



July 15, 1999

Ms. Jacqueline A. Strashun
Supervising Attorney
Investigations and Enforcement
State Board for Educator Certification
1001 Trinity
Austin, Texas 78701-2603

OR99-1959

Dear Ms. Strashun:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 127495.

The State Board for Educator Certification (the "board") received a request for letters and correspondence relating to a complaint about an educator. You claim that the requested information is exempted from disclosure under section 552.103(a) of the Government Code. We have considered the exception you claim and reviewed the submitted information.

When asserting section 552.103(a), a governmental body must establish that the requested information relates to pending or reasonably anticipated litigation. Section 552.103(a) exempts from required public 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.

Thus, under section 552.103(a) a governmental body's burden is two-pronged. The governmental body must establish that (1) litigation is either pending or reasonably anticipated, and that (2) the requested information relates to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App. - Austin 1997, no pet.); *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).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Contested cases conducted under the Administrative Procedure Act, chapter 2001 of the Government Code, are considered litigation under section 552.103. Open Records Decision No. 588 at 7 (1991). Whether litigation is reasonably anticipated, must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

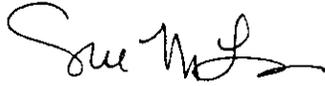
You state that the board certifies and regulates public school educators pursuant to the Texas Education Code, subchapter B, chapter 21. The board is responsible for prosecuting disciplinary actions against certified educators, including enforcement of the Educator's Code of Ethics. Contested cases are conducted under the Administrative Procedure Act and the rules promulgated by the State Office of Administrative Hearings. You have stated that the board will be filing an administrative petition against the educator at the State Office of Administrative Hearings. In this instance, the board has supplied this office with information that the board will take enforcement action as authorized by statute. We conclude that litigation is reasonably anticipated. We additionally find that the documents submitted by the board are related to the reasonably anticipated litigation for the purposes of section 552.103(a). You may, therefore, withhold the submitted documents pursuant to section 552.103(a).

In reaching this conclusion, however, we assume that the opposing party to the anticipated litigation has not previously had access to the records at issue; absent special circumstances, once information has been obtained by all parties to the litigation, *e.g.*, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). If the opposing parties in the anticipated litigation have seen or had access to any of the information in these records, there would be no justification for now withholding that information from the requestor pursuant to section 552.103(a). We also note that 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).

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.

Sincerely,

A handwritten signature in cursive script, appearing to read "Sue M. Lee".

Sue M. Lee
Assistant Attorney General
Open Records Division

SML\ch

Ref: ID# 127495

Encl: Submitted documents

cc: Mr. William C. Bednar
Attorney at Law
712 West 14th Street, Suite A
Austin, Texas 78701-1708
(w/o enclosures)