confidential communications or the attorney's legal advice or opinions and, therefore, may not be withheld under section 552.107.

We note that section 552.111 excepts from disclosure interagency or intra-agency communications "consisting of advice, recommendations, opinions, and other material reflecting the deliberative or policymaking processes of the governmental body." Open Records Decision No. 615 (1993) at 5. The information at issue within the two documents concerns routine personnel and administrative issues which involve the district's attorneys, not the district's policymaking functions. Thus, the information at issue is not excepted from disclosure under section 552.111.

However, this office recently stated that if a governmental body wishes to withhold attorney work product, the proper exception to raise is either section 552.103 or section 552.111. Open Records Decision No. 647 (1996). We announced in Open Records Decision No. 647 (1996) that a governmental body must show that the work product (1) was created for trial or in anticipation of litigation under the test articulated in *National Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458 (Tex. 1993), and (2) consists of or tends to reveal the thought processes of an attorney. *Id.* at 5. In reviewing the two documents not excepted under section 552.103, neither of the two documents comes within this demonstration and so they consequently must be released.

We are resolving this matter with an 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 should 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,


Janet Monteros
Assistant Attorney General
Open Records Division

JIM/alg

Ref: ID# 108862

Enclosures: Submitted documents

cc: Pat Taylor
5044 Hildring Drive East, Apt. 108
Fort Worth, Texas 76132
(w/o enclosures)

