



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 4, 2010

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

OR2010-08087

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# 382318 (TEA PIR# 12900).

The Texas Education Agency (the "agency") received a request for information pertaining to the certification, employment, and the agency's investigation of a named individual. You state some information will be released to the requestor. You state the agency has redacted information from the submitted documents pursuant to Open Records Decision No. 684 (2009).¹ You further state the agency has redacted social a security number pursuant to section 552.147(b) of the Government Code.² You claim the submitted information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We

¹This 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 a Texas driver's license number under section 552.130 of the Government Code and an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

²Section 552.147(b) of the Government Code authorizes a governmental 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.

have considered the exceptions you claim and reviewed the submitted representative sample of information.³

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 exception encompasses information protected by chapter 411 of the Government Code, which deems confidential criminal history record information (“CHRI”) generated by the National Crime Information Center or by the Texas Crime Information Center. *Id.* § 411.083(a). CHRI means “information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions.” *Id.* § 411.082(2). Section 411.083 authorizes the Texas Department of Public Safety (“DPS”) to disseminate CHRI to “noncriminal justice agencies authorized by . . . state statute to receive criminal history record information[.]” *Id.* § 411.083(b)(2). Furthermore, authorized persons have access to federal criminal history records compiled and maintained by DPS. *See id.* §§ 411.042, .087. Section 411.0845 of the Government Code provides in relevant part:

(a) [DPS] shall establish an electronic clearinghouse and subscription service to provide criminal history record information to a particular person entitled to receive criminal history record information and updates to a particular record to which the person has subscribed under this subchapter.

(b) On receiving a request for criminal history record information from a person entitled to such information under this subchapter, [DPS] shall provide through the electronic clearinghouse:

(1) the criminal history record information reported to [DPS] or the Federal Bureau of Investigation relating to the individual who is the subject of the request; or

(2) a statement that the individual who is the subject of the request does not have any criminal history record information reported to [DPS] or the Federal Bureau of Investigation.

³We assume 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 those records contain substantially different types of information than that submitted to this office.

(d) [DPS] shall ensure that the information described by Subsection (b) is provided only to a person otherwise entitled to obtain criminal history record information under this subchapter. Information collected under this section is confidential and is not subject to disclosure under [the Act].

Id. § 411.0845(a)-(b), (d). Section 411.090 of the Government Code provides in part:

(a) The State Board for Educator Certification [the "SBEC"] is entitled to obtain from the [DPS] any [CHRI] maintained by the [DPS] about a person who has applied to the [SBEC] for a certificate under Subchapter B, Chapter 21, Education Code.

(b) [CHRI] obtained by the [SBEC] in the original form or any subsequent form:

(1) may be used only for a purpose related to the issuance, denial, suspension, or cancellation of a certificate issued by the board;

(3) is not subject to disclosure as provided by [the Act].

Gov't Code § 411.090(a), (b). We note the agency has assumed the duties of the SBEC.⁴ You inform us the agency obtained the CHRI of the named individual from DPS, through the criminal history clearinghouse, and pursuant to its investigation under section 411.090. Upon review, we agree the information you have marked constitutes CHRI for the purposes of chapter 411. Accordingly, the CHRI you have marked is confidential under sections 411.083(b)(2), 411.0845, and 411.090(b) of the Government Code and must be withheld under section 552.101.

Section 552.103 of the Government Code provides in part:

(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.

⁴The 79th Texas Legislature passed House Bill 1116, which required the transfer of SBEC's administrative functions and services to the agency, effective September 1, 2005.

(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.

Id. § 552.103(a), (c). The agency 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 of the receipt of the request for information and (2) the information at issue is related to the pending or anticipated 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).

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). 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) (finding that investigatory file may be withheld from disclosure if governmental body attorney determines that it should be withheld pursuant to section 552.103 and that litigation is “reasonably likely to result”). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. See Open Records Decision No. 452 at 4 (1986).

You inform us the remaining information is related to an open investigation of allegations that an applicant for educator certification engaged in inappropriate conduct. You state the alleged conduct may require the agency to deny the application for certification and the applicant may appeal that denial in the form of a petition. See Educ. Code §§ 21.031(a) (the agency shall regulate and oversee standards of conduct of public school educators), 21.041(b) (the agency shall propose rules providing for disciplinary proceedings); 19 T.A.C. § 249.15(c). You explain the agency will answer the petition and refer the matter 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(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 that it received the request for information. Furthermore, upon review of the remaining information, we find it relates to the anticipated litigation. We therefore conclude the agency may generally withhold the remaining information under section 552.103.

We note, however, 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.

In summary, the agency must withhold the information you have marked under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code. The agency may withhold the remaining 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, 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,



Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/eeg

Ref: ID# 382318

Enc. Submitted documents

c: Requestor
(w/o enclosures)