



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

December 18, 2008

Mr. Humberto F. Aguilera
Escamilla & Poneck, Inc.
P.O. Box 200
San Antonio, Texas 78291-0200

OR2008-17187

Dear Mr. Aguilera:

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# 330805.

The San Antonio Independent School District (the "district"), which you represent, received a request for several categories of information pertaining to the requestor's client.¹ You state that the district has provided the requestor with some of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information.³

The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that the Family Educational Rights and Privacy Act ("FERPA"), 20

¹You state that the district has sought clarification of the information requested from the requestor. *See* Gov't Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request); *see also* Open Records Decision No. 31 (1974) (when presented with broad requests for information rather than for specific records, governmental body may advise requestor of types of information available so that request may be properly narrowed). You inform us and provide an affidavit from a district employee stating the requestor narrowed his request to exclude the request for the transcribed notes/tape of the September 29, 2008 board meeting.

²You also raise sections 552.101 and 552.104 of the Government Code as exceptions to disclosure. However you have only raised these exceptions with respect to the request for the transcribed notes/tape of the September 29, 2008 board meeting. You represent that the requestor has withdrawn his request for that information. Thus, we will not address your arguments against the disclosure of this information.

³We 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.

U.S.C. § 1232(a), does not permit state and local educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act.⁴ Consequently, state and local educational authorities that receive a request for education records from a member of the public under the Act must not submit education records to this office in unredacted form, that is, in a form in which “personally identifiable information” is disclosed. *See* 34 C.F.R. § 99.3 (defining “personally identifiable information”). The submitted information includes unredacted education records. Because our office is prohibited from reviewing these records to determine whether appropriate redactions under FERPA have been made, we will not address the applicability of FERPA to any of the submitted records. Such determinations under FERPA must be made by the educational authority in possession of such records.⁵ We will, however, address the applicability of the claimed exceptions to the submitted information.

Next, you inform us that the information in Exhibit A was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2008-02183 (2008). In Open Records Letter No. 2008-02183, we found, based on the filing of an Equal Employment Opportunity Commission (“EEOC”) complaint against the district prior to the receipt of the request for information, that the district reasonably anticipated litigation. We ruled that the district may withhold the requested information under section 552.103 of the Government Code. You inform us that Exhibit A contains the same information we previously ruled upon. We conclude that, as we have no indication that the law, facts, and circumstances on which the prior ruling was based have changed, the district may continue to rely on that ruling as a previous determination and withhold Exhibit A in accordance with Open Records Letter No. 2008-02183. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

The district claims that Exhibits B and C are excepted from public disclosure under section 552.103 of the Government Code. 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

⁴A copy of this letter may be found on the Office of the Attorney General’s website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

⁵In the future, if the district does obtain parental consent to submit unredacted education records and the district seeks a ruling from this office on the proper redaction of those education records in compliance with FERPA, we will rule accordingly.

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). 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 was pending or reasonably anticipated on the date the governmental body received the request for information, 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). A 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). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. ORD 452 at 4. This office has found that a pending Equal Employment Opportunity Commission ("EEOC") complaint indicates litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982), 281 at 1 (1981).

In this instance, you state, and provide documentation showing, that the requestor is the representative of a district employee who filed a claim of alleged discrimination with the EEOC against the district prior to the date the district received the request for information. Upon review, we determine that the district has established that it reasonably anticipated litigation on the date that it received the request for information. Further, you state that Exhibits B and C pertain to the employee's employment with the district which is the issue that gives rise to his claim with the EEOC. Thus, we agree that this information is related to the anticipated litigation. We note, however, that the opposing party to the anticipated litigation has already seen or had access to some of the submitted information. Many of the e-mails submitted in Exhibit B are between district employees and the employee who filed the claim with the EEOC. 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 is related to litigation through discovery procedures. See Open Records Decision No. 551 at 4-5 (1990). If the opposing party has seen or had access to information that is related to litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. See Open Records Decision Nos. 349

(1982), 320 (1982). Thus, the e-mails in Exhibit B that have been seen by the opposing party may not be withheld on the basis of section 552.103. As you raise no further exceptions against the disclosure of the e-mails in Exhibit B that have been seen by the opposing party, these e-mails must be released to the requestor.

However, based on your representations and our review, the district may withhold Exhibit C and the remaining information in Exhibit B under section 552.103 of the Government Code.⁶ However, the applicability of section 552.103(a) ends once the litigation has concluded or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

In summary, the district may continue to rely on Open Records Letter No. 2008-02183 as a previous determination and withhold Exhibit A in accordance with that ruling. The district may also withhold Exhibit C and the e-mails in Exhibit B that the opposing party has not seen or had access to under section 552.103 of the Government Code. The e-mails in Exhibit B that have been seen or accessed by the opposing party to the EEOC complaint must be released.

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3). If the governmental body does not file suit over 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,

⁶As our ruling is dispositive with regard to the information in Exhibit C, we need not address your argument under section 552.107 of the Government Code.

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 challenge 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 Office of the Attorney General 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,



Laura E. Ream
Assistant Attorney General
Open Records Division

LER/jb

Ref: ID# 330805

Enc. Submitted documents

cc: Requestor
(w/o enclosures)