



December 7, 1999

Mr. Aric J. Garza
1200 South Texas Building
603 Navarro Street
San Antonio, Texas 78205-1826

OR99-3541

Dear Mr. Garza:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 130062.

The San Antonio Independent School District (the "District") received a request for a copy of an investigation regarding a teacher who is employed by the District. You claim that the documents submitted within Exhibit B are excepted from required public disclosure by sections 552.026, 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and have reviewed the documents submitted.

You state that parts of the investigation are comprised of materials and communications prepared in anticipation of administrative hearings. Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which a governmental body is or may be a party. To show that section 552.103(a) is applicable, the District must demonstrate 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). Section 552.103 requires concrete evidence that litigation may ensue. To demonstrate that litigation is reasonably anticipated, the District must furnish evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 at 5 (1989). 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 upon conclusion of the investigation, a recommendation will be made to the District Superintendent regarding the teacher's employment with the District to the District's Board of Trustees (the "Board"). The Board will then render a final decision in the matter in accordance with section 21.208 of the Texas Education Code. You further state that prior to the Board's final decision, the teacher may request a hearing pursuant to section 21.207.

If a hearing is requested, you contend that it is the policy of the District to conduct the hearing consistent with Subchapter F of the Education Code. Having reviewed your arguments and the information at issue, we conclude that you may withhold that information for which you have claimed section 552.103. *See e.g.*, Open Records Decision No. 368 (1983) (administrative hearing as litigation for purposes of section 552.103(a)).

We note, however, that when the opposing party in the litigation has seen or had access to any of the information in these records, there is no justification for withholding that information from the requestor pursuant to section 552.103(a). 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. In addition, the applicability of section 552.103(a) ends once the litigation has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).¹

You also contend that portions of the requested records must be withheld from the public pursuant to sections 552.026 of the Government Code. Section 552.026 of the Government Code provides as follows:

This chapter does not require the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, Sec. 513, Pub. L. No. 93-380, 20 U.S.C. Sec. 1232g.

The Family Educational Rights and Privacy Act of 1974 (“FERPA”) provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information (other than directory information) contained in a student’s education records to anyone but certain numerated federal, state, and local officials and institutions, unless otherwise authorized by the student’s parent. *See* 20 U.S.C. § 1232g(b)(1). “Education records” means those records that contain information directly related to a student and 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). 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). For purposes of FERPA, the records at issue constitute “education records” only to the extent that they contain information about identifiable students. Consequently, the district must withhold those portions of the records unless you receive permission to release the information from the parent of the student or from the student himself if qualified to do so as specified above. Without receipt of permission from the parent or student to release the information, information in a document identifying a student must be redacted prior to release of the remaining information.

¹ Some of the information submitted is confidential by law and as such may not be released after the litigation has concluded.

You submitted a single document upon which you indicated that a section 552.101 exception applies. You argue that under the Texas Rules of Civil Evidence, the District may withhold attorney work product from disclosure under section 552.101 if it demonstrates that the material was 1) created for trial or in anticipation of civil litigation, and 2) consists of or tends to reveal an attorney's mental processes, conclusions and legal theories. Open Records Decision No. 647 (1996). The first prong of the work product test, which requires a governmental body to show that the documents at issue were created in anticipation of litigation, has two parts. A governmental body must demonstrate that 1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and 2) the party resisting discovery or release believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. *Id.* at 4. After reviewing the submitted documentation and the arguments, we do not believe that you have established that the document may be withheld as attorney work-product.² This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report

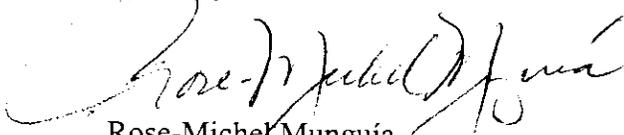
² In Open Records Decision No. 647 (1996), this office concluded that pursuant to the rationale set forth in *National Union Fire Insurance Co. v. Valdez*, 863 S.W.2d 458, 461 (Tex. 1993), a request for an attorney's entire litigation file may be denied under either section 552.103 or section 552.111 of the Government Code, depending upon whether the litigation is reasonably anticipated, pending, or concluded. Open Records Decision No. 647 at 5 (1996). Therefore, attorney work product is properly claimed under section 552.103 or section 552.111.

that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Rose-Michel Munguía
Assistant Attorney General
Open Records Division

RMM/jc

Ref: 130062

Encl. Submitted documents

cc: Mr. Matthews Thomas
15727 Walnut Creek
San Antonio, Texas 78247
(w/o enclosures)