



July 16, 1999

Mr. Raymundo Lopez
Garcia, Lopez & Wood
Attorneys - Mediators
214 West Cano Street
Edinburg, Texas 78539

OR99-1991

Dear Mr. Lopez:

You represent the Edinburg Independent School District (the “school district”). On behalf of the school district, you have asked whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 125720.

The school district received two open records requests from the same requestor for a variety of information related to a specified individual.¹ Specifically, the requestor seeks investigation material, opinions, and “any and all” statements concerning a specified school district employee, and the minutes of an executive session meeting concerning the requestor. In response to the request, you submit to this office for review a representative sample of the information at issue. You state that the school district will make available to the requestor some responsive information.² You contend, however, that the requested information is excepted from disclosure pursuant to sections 552.026, 552.101, 552.103, 552.107, and 552.114 of the Government Code. We have considered your arguments and claimed exceptions, and reviewed the submitted information.

¹At the outset, we note that the requestor also asks certain questions concerning the school district and the employee at issue. The Public Information Act does not require a governmental body to answer factual questions or to perform legal research. Open Records Decision Nos. 555 (1990), 379 (1983), 347 (1982).

²In your letter to this office, dated May 4, 1999, you represent that “the District will be providing to [the requestor] copies of court records obtained by the District.” Among the records you have submitted to our office for review you included what appear to be documents filed with a court. We agree that documents which are part of the public record cannot be withheld under the Public Information Act. See *Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54, 57 (Tex. 1992) (orig. proceeding).

We first consider your assertion that a portion of the requested information is excepted from required disclosure as records of an executive session.³ Section 551.104 of the Government Code, a provision of the Open Meetings Act, makes the certified agenda and tape of a properly closed meeting confidential. An audiotape recording or certified agenda of a closed meeting is available for public inspection and copying only under a court order. Gov't Code § 551.104; Open Records Decision No. 495 at 4 (1988) (audiotape recordings of closed meetings are confidential unless court rules otherwise). Furthermore, section 551.146 provides that it is a criminal offense to disclose to a member of the public the certified agenda or audiotape recording of a closed meeting. However, records that were discussed in a closed meeting and records created in a closed meeting, other than a certified agenda or tape recording, are not made confidential by chapter 551 of the Government Code. Open Records Decision No. 605 (1992). If the information at issue is the certified agenda or audiotape recording of a closed meeting, then it is confidential. Otherwise, based on your brief and your failure to submit the information,⁴ we can only assume that the information is *not* “[t]he certified agenda or tape of a closed meeting,” therefore, the information is not protected by chapter 551 of the Government Code. Accordingly, the records at issue are not subject to exception under section 551.104(c), and we will consider your other arguments against disclosure.

You claim that a portion of the requested records are excepted from disclosure under sections 552.026 and 552.114 of the Government Code. In Open Records Decision No. 634 (1995), this office concluded that (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. FERPA provides the following:

No funds shall be made available under any applicable program
to any educational agency or institution which has a policy or practice

³You also explain that “the District does not have ‘minutes’ of the closed session.” We note that a governmental body is not expected to produce information which does not exist, nor does it require a governmental body to prepare new information. Open Records Decision Nos. 605 (1992), 555 (1990), 362 (1983).

⁴A governmental body is required to submit to this office a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See* Gov't Code § 552.301(b)

of permitting the release of education records (or personally identifiable information contained therein . . .) of students without the written consent of their parents to any individual, agency, or organization

20 U.S.C. § 1232g(b)(1). “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.

Id. § 1232g(a)(4)(A); *see also* Open Records Decision Nos. 462 (1987) at 14-15, 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).

In this instance, you have submitted a blank questionnaire which was to be completed by school district students. The handwritten student responses on the submitted questionnaire may be identifiable information about a particular student. Further, it appears to this office that the school district has made a determination that the responsive student information is excepted from disclosure under FERPA.⁵ Accordingly, we conclude the student completed questionnaires are protected under FERPA, pursuant to sections 552.114 and 552.026 of the Government Code and may not be released to the requestor. We assume that the school district has no objection to releasing the blank questionnaire since no other exception was raised for this information.

You also claim that “the District believes that all of the information requested by [the requestor] is excepted from disclosure by Section 551.103 [sic] of the Act which excepts from disclosure information relating to reasonably anticipated litigation.” By your representation, we understand that the school district is claiming section 552.103 of the Government Code. Section 552.103(a), the “litigation exception” excepts from disclosure information:

⁵Although, you did not submit to this office for review copies of completed student questionnaires, we will rule on your request for a decision. *See* Open Records Decision No. 634 (1995) at 10 (if school 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).

(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 school 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. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (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). The school district must meet both prongs of this test for information to be excepted under section 552.103(a). Section 552.103 requires concrete evidence that litigation may ensue. To demonstrate that litigation is reasonably anticipated, the school district must furnish evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 at 5 (1989).

Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, 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. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Nor does the mere fact that an individual hires an attorney and alleges damages serve to establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986). Under the facts presented and your arguments, we conclude that the school district has not met its burden under section 552.103. Therefore, you may not rely on section 552.103 to withhold any of the requested information.

We next consider your assertion that a portion of the requested information is "protected by the attorney-client privilege as communications made to the District for the purpose of giving legal opinion and advise [sic]," pursuant to sections 552.101 and 552.107 of the Government Code. Although early open records decisions permitted governmental bodies to withhold from disclosure information within the attorney-client privilege pursuant to section 552.101, the privilege is specifically covered under section 552.107(1). Section

552.107 is the appropriate section to cite when seeking to withhold from disclosure communications between the governmental body and its legal counsel. *See* Open Records Decision No. 574 (1990). We note that you have not submitted any records which would implicate section 552.107 of the Government Code. As stated previously, pursuant to section 552.301(b), a governmental body is required to submit to this office a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Since the information at issue was not submitted to our office, we will not address the application of section 552.107 to requested information. Consequently, we assume that responsive information will be released to the requestor.

We are resolving this matter with an informal letter ruling rather than with a published open records decision.⁶ 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 black ink that reads "Sam Haddad". The signature is written in a cursive style with a large, looping initial "S".

Sam Haddad
Assistant Attorney General
Open Records Division

SH/nc

Ref.: ID# 125720

Encl. Submitted documents

cc: Mr. Roel Rolando Zamora
1701 Wendy Drive
Edinburg, Texas 78539
(w/o enclosures)

⁶In reaching our conclusion, 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.