ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 5, 2010

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

OR2010-03268

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# 372728 (TEA Request No. 12370).

The Texas Education Agency (the "TEA") received a request for information pertaining to the requestor's client. You state the TEA is redacting some information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g.[1] You also state some of the requested information will be released, but claim the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of the requested information.[2]

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[1]The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office FERPA 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 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.

[2]We 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 of the Government Code provides in part the following:

> (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.
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> . . .
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> (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 that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information at issue. To do so, the governmental body must demonstrate (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See* Open Records Decision No. 551 at 4 (1990).

To establish litigation is reasonably anticipated for the purposes of section 552.103, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *See* Open Records Decision No. 452 at 4 (1986). In the context of anticipated litigation in which the governmental body is the prospective plaintiff, the concrete evidence must at least reflect litigation is "realistically contemplated." *See* Open Records Decision No. 518 at 5 (1989); *see also* Attorney General Opinion MW-575 (1982) (finding investigatory file may be withheld if governmental body attorney determines it should be withheld pursuant to section 552.103 and litigation is "reasonably likely to result"). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* ORD 452 at 4.

You inform us the submitted information is related to an open investigation of allegations that an educator engaged in inappropriate conduct. You state TEA may be required 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) (TEA shall regulate and oversee standards of conduct of public school educators), 21.041(b) (TEA shall propose rules providing for disciplinary proceedings); 19 T.A.C. §§ 247.2(b)(3)(F), 249.15. You explain if the educator files an answer to the petition, the matter will 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. § 249.4; Open Records Decision No. 588 (1991) (contested case under APA constitutes litigation for purposes of statutory predecessor to Gov't Code § 552.103). You contend that, under these circumstances, TEA reasonably anticipated litigation on the date of its receipt of the present request for information. You also contend the submitted information is related to the anticipated litigation because the information was compiled for the purpose of investigating the educator's alleged misconduct. Based on your representations, we find the submitted information is related to litigation that was reasonably anticipated on the date of TEA's receipt of this request for information. We therefore conclude the TEA may generally withhold the submitted information under section 552.103 of the Government Code.

We note, however, the TEA seeks to withhold information that the requestor's client, as opposing party to the anticipated litigation, has already seen or had access to. 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 relates to the litigation through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). If, thus, the opposing party to pending litigation has already seen or had access to information that relates to the litigation, through discovery or otherwise, there is no interest in now withholding such information under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, the submitted information that the requestor has already seen or had access to is not excepted under section 552.103, and the TEA must release it to the requestor. However, the TEA may withhold the remaining information under section 552.103.

Generally, however, once information has been obtained by all parties to the litigation though 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 must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We note that the information the opposing party has already seen contains an e-mail address.[3] Section 552.137 of the Government Code provides that "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 [the Act]," unless the owner of the e-mail address has affirmatively consented to its public disclosure or the e-mail address falls within the scope of section 552.137(c). Gov't Code § 552.137(a)-(c). We note

[3]The Office of the Attorney General will raise a mandatory exception, such as section 552.137, on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

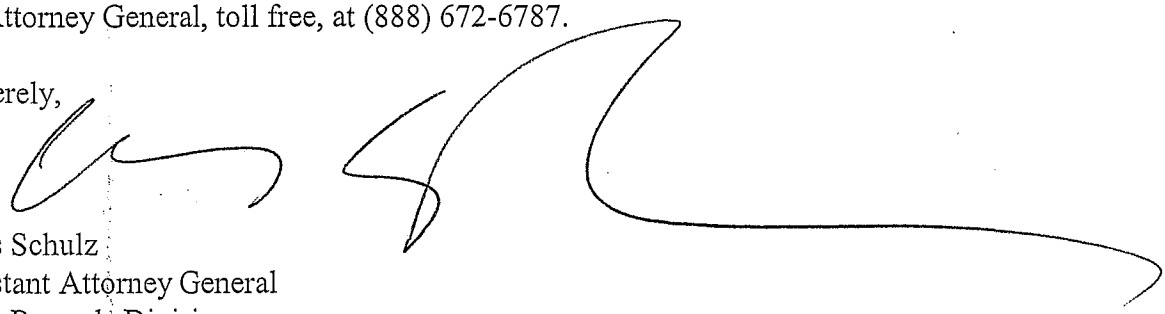
that this exception is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. The TEA must withhold the e-mail address we have marked under section 552.137, unless the owner of the e-mail address has affirmatively consented to its disclosure.[4]

In summary, the TEA may withhold the submitted information under section 552.103, except to the extent the opposing party has seen or had access to the information at issue. The TEA must withhold the e-mail address we have marked under section 552.137, unless the owner of the e-mail address has affirmatively consented to its disclosure. The remaining information the opposing party has had access to must be released.

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, toll free, at (888) 672-6787.

Sincerely,



Chris Schulz
Assistant Attorney General
Open Records Division

CS/cc

Ref: ID# 372728

Enc. Submitted documents

cc: Requestor
(w/o enclosures)

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[4] We note that this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137, without the necessity of requesting an attorney general decision.