



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 14, 2009

Ms. Andrea Sheehan
Law Offices of Robert E. Luna, P.C.
4411 North Central Expressway
Dallas, Texas 75205

OR2009-00538

Dear Ms. Sheehan:

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# 332224.

The Garland Independent School District (the "district"), which you represent, received a request for fourteen categories of information generally related to the requestor's grievance against the district. You state that the district has released some of the requested information. You also state the district is redacting some of the responsive information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.¹ You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes. Section 551.104(c) of the Government Code provides that "[t]he certified agenda or tape of a closed meeting is available for public inspection and copying only under a court order issued under Subsection (b)(3)." Thus, such information cannot be released to a member of

¹We note the United States Department of Education Family Policy Compliance Office (the "DOE") informed this office that FERPA, 20 U.S.C. § 1232g(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. The DOE has determined that FERPA determinations must be made by the educational authority in possession of the education records. We have posted a copy of the letter from the DOE to this office on the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

the public in response to an open records request.² *See* Open Records Decision No. 495 (1988). You inform us that the responsive information includes an audio recording of a closed meeting of the district. Therefore, the district must withhold the audio recording pursuant to section 552.101 of the Government Code in conjunction with section 551.104(c) of the Government Code.

Next, we will address your argument under section 552.103 of the Government Code for the submitted information as it is the most encompassing exception you raise. 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.

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). This office has held that cases conducted under the Texas Administrative Procedure Act (the "APA"), chapter 2001 of the Government Code, constitute litigation under section 552.103. *See* Open Records Decision Nos. 588 (1991) (concluding that a contested case under the APA qualifies as litigation under the statutory predecessor to section 552.103), 301 (1982) (concluding that litigation includes a contested case before an administrative agency).

²We note that the district is not required to submit the certified agenda or audio recording of a closed meeting to this office for review. *See* Open Records Decision No. 495 at 4 (1988) (attorney general lacks authority to review certified agendas or tapes of executive sessions to determine whether a governmental body may withhold such information under statutory predecessor to Gov't Code § 552.101).

You contend that the district is involved in "litigation" for the purposes of section 552.103 and that the submitted information is related to the pending litigation. You state that the requestor disputes decisions the district made in the requestor's grievance hearing before the district. You inform us, and provide documentation showing that, prior to the district's receipt of the instant request, the requestor filed a Petition for Review and Motion for Injunctive Relief (the "petition") with the Commissioner of Education of the Texas Education Agency (the "commissioner") appealing the district's decisions. You state that the commissioner will conduct the appeal proceedings in accordance with the procedures outlined in chapter 157 of title 19 of the Texas Administrative Code. You inform us that section 157.1073 of title 19 of the Texas Administrative Code governs the appeal in this case. *See* 19 T.A.C. § 157.1073 (relating to hearings brought under Educ. Code § 7.057); *see also* Educ. Code § 7.057(a) (setting forth circumstances under which a person may appeal a school district's decision to the commissioner). We note that section 157.1073(g) of title 19 of the Administrative Code specifically adopts the APA to actions brought under section 7.057 of the Education Code. 19 T.A.C. § 157.1073(g). Having reviewed your arguments and information at issue, we find that the district has established that litigation was pending on the date the district received the request. Further, we find that the district has demonstrated that the submitted information is related to the pending litigation. Thus, the district has demonstrated the applicability of section 552.103 to the submitted information.

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 litigation is not excepted from disclosure under section 552.103(a), and 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).³

In summary, the district must withhold the audio recording of the closed meeting pursuant to section 552.101 of the Government Code in conjunction with section 551.104(c) of the Government Code. The district may withhold the submitted information under section 552.103 of the Government Code.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php,

³As our ruling is dispositive, we need not address your remaining arguments against the disclosure of the submitted information.

or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,

A handwritten signature in cursive script that reads "Laura E. Ream".

Laura E. Ream
Assistant Attorney General
Open Records Division

LER/jb

Ref: ID# 332224

Enc. Submitted documents

cc: Requestor
(w/o enclosures)