



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 22, 2005

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

OR2005-05523

Dear Ms. Huchital:

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# 225740.

The Eanes Independent School District (the "district"), which you represent, received a request for the "four pages of legal expenses . . . discussed with the board" in an open meeting. You indicate that more than four documents were shared with the board; therefore you have submitted all of the documents to this office that you believe are responsive to the request. You claim that portions of the submitted information are excepted from disclosure under sections 552.101 of the Government Code and Texas Rule of Evidence 503, as well as section 552.136 of the Government Code. Additionally, you claim that the submitted information is excepted in its entirety under section 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

First, you acknowledge that most of the submitted information is subject to section 552.022 of the Government Code. This section provides:

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:

...

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

...

(16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege[.]

Gov't Code § 552.022(a)(3), (16). In this instance, most of the information you seek to withhold is contained in the district's attorney fee bills. This information must be released under section 552.022(a)(16) unless it is expressly confidential under other law. The submitted documents also contain information that is subject to section 552.022(a)(3). You claim that all of the submitted information may be withheld under section 552.103. This section is a discretionary exception and is not "other law" for the purpose of section 552.022. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 663 (1999) (governmental body may waive section 552.103), 522 at 4 (1989) (discretionary exceptions in general). Therefore, none of the information subject to section 552.022 may be withheld on that basis. The Texas Supreme Court has held that the Texas Rules of Evidence are "other law" within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will address your arguments under Texas Rule of Evidence 503.¹ Furthermore, we will address the applicability of the Federal Educational Rights and Privacy Act ("FERPA"), as well as section 552.136, both of which are other law for purposes of section 552.022.

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:

[t]his 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. 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)*. Generally, FERPA requires that information be withheld only to the extent "reasonable and necessary to avoid personally

¹Although you also raise section 552.101 of the Government Code, we note that this section does not encompass the attorney-client privilege. *See Open Records Decision No. 676 at 1-3 (2002)*.

identifying a particular student.” *See* 34 C.F.R. § 99.3 (“personally identifiable information” under FERPA includes, among other things, “[o]ther information that would make the student’s identity easily traceable”).

We note that under FERPA, a student’s parents or guardians have an affirmative right of access to their child’s education records. *See* 20 U.S.C. § 1232g(a)(1)(A); *see also* 34 C.F.R. § 99.3 (“parent” includes legal guardian of student). As the requestor in this instance is the parent of a student who is identified in the requested information, the requestor has a right of access under FERPA to the records that pertain to her child. Thus, this particular information 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); *see also* 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). However, since 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, we will address your claim that this particular information, as well as the remaining information that you have marked, are excepted from disclosure pursuant to rule 503. With regard to certain other information in the submitted documents that you have marked under FERPA, but not rule 503, the district must withhold this information under FERPA to the extent it is identifying of district students.²

Rule 503 provides in pertinent part as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

- (A) between the client or a representative of the client and the client’s lawyer or a representative of the lawyer;
- (B) between the lawyer and the lawyer’s representative;
- (C) by the client or a representative of the client, or the client’s lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

²We note that although you have marked certain information as being subject to FERPA and not rule 503, you make no arguments for withholding this information under FERPA. *See* Open Records Decision No. 634 (1995) (concluding that an educational institution or agency may withhold information that is protected by FERPA without necessity of requesting attorney general decision).

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is “confidential” if 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). Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You indicate that the information you have marked discloses communications between representatives of and attorneys for the district that were made for the purpose of facilitating the rendition of professional legal services to the district or were necessary for the transmission of communications. You also state that these communications were not intended to be disclosed to third parties. Based on your representations and our review of the information that you seek to withhold, we agree that the information you have marked is confidential under rule 503, unless we have noted otherwise.

We will now address section 552.136 of the Government Code for the information that is subject to section 552.022(a)(3).³ Section 552.136 states that “[n]otwithstanding 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. The district must, therefore, withhold the marked bank account numbers under section 552.136.

For the remaining submitted information that is not subject to section 552.022, we will now address your argument under section 552.103 of the Government Code. Section 552.103 provides as follows:

³Although you did not timely raise section 552.136, this provision constitutes a compelling reason to withhold information, and we will address your arguments under this exception. *See* Gov’t Code §§ 552.301, .302.

(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 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 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. *Univ. of Tex. Law Sch. v. Tex. 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. *See id.* 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. *See* Open Records Decision No. 555 (1990); *see also* 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. *See* 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: the United States Department of Education Office for Civil Rights, the Texas Education Agency, and the Attorney General of Texas. Furthermore, you indicate that the requestor is currently engaged in a due process hearing with the district and that this litigation was pending at the time the requestor made this request for documents. Based upon your representations and the totality of the circumstances, we conclude that the school

district reasonably anticipated litigation on the date that it received this request for information. However, we conclude that you have not demonstrated that any of the submitted information not subject to section 552.022 is related to pending or reasonably anticipated litigation. We therefore conclude that this information may not be withheld under section 552.103.

In summary, you must withhold the information you have marked under FERPA to the extent that it identifies a student other than the requestor's child. You may withhold the information you have marked under Texas Rule of Evidence 503, unless we have noted otherwise. You must withhold the marked bank account numbers under section 552.136. 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, 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).

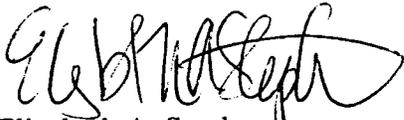
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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,

A handwritten signature in black ink, appearing to read 'Elizabeth A. Stephens', written in a cursive style.

Elizabeth A. Stephens
Assistant Attorney General
Open Records Division

EAS/krl

Ref: ID#225740

Enc. Submitted documents

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