



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

April 7, 2009

Mr. W. Montgomery Meitler
Assistant Counsel
Texas Education Agency
1701 North Congress
Austin, Texas 78701-1494

OR2009-04610

Dear Mr. Meitler:

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# 339204 (TEA PIR# 10654).

The Texas Education Agency (the "agency") received a request for documents related to a recent investigation of a named educator. You state that most of the information will be released to the requestor. You note you have redacted social security numbers pursuant to section 552.147 of the Government Code.¹ You claim that the remaining requested information is excepted from disclosure under sections 552.102, 552.103, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

¹Section 552.147(b) of the Government Code authorizes a government body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

²We 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.

Section 552.103 provides:

(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 agency has the burden of providing relevant facts and documents to show 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 agency must meet both prongs of this test for information to be excepted under section 552.103(a).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. See Open Records Decision No. 452 at 4 (1986). When the governmental body is the prospective plaintiff in litigation, the evidence of anticipated litigation must at least reflect that litigation involving a specific matter is "realistically contemplated." See Open Records Decision No. 518 at 5 (1989); see also Attorney General Opinion MW-575 (1982) (investigatory file may be withheld if governmental body's attorney determines it should be withheld pursuant to section 552.103 and litigation is "reasonably likely to result").

You inform us the requested information is related to an open investigation of allegations that an educator engaged in inappropriate conduct. You state the alleged misconduct may require the agency to file a petition for sanctions against the educator pursuant to provisions of the Education Code and title 19 of the Texas Administrative Code. See Educ. Code §§ 21.031(a) (agency shall regulate and oversee standards of conduct of public school educators), .041(b) (agency shall propose rules providing for disciplinary proceedings); 19 T.A.C. §§ 247.2(b)(3)(B), 249.15(a). You explain that if the educator files an answer to the petition, the matter will be referred to the State Office of Administrative Hearings for a contested case proceeding. See 19 T.A.C. § 249.18. You state such proceedings are

governed by the Administrative Procedure Act (the "APA"), chapter 2001 of the Government Code. *See* Educ. Code § 21.041(b)(7); 19 T.A.C. §§ 249.15(c), 4(a)(1); Open Records Decision No. 588 (1991) (contested case under APA constitutes litigation for purposes of statutory predecessor to section 552.103). Based on your representations and our review, we determine the agency reasonably anticipated litigation on the date it received this request for information. Furthermore, you state the information at issue consists of documents compiled for the purpose of investigating the educator's alleged misconduct. Upon review, we find the information at issue relates to the anticipated litigation. Accordingly, the agency may withhold the information you have marked under section 552.103 of the Government Code.

We note, however, that once information has been obtained by all parties to the anticipated 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 when the litigation has concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

Next, you claim that the named educator's transcript is excepted under section 552.102(b). Section 552.102(b) excepts from disclosure "a transcript from an institution of higher education maintained in the personnel file of a professional public school employee." Gov't Code § 552.102(b). However, this section further provides that "the degree obtained or the curriculum on a transcript in the personnel file of the employee" is not excepted from disclosure. *Id.* You state that the submitted transcript is maintained in the educator's personnel file at Goliad Independent School District and the agency has possession of it via a special right of access in chapter 249 of title 19 of the Texas Administrative Code. *See* 19 T.A.C. § 249.14 (agency may obtain and investigate information concerning alleged improper conduct by an educator). In *Texas Education Agency v. Greg Abbott* the district court held that transcripts obtained by the agency from a school district during their investigation of an educator are considered to be maintained in the personnel files of employees of the district and are thus subject to section 552.102(b). *Tex. Educ. Agency v. Greg Abbott, Att'y Gen. For the State of Tex.*, No. 07-002656 (250th Dist. Ct., Tex. Dec. 1, 2008). Thus, with the exception of the employee's name, courses taken, and degree obtained, the agency must withhold the submitted transcript pursuant to section 552.102(b) of the Government Code.

Finally, you assert that the marked e-mail addresses are excepted from disclosure pursuant to section 552.137 of the Government Code. Section 552.137 makes certain e-mail addresses confidential, providing the following:

- (a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating

electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

(c) Subsection (a) does not apply to an e-mail address:

(1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Gov't Code § 552.137. Under section 552.137, a governmental body must withhold the e-mail address of a member of the general public, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure. *See id.* § 552.137(b). Upon review, we determine that the e-mail addresses contained in the submitted documents are of a type specifically excluded by section 552.137(c) of the Government Code. Therefore, the agency may not withhold the e-mail addresses which it has marked under section 552.137 of the Government Code.

In summary, the agency may withhold the information it has marked pursuant to section 552.103 of the Government Code. Further, the agency must, with the exception of the employee's name, courses taken, and degree obtained, withhold the information in the submitted transcript pursuant to section 552.102(b) of the Government Code. The remaining information must be released.

You also ask this office to issue a previous determination permitting the agency to withhold information pursuant to section 552.137 of the Government Code. We decline to issue such a previous determination at this time. Accordingly, 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, 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 black ink, appearing to read 'Travis Tidmore', with a long horizontal flourish extending to the right.

Travis Tidmore
Assistant Attorney General
Open Records Division

TT/sdk

Ref: ID# 339204

Enc. Submitted documents

cc: Requestor
(w/o enclosures)