



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 12, 2009

Ms. Karla Schultz
Walsh, Anderson, Brown, Schulze, & Aldridge, P.C.
Attorney for China Spring Independent School District
P.O. Box 2156
Austin, Texas 78768

OR2009-11265

Dear Ms. Schultz:

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# 351841.

The China Springs Independent School District (the "district"), which you represent, received a request for several categories of information pertaining to a named child. You claim that the request is a request for production and thus is not a request for information under the Act. Alternatively, you claim that the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered your arguments and reviewed the submitted representative sample of information.¹

We begin by addressing your claim that the present request is not a request for information under the Act. You state that discovery in a due process hearing is "limited to those specified in the Administrative Procedure Act ("APA"), Texas Government Code, Chapter 2001 . . . [and] discovery between parties engaged in a contested case such as the one at issue here is conducted under the Texas Rules of Civic Procedure." You further state that because legal

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.

authority already exists which governs the production of documents, the request is not subject to the Act. Section 552.0055 of the Government Code provides that “[a] subpoena duces tecum or a request for discovery that is issued in compliance with a statute or a rule of civil or criminal procedure is not considered to be a request for information under this chapter.” Gov’t Code § 552.0055. This section does not apply in all instances in which a governmental body could have received such a subpoena or discovery request. *See Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 865-66 (Tex. 1999) (in interpreting statutes, goal of discerning legislature’s intent is served by beginning with statute’s plain language because it is assumed that legislature tried to say what it meant and its words are therefore surest guide to its intent); *see also City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 324 (Tex. App.—Austin 2002, no pet.) (citing *Sorokolit v. Rhodes*, 889 S.W.2d 239, 241 (Tex.1994)) (“In applying the plain and common meaning of a statute, [one] may not by implication enlarge the meaning of any word in the statute beyond its ordinary meaning, especially when [one] can discern the legislative intent from a reasonable interpretation of the statute as it is written.”).

You do not assert that the request the district received is in fact a “subpoena duces tecum or a request for discovery that is issued in compliance with a statute or a rule of civil or criminal procedure.” The requestor states that she is requesting the information under the “Texas Open Records Act.” Nothing in the request reflects that it meets the elements of a subpoena duces tecum. *See* Code Crim. Proc. arts. 24.02 (defining subpoena duces tecum), .03 (describing procedures for obtaining subpoenas, including subpoena duces tecum). Furthermore, the request does not indicate that the information was otherwise requested pursuant to the authority of a statute or a rule of civil or criminal procedure. Therefore, we find the district received a request for information under the Act, and we will address whether the district is required to release the requested information pursuant to chapter 552 of the Government Code.

We understand you to argue that complying with the present request in this form would be burdensome. However, we note that a governmental body may not decline to comply with the requirements of the Act on the ground of administrative inconvenience. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 687 (Tex. 1976) (cost or difficulty in complying with Act does not determine availability of information). The fact that it may be burdensome to provide the information at issue does not relieve a governmental body of its responsibility to comply with the Act. *Id.*; Open Records Decision No. 497 (1988). Therefore, the district may not decline to comply with the requirements of the Act on the basis of administrative inconvenience.

Next, we note that the United States Department of Education Family Policy Compliance Office has informed this office that the Family Educational Rights and Privacy Act (“FERPA”), 20 U.S.C. § 1232g, 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.² See 20 U.S.C. § 1232g(b); see also *id.* § 1232g(a)(4)(A) (defining “education records”); Open Records Decision No. 462 at 15 (1987). 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”).

Portions of the documents you have submitted for our review appear to be redacted education records. Because our office is prohibited from reviewing these education 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 the education records.³ We must note, however, that parents have a right of access to their own child’s education records and that right prevails over a claim under section 552.103 of the Government Code. See 20 U.S.C. § 1232g(a)(1)(A) (granting parents affirmative right of access to their child’s education records); see also 34 C.F.R. § 99.3 (“Parent means a parent of a student and includes a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or guardian”); Open Records Decision No. 431 (1985) (information subject to right of access under FERPA may not be withheld pursuant to statutory predecessor to Gov’t Code Section 552.103); see also *Equal Employment Opportunity Comm’n v. City of Orange, Tex.*, 905 F. Supp. 381, 382 (E.D. Tex. 1995) (holding FERPA prevails over inconsistent provision of state law).

We will address your claim under section 552.103 of the Government Code to the extent the requestor does not have a right of access under FERPA. Section 552.103 provides in relevant part 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.

...

²A copy of this letter may be found on the Office of the Attorney General’s website at <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

³In 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.

(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 that 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).

You assert that the submitted information is excepted under section 552.103. We note the request for information was submitted along with a notice of request for a due process hearing. We understand that this type of hearing is subject to the APA, chapter 2001 of the Government Code. *See* 19 T.A.C. § 89.1180(f) (discovery methods for these disputes shall be limited to those specified in the APA); *see also* Open Records Decision No. 588 at 7 (1991) (ruling that, for purposes of the Act, litigation includes a contested case under the predecessor to the APA). We therefore find the district reasonably anticipated litigation on the date it received the request. Further, you contend, and we agree, that the submitted information relates to the pending litigation. Therefore, we determine that section 552.103 is generally applicable in this instance.

We note, however, 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* ORD 551 at 4-5. It appears that the opposing party to the litigation has previously been provided with some of the information at issue. If the opposing party has seen or had access to information relating to the 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). Therefore, the information that has either been obtained from or provided to the opposing parties in the litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Accordingly, the district may withhold the submitted information under section 552.103 of the Government Code only to the extent that the opposing parties have not seen this information. Furthermore, the applicability of section 552.103(a) ends once the litigation has concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

In summary, to the extent the district determines the submitted information does not constitute education records, the district may withhold the information the opposing party to the litigation has not seen or had access to 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, 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,



Greg Henderson
Assistant Attorney General
Open Records Division

GH/rl

Ref: ID#351841

Enc. Submitted documents

c: Requestor
(w/o enclosures)