



December 9, 1999

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

OR99-3568

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# 130273.

The State Board for Educator Certification ("SBEC") received a request for all information pertaining to the requestor. You have provided for our review a representative sample¹ of information that is responsive to the request. You assert the requested information, in its entirety, is excepted from public disclosure under section 552.103 of the Government Code. We have reviewed the information you have submitted and considered the exception you assert.

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. A governmental body 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

¹In 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.

(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 governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

As to the first prong, you state that SBEC regulates public school educators pursuant to chapter 21 of the Texas Education Code. You further advise "SBEC has both an open disciplinary investigation as well as a pending Code of Ethics complaint concerning [the requestor], a Texas certified educator" and that "this matter will be litigated under the Administrative Procedure Act, Government Code, Chapter 2001." We thus find you have demonstrated that litigation is reasonably anticipated. Open Records Decision No. 588 at 7 (1991) (contested administrative proceedings constitute litigation for purposes of statutory predecessor to section 552.103 of the Government Code).

As to the second prong, the governmental body must identify the issues in the litigation and explain how the requested information relates to those issues. Open Records Decision No. 551 at 5 (1990). You neither state the specific issues in the anticipated litigation, nor do you explain how the submitted representative samples relate to those issues. However, you have stated that there is a pending Code of Ethics complaint. Thus, we will consider whether the submitted information relates to the anticipated litigation.

Section 552.103(a) was intended to prevent the use of the Public Information Act as a method of avoiding the rules of discovery in litigation. Attorney General Opinion JM-1048 at 4 (1989). The litigation exception enables a governmental body to protect its position in litigation by requiring information related to the litigation to be obtained through discovery. Open Records Decision No. 551 at 3 (1990). Generally, 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). 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). We now turn to the submitted samples at issue.

As to the samples you have labeled "Travel Reimbursement Records," "Financial Reports," "Internal Audit," "External Audit," "Example of Report for CCISD," "Audit request from Abelardo Saaverdra," "Code of Ethics Complaint Against Dr. Abelardo Saaverdra,"² and "TEA response to CCISD audit request," we find the information was either obtained from the requestor or already provided to the requestor. Hence, none of this information may be

²The letter from the requestor indicates the requestor has already been provided with Mr. Edmund Hecht's code of ethics complaint.

withheld.³

As to the samples labeled “Newspaper Articles,” and “Complaint form from citizen,” both contain newspaper articles. We note that newspaper clippings, whether or not they relate to the anticipated litigation, constitute information that is within the public domain and, as such, cannot be withheld under section 552.103. The latter sample also contains three complaint letters which appear to relate to the anticipated litigation, and thus may be withheld under section 552.103.⁴

As to the sample labeled “complaint from Board Member,” we are unable to ascertain how this sample relates to the anticipated litigation. The sample consists of a memorandum discussing various newspaper articles. Because you have not explained how this sample relates to the anticipated litigation, the sample must be released.

As to the sample labeled “Credit Card record,” we specifically refer you to section 552.022 of the Government Code, which reads in pertinent part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

We find this sample consists of information in an account relating to the expenditure of public funds. We find no other law that makes this information confidential.

³Moreover, we believe the “Travel Reimbursement Records” are expressly made public by section 552.022(a)(3) of the Government Code, and both the “Internal Audit” and “External Audit” samples are expressly made public by section 552.022(a)(1) of the Government Code (see *infra*).

⁴These complaint letters are marked “Confidential.” We note that information is not confidential under the Public Information Act simply because the party submitting the information to the governmental body anticipates or requests that it be kept confidential, nor can a governmental body promise to keep information confidential absent statutory authorization. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), *cert. denied* 430 U.S. 931 (1977).

Notwithstanding your assertion of section 552.103, this information must be released in accordance with section 552.022(a)(3).

As to the remaining samples labeled “Complaint report from an employee”⁵ and “Anonymous letter,” these documents appear to relate to the anticipated litigation. This information may thus be withheld pursuant to section 552.103.⁶

We are resolving this matter with an informal letter ruling rather than with a published open records decision. 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 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).

⁵This sample refers to attachments marked “A” through “L” which were not provided for our review. This ruling thus expresses no opinion as to the release of the attachments. However, we again refer you to section 552.022 of the Government Code and caution that the attachments may expressly be made public by this section of law.

⁶We caution that some of the information in these samples may be confidential by law. Therefore, if SBEC receives a request in the future, at a time when litigation is no longer reasonably anticipated or pending, SBEC should seek a ruling from this office before releasing this information. See Gov’t Code § 552.352 (distribution of confidential information constitutes a criminal offense).

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,



Michael Garbarino
Assistant Attorney General
Open Records Division

MG/jc

Ref: ID# 130273

Encl. Submitted documents

cc: Abelardo Saavedra, Ph.D.
Superintendent of Schools
Corpus Christi Independent School District
P.O. Drawer 110
Corpus Christi, Texas 78403-0110
(w/o enclosures)