



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 9, 2004

Ms. Ellen B. Huchital
McGinnis, Lochridge & Kilgore, L.L.P.
3200 One Houston Center
1221 McKinney Street
Houston, Texas 77010

OR2004-6719

Dear Ms. Huchital:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 206887.

The Eanes Independent School District (the "district"), which you represent, received a request for 1) any and all documentation generated or received by the district or its legal counsel in response to confidentiality violations allegedly occurring at a district Board of Trustees meeting in November, 2003, and 2) a copy of the taped January, 2004 hearing with the district Board of Trustees in Executive Session.¹ You claim that the responsive information you have submitted as Exhibits E and F is excepted from disclosure under sections 552.101, 552.103 and 552.107 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that person may submit comments stating why information should or should not be released). Initially, we note that the submitted information contains copies of minutes of open meetings of the district board. Section 551.022 of the Government Code states in relevant part that "[t]he minutes and tape recordings of an open meeting are public records and shall be available for public inspection and copying on request[.]" Exceptions to disclosure under the Public Information Act (the "Act") do not generally apply to information that another statute specifically makes public. Therefore, all copies of minutes of open meetings within the submitted information must be released.

¹ The submitted information does not include a copy of the taped January, 2004 meeting, and the district asserts that it does not seek the Attorney General's opinion regarding that recording.

We also note that portions of the submitted information constitute information that is subject to section 552.022 of the Government Code. Section 552.022(a) enumerates categories of information that are public information and not excepted from required disclosure under chapter 552 of the Government Code unless they are expressly confidential under other law. *See Gov't Code §§ 552.022(a)(3)* (“information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body”); *552.022(a)(5)* (“all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate”); *552.022(a)(13)* (“a policy statement or interpretation that has been adopted or issued by an agency”); *552.022(a)(14)* (“administrative staff manuals and instructions to staff that affect a member of the public”); *552.022(a)(15)* (“information regarded as open to the public under an agency’s policies”). The information subject to section 552.022 must therefore be released unless the information is expressly made confidential under other law. The only exception to disclosure that you claim for the information subject to section 552.022 is section 552.103. Section 552.103 of the Government Code is a discretionary exception that does not constitute “other law” that makes information confidential for purposes of section 552.022. *See Open Records Decision Nos. 542 (1990)* (“litigation exception” does not implicate third party rights and therefore is waivable by a governmental body). We therefore conclude that the submitted information subject to sections 552.022(a)(3), (5), (13), (14) and (15), which we have marked, must be released in its entirety.

Before we address your arguments against disclosure for information that is not subject to section 552.022, we note that some of the remaining submitted information comes within the scope of the Family Educational Rights and Privacy Act of 1974 (“FERPA”). *See 20 U.S.C. § 1232g*. FERPA is incorporated into chapter 552 of the Government Code under section 552.026. *See Open Records Decision No. 634 at 6-8 (1995)*. Section 552.026 of the Government Code provides that chapter 552

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. 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 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). Under FERPA, “education records” 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)*.

Under FERPA, a student's parents or guardians have an affirmative right of access to their child's education records. 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.3 ("parent" includes legal guardian of student). As the requestor in this instance is the parent of the child at issue, the requestor has a right of access to the submitted records pertaining to her child under FERPA. Accordingly, the records at issue generally may not be withheld pursuant to an exception to disclosure under the Act. *See Equal Employment Opportunity Comm'n v. City of Orange, Texas*, 905 F. Supp 381, 382 (E.D. Tex. 1995) (federal law prevails over inconsistent provision of state law); Open Records No. 431 (1985) (information subject to right of access under FERPA may not be withheld pursuant to statutory predecessor to section 552.103). Thus, Documents F210 - F212, F218 - F222, F235 - F237, and F261 - F266 are not excepted from disclosure under section 552.103 of the Government Code, and must be released to this requestor pursuant to FERPA. We note, however, that Documents F1 - F7 and F216 - F217 contain identifying information of both the requestor's child and another student whose identity is known to the requestor. We therefore find that withholding only the identifying information of this additional student would not suffice to avoid the release of personally identifiable information as mandated by FERPA. Accordingly, the district must withhold Documents F1 - F7 and F216 - F217 in their entirety under FERPA.

With respect to your claim under the attorney-client privilege, however, the Family Policy Compliance Office of the United States Department of Education has informed this office that a parent's right of access under FERPA to information about the parent's child does not prevail over a school district's right to assert the attorney-client privilege. Therefore, we next consider whether the district may withhold any of the submitted information under the attorney-client privilege.

You claim that Documents E1, E2 and F213 are excepted in their entirety pursuant to section 552.107 of the Government Code. Section 552.107 protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer

representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You inform us that the information in Documents E1, E2 and F213 reveals the substance of communications between attorneys for and representatives of the district. You state that these communications occurred in the course of the rendition of professional legal services and were intended to be confidential. You indicate that the district has maintained the confidentiality of the communications. Therefore, we conclude that you may withhold Documents E1, E2 and F213 in their entirety as privileged under section 552.107.²

Lastly, we address your section 552.103 argument against disclosure of the remaining submitted information. In relevant part, section 552.103 provides as follows:

(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.

....

(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.

² Because we reach this conclusion under section 552.107, we need not reach your argument against disclosure under Rule 503 of the Texas Rules of Evidence.

The 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 district must meet both prongs of this test for information to be excepted under 552.103(a).

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). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986). 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 at 5 (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). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

In this instance, although you concede that no lawsuit had been filed at the time the district received the request for information, you state that the requestor has filed complaints against the district with six different agencies, as well as an internal grievance, all of which were filed prior to the district’s receipt of the request. Based upon these representations and the totality of the circumstances, we conclude that the district reasonably anticipated litigation on the date it received the request for information. We also find that the submitted information relates to the anticipated litigation. Therefore, the remaining submitted information may be withheld under section 552.103(a).

Generally, however, 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), and it must be disclosed. 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).

In summary, the district must withhold Documents F1 - F7 and F216 - F217 under FERPA. The district may withhold Documents F17, F19 - F20, F33 - F34, F62 - F69, F110 - F155,

F177 - F209, F214 - F215, F223 - F224, F229 - F234, and F238 - F260 under section 552.103. The district may withhold Documents E1, E2 and F213 in their entirety under section 552.107. The district must release all remaining submitted information 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 Dep't of Pub. 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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, appearing to read "Marc A. Barenblat", with a long horizontal flourish extending to the right.

Marc A. Barenblat
Assistant Attorney General
Open Records Division

MAB/krl

Ref: ID# 206887

Enc: Submitted documents

c: Ms. Dianna Pharr
2204 Westlake Drive
Austin, Texas 78746
(w/o enclosures)