



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 4, 2010

Ms. Evelyn Howard-Hand
Walsh, Brown, Gallegos and Green, P.C.
P.O. Box 2156
Austin, Texas 78768

OR2010-08123

Dear Ms. Howard-Hand:

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# 381551.

The El Paso Independent School District (the "district"), which you represent, received two requests from the same requestor for information pertaining to a named student for the past two years, information pertaining to in-service training of specified individuals, and any studies on a particular topic. You state the district is releasing the requested information pertaining to the named student to this requestor pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.¹ You claim the request is not subject to 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 information.

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

¹The 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 or student 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>.

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 Civil Procedure.” You further state that because legal 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 submitted information pursuant to chapter 552 of the Government Code.

Next, we note that you have only submitted the requested information pertaining to in-service training. Thus, to the extent any information responsive to the requestor’s request for any studies on a particular topic existed and was maintained by the district on the date the district received the request, we assume you have released it. If you have not released any such information, you must do so at this time. *See* Gov’t Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

You raise section 552.103 of the Government Code, which 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.

...

(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). 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). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See id.*

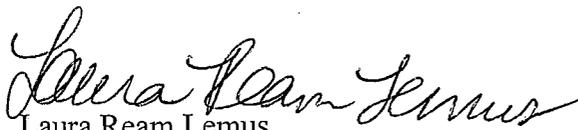
You assert that the submitted information is excepted under section 552.103. We note the request for information was submitted along with a notice of request for a due process hearing. You inform us that this type of hearing is subject to the APA, chapter 2001 of the Government Code. *See* 19 T.A.C. § 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 anticipated litigation. Therefore, we determine that section 552.103 is generally applicable in this instance.

However, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103 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, and it must be disclosed. We also note that the applicability of section 552.103 ends once the anticipated litigation has been concluded.

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,



Laura Ream Lemus
Assistant Attorney General
Open Records Division

LRL/jb

Ref: ID# 381551

Enc. Submitted documents

c: Requestor
(w/o enclosures)