



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 2, 2005

Ms. Robin Chapman
Staff Attorney
State Board for Educator Certification
1701 North Congress Avenue, 5th Floor
Austin, Texas 78701

OR2005-03743

Dear Ms. Chapman:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 222224.

The State Board for Educator Certification ("SBEC") received a request for information relating to an investigation of the requestor's client. You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.117, 552.130, 552.135, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.¹

Initially, we note that the submitted information includes the minutes of public meetings of a governmental body. The minutes and agendas of a governmental body's public meetings are specifically made public by statute. *See* Gov't Code §§ 551.022 (minutes and tape recordings), 551.043 (notice). Information made public by statute may not be withheld from the public under any of the Act's exceptions to public disclosure. *See, e.g.*, Open Records Decision Nos. 544 (1990), 378 (1983), 161 (1977), 146 (1976). Accordingly, the submitted minutes of public meetings must be released in accordance with the Open Meetings Act.

¹We 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.

We next address your section 552.103 claim. Section 552.103 of the Government Code 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.

Gov't Code § 552.103(a), (c). The 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 (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).

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). 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). For purposes of section 552.103(a), this office considers a contested case under the Texas Administrative Procedure Act ("APA"), Government Code chapter 2001, to constitute "litigation." Open Records Decision No. 588 at 7 (1991) (construing statutory predecessor to the APA).

You explain that as the agency responsible for prosecuting certification actions, SBEC is presently investigating the requestor's client. You assert that litigation related to the requested information is reasonably anticipated because "SBEC's investigations are conducted with an eye toward litigation." You note that the subject of the investigation is represented by an attorney "and is expected to strongly contest the allegations against him." Based on your representations and our review, we determine that litigation in this matter was reasonably anticipated by SBEC prior to the date SBEC received the present request. We further find that most of the information for which you claim exception under section 552.103 relates to the anticipated litigation for purposes of section 552.103(a). We therefore determine that section 552.103 is applicable to the information that we have marked.

You note, and we acknowledge, that the opposing party in the pending litigation already has seen or had access to some of the information at issue. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information that relates to the litigation through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). If the opposing party already has seen or had access to information that relates to the litigation, through discovery or otherwise, then there is no interest in withholding that information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). We further note that the applicability of section 552.103 to this information ends at the conclusion of the related litigation. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We now turn to your section 552.117 claim against disclosure. Section 552.117(a)(1) excepts from disclosure the home address, home telephone number, social security number, and family member information of an employee of a governmental body, provided the employee elected to keep such information confidential pursuant to section 552.024 of the Government Code prior to the date the governmental body received a request for the information. We note, however, that the protections of section 552.117 only apply to information that the governmental body holds in its capacity as an employer. *See* Gov't Code § 552.117 (providing that employees of governmental entities may protect certain personal information in the hands of their employer); *see also* Gov't Code § 552.024 (establishing election process for section 552.117). In this instance, the information you seek to withhold under section 552.117 is not held by SBEC as an employer of the individuals at issue. Consequently, we find that the none of the submitted information may be withheld under section 552.117(a)(1) of the Government Code.

You assert that social security numbers contained in the submitted information are excepted from disclosure under section 552.101 in conjunction with section 58.001 of the Occupations Code, which provides as follows:

The social security number of an applicant for or holder of a license, certificate of registration, or other legal authorization issued by a licensing

agency to practice in a specific occupation or profession that is provided to the licensing agency is confidential and not subject to disclosure under Chapter 552, Government Code.

Occ. Code § 58.001.² To the extent that the social security numbers in question are those of an applicant for or a holder of a license, certificate of registration, or other legal authorization issued by SBEC, we agree that they are confidential under section 58.001 of the Occupations Code and must be withheld from disclosure under section 552.101 of the Government Code. We note that the requestor has a right of access to his client's social security number under section 552.023 of the Government Code. *See* Gov't Code § 552.023(a); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual asks governmental body to provide him with information concerning himself).

To the extent that section 58.001 of the Occupations Code is not applicable to any social security number contained in the submitted documents, the social security number may be confidential under federal law. The 1990 amendments to the federal Social Security Act make confidential social security numbers and related records that are obtained or maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See* 42 U.S.C. § 405(c)(2)(C)(viii)(I); Open Records Decision No. 622 at 2-4 (1994). We have no basis for concluding that any of the social security numbers at issue are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, SBEC should ensure that no such information was obtained or is maintained by SBEC pursuant to any provision of law enacted on or after October 1, 1990.

You claim that a portion of the remaining submitted information is excepted from disclosure under section 552.135 of the Government Code, which 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:

²Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. *See* Gov't Code § 552.101.

(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. It is clear from the legislative history of the exception that section 552.135 applies only to information held by a school district or a proper regulatory enforcement authority. *See* House Comm. on Public Education, Bill Analysis, H.B. 211, 76th Leg. (1999) (noting that enacting legislation provides appellate remedy for school districts and open-enrollment charter schools that disagree with attorney general decisions with respect to public information, along with new exception to disclosure for identity of school district informer); *see also* Gov't Code § 552.135(d); *see also* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality provision must be express and cannot be implied), 478 at 2 (1987) (language of confidentiality statute controls scope of protection). The information at issue here is held by SBEC. You seek to withhold the identity of the school district employee who reported to SBEC that the requestor's client allegedly violated section 821.101(b) of the Government Code and the "Professional Code of Ethics, including Standards 1.2 and 1.4, which impose enforceable standards pursuant to [the Texas Administrative Code]." *See* 19 T.A.C. § 247.2. You inform us that SBEC is the proper regulatory enforcement authority in this instance. *See* Educ. Code § 21.0031(a); *see also id.* § 21.041(b) (enumerating rules SBEC is authorized to propose); Gov't Code § 2054.352(a)(25) (referring to SBEC as "licensing entity"); 19 T.A.C. § 249.1 (summarizing SBEC's statutory regulatory authority). Further, you assert that the Legislature intended that section 552.135 apply to information held by a proper regulatory enforcement authority as well as to information held by a school district. We therefore determine that section 552.135 is applicable to the information at issue. We conclude, therefore, that the information that would substantially reveal the identity of an informer, which you have marked, may be withheld under section 552.135 of the Government Code.

Finally, we note that some of the remaining information is excepted from public disclosure under section 552.136 of the Government Code, which provides as follows:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

(1) obtain money, goods, services, or another thing of value; or

(2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov't Code § 552.136. We have marked the account numbers that must be withheld pursuant to section 552.136.

In summary, we have marked the information that may be withheld under section 552.103 of the Government Code; however, to the extent the opposing party has had access to the marked information, it may not be withheld under section 552.103. Except for that of the requestor's client, social security numbers of an applicant for or a holder of a license, certificate of registration, or other legal authorization issued by SBEC are confidential under section 58.001 of the Occupations Code and must be withheld from disclosure under section 552.101 of the Government Code. Social security numbers not confidential under section 58.001 of the Occupations Code may be confidential under federal law. The information that would substantially reveal the identity of an informer, which you have marked, may be withheld under section 552.135 of the Government Code. We have marked the account numbers that must be withheld pursuant to section 552.136 of the Government Code. The remaining information must be released to the requestor.³

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

³As our ruling is dispositive, we do not address your remaining claims.

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).

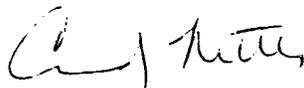
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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); *Tex. 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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/krl

Ref: ID# 222224

Enc. Submitted documents

c: Mr. Richard E. Hill
Adams, Lynch & Loftin, P.C.
1903 Central Drive, Suite 400
Bedford, Texas 76021-5813
(w/o enclosures)