



February 11, 2002

Mr. Therold I. Farmer  
Walsh, Anderson, Brown, Schulze & Aldridge  
P.O. Box 2156  
Austin, Texas 78752

OR2002-0628

Dear Mr. Farmer:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 158426.

The Elgin Independent School District (the "district"), which you represent, received a request for statements of teachers used as evidence at an expulsion hearing concerning a named student, and other evidence used at the hearing. You advise that the requestor has clarified that her request encompasses any police department records that the district possesses. You claim that some of the requested information is excepted from disclosure under sections 552.026, 552.101, 552.103, 552.108, 552.111, 552.114, 552.131, and 552.305<sup>1</sup> of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

As section 552.103 of the Government Code is the most inclusive exception you raise, we address it first. Section 552.103, the "litigation exception," provides in relevant part:

- (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature 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.

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<sup>1</sup>As you acknowledge, section 552.305 does not constitute an exception to disclosure under the Public Information Act. Although a third party whose interests may be involved may submit to this office reasons why the information at issue should be withheld or released, a governmental body is not authorized to withhold information subject to the Act on the basis of section 552.305. See Gov't Code § 552.305.

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body that raises section 552.103 has the burden of providing relevant facts and documents sufficient to establish the applicability of the exception to the information that it seeks to withhold. To sustain this burden, the governmental body must demonstrate that: (1) litigation was pending or reasonably anticipated on the date that the governmental body received the written request for information and (2) the requested information is related 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 (Tex. App. – Houston [1<sup>st</sup> Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 at 4 (1990). Both elements of the test must be established in order for information to be excepted from disclosure under section 552.103. *Id.*

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To establish that litigation is reasonably anticipated, the governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *Id.* Among other examples, this office has concluded that litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission (“EEOC”), *see* Open Records Decision No. 336 (1982); (2) hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and (3) threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

In this instance, you explain that the requestor is the mother of the student involved in the alleged assault to which the relevant disciplinary proceeding and submitted witness statements pertain. You represent to this office that the requestor “has informed [district] administrators that she has filed a complaint with the Office of Civil Rights (OCR),” a federal administrative agency, and that she states the complaint is based on racial discrimination in the district’s decision to expel her son. However, you have not informed this office when the requestor informed the district that she had filed a complaint or when she stated that she filed the complaint. Therefore, having carefully considered your arguments, we find that the district has not demonstrated that the information in question relates to litigation that the district reasonably anticipated on the date of its receipt of the request for that information. Therefore, the district may not withhold the requested information under section 552.103. *See* Gov’t Code § 552.103(c).

You also contend that the records submitted as "Group #1" are excepted from disclosure under section 552.108 of the Government Code. Section 552.108 states that "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if release of the information would interfere with the detection, investigation, or prosecution of crime." Gov't Code § 552.108(a)(1). The Elgin Independent School District is neither a law enforcement agency nor a prosecutor. However, this exception may be asserted by a custodian of records on behalf of another governmental body which is a law enforcement agency or prosecutor. *See, e.g.,* Open Records Decision Nos. 474 (1987), 372 (1983) (where incident involving allegedly criminal conduct is still under active investigation or prosecution, section 552.108 may be invoked by any proper custodian of information which relates to incident). You advise that the records in Group #1 are records of the Elgin Municipal Police Department, that the criminal matter to which the records pertain is still under investigation, and that release of these records would hinder further investigation and interfere with law enforcement. Based on these representations, we find that release of the documents in Group #1 would interfere with the detection, investigation, or prosecution of crime. Therefore, we conclude that the district may withhold this information under section 552.108(a)(1) of the Government Code. Having found the information excepted under section 552.108(a)(1) of the Government Code, we need not address your remaining asserted exceptions for this information.

You further argue that the documents labeled "Group #2" are excepted from disclosure pursuant to the informer's privilege as set out under sections 552.101 and 552.131 of the Government Code. Please note that former section 552.131, "Exception: Certain Information Held by School District," was renumbered as section 552.135 by the Seventy-seventh Legislature, effective September 1, 2001. The revision was non-substantive. Section 552.135 provides as follows:

(a) "Informer" means a student or former student or an employee or former employee of a school district who has furnished a report of another person's or persons' possible violation of criminal, civil, or regulatory law to the school district or the proper regulatory enforcement authority.

(b) An informer's name or information that would substantially reveal the identity of an informer is excepted from [required public disclosure].

(c) Subsection (b) does not apply:

(1) if the informer is a student or former student, and the student or former student, or the legal guardian, or spouse of the student or former student consents to disclosure of the student's or former student's name; or

(2) if the informer is an employee or former employee who consents to disclosure of the employee's or former employee's name; or

(3) if the informer planned, initiated, or participated in the possible violation.

(d) Information excepted under Subsection (b) may be made available to a law enforcement agency or prosecutor for official purposes of the agency or prosecutor upon proper request made in compliance with applicable law and procedure.

(e) This section does not infringe on or impair the confidentiality of information considered to be confidential by law, whether it be constitutional, statutory, or by judicial decision, including information excepted from the requirements of Section 552.021.

Gov't Code § 552.135. Because the legislature specifically limited the protection of section 552.135 to the identity of a person who reports a possible violation of "law," a school district that seeks to withhold information under section 552.135 must clearly identify to this office the specific civil, criminal, or regulatory law that is alleged to have been violated. *See also* Gov't Code § 552.301(e)(1)(A).

In this instance, you seek to withhold the submitted statements in Group #2 under section 552.135. You inform this office that the information concerns possible violations of Texas Penal Code 22.01 and common law assault and/or battery. However, after reviewing the submitted information, we conclude that the statements do not constitute reports of violations of law. Thus, we conclude that the district may not withhold from disclosure any information in Group #2 under section 552.135.

You also argue that the information in Group #2 is excepted under section 552.101 in conjunction with the common law informer's privilege. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." The informer's privilege has long been recognized by Texas courts and is incorporated into the Public Information Act by section 552.101. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). It protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer's identity. Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978). The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 at 2 (1981)

(citing Wigmore, Evidence, § 2374, at 767 (McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5 (1988). Again, however, the statements in Group #2 do not reflect reports of violations of law. Therefore, we find that the requested information is not excepted from disclosure under the informer's privilege and section 552.101.

We note, however, that the names of students appear in Group #2. The federal Family Educational Rights and Privacy Act of 1974 (FERPA), 20 U.S.C. § 1232g, 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 enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1); *see also* 34 C.F.R. § 99.3 (defining personally identifiable information).

Section 552.026 of the Government Code incorporates FERPA into chapter 552 of the Government Code. *See* Open Records Decision No. 634 at 6-8 (1995). Section 552.026 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.

Gov't Code § 552.026. "Education records" under FERPA are those records that contain information directly related to a student and that are maintained by an educational agency or institution or by a person acting for such agency or institution. *See* 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." *See* Open Records Decision Nos. 332 at 3 (1982), 206 at 2 (1978).

Section 552.114(a) of the Government Code requires that the district withhold "information in a student record at an educational institution funded wholly or partly by state revenue." This office generally has treated "student record" information under section 552.114(a) as the equivalent of "education record" information that is protected by FERPA. *See* Open Records Decision No. 634 at 5 (1995).

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 of the Government Code 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 of the Government Code 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. See Open Records Decision No. 634 at 6-8 (1995). However, FERPA gives a parent the right to inspect and review the education records of his or her child. See 20 U.S.C. § 1232g(a)(1)(A). Therefore, you may not withhold the information identifying the requestor’s son in Group #2. It appears that one other student is identified in these statements. This identifying information is confidential under FERPA. The district must not disclose this information, which we have marked, unless it has authority to release the information under the federal law.

You also claim that the statements in Group #2 contain information that must be protected as private under section 552.101. For information to be protected from public disclosure pursuant to the common law right of privacy under section 552.101, the information must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). Information must be withheld from the public when (1) it is highly intimate or embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 at 1 (1992). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. After reviewing the submitted information, we conclude that none of it is protected by the common law right of privacy under section 552.101.

Finally, we address your argument under section 552.111 for the information in Group #2. Section 552.111 excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.). An agency’s policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. ORD 615 at 5-6. Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 160; ORD 615 at 4-5.

We understand you to argue that because the submitted records originated from the Elgin Police Department, they constitute interagency memoranda protected by section 552.111. However, after reviewing your arguments, we conclude that you have failed to explain how the information reflects advice, recommendations, opinions, or other material reflecting the policymaking processes of the police department or the district. Therefore, you may not withhold any of the information under section 552.111.

In summary, you may withhold the information in Group #1 under section 552.108(a)(1). You must withhold the information that we have marked in Group #2 under FERPA and section 552.114 unless the district has authority to release the information under the federal law. The remaining information must be released to the requestor.

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).

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).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

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,

A handwritten signature in black ink that reads "Kristen Bates". The signature is written in a cursive style with a long horizontal line extending to the right.

Kristen Bates  
Assistant Attorney General  
Open Records Division

KAB/sdk

Ref: ID# 158426

Enc. Submitted documents