



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 14, 2010

Ms. Evelyn Howard-Hand
Walsh, Anderson, Brown, Gallegos & Green, P.C.
For Lumberton Independent School District
P.O. Box 2156
Austin, Texas 78768

OR2010-08593

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# 382580.

The Lumberton Independent School District (the "district"), which you represent, received a request for (1) all records for the past 2 years pertaining to the requestor's clients' child; (2) all documents regarding training attended by school staff involved in the child's education; and (3) all peer-reviewed, scientifically-based studies showing the efficacy of a particular school's programming and methodology used for students with disabilities. You claim the requested information is not subject to the Act. Alternatively, you claim the requested 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 the present request is not a request for information under the Act. You inform us the requested information relates to pending due process hearing involving the requestor's clients. You state discovery in a due process hearing is "limited to those [methods] specified in the Administrative Procedure Act ("APA"), Texas

¹We 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.

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 argue that because legal authority already exists that governs the production of documents, the request is not subject to the Act. Section 552.0055 of the Government Code provides “[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 [the Act].” 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) (stating in interpreting statutes, goal of discerning legislature’s intent is served by beginning with statute’s plain language because it is assumed 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 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.” Gov’t Code § 552.0055. Nothing in the request reflects 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, you have not demonstrated, and the request does not indicate, the request for information constitutes a discovery request issued in compliance with a statute or a rule of civil or criminal procedure. In her request, the requestor lists the “Texas Open Records Act” as a basis for requesting the information. Although discovery in a contested case is conducted under the Texas Rules of Civil Procedure, there is nothing that prevents the requestor from also submitting a request for information under the Act. Therefore, we find the district received a request for information under the Act. Consequently, we will consider your claimed exception to disclosure for the submitted information.

Next, we note you have not submitted for our review records regarding the requestor’s clients’ child. To the extent information responsive to this aspect of the request existed on the date the district received this request, we assume you have released it pursuant to the Family Educational Rights and Privacy Act (“FERPA”), section 1232g of title 20 of the United States Code. *See* 20 U.S.C. § 1232g(a)(1)(A) (providing parents have right of access to own child’s education records); 34 C.F.R. § 99.3 (defining “education records”); Open Records Decision No. 431 (1985) (stating information subject to right of access under FERPA may not be withheld pursuant to statutory predecessor to section 552.103 of the Government Code). If you have not released any such information, you must do so at this time. *See* 20 U.S.C. § 1232g(a)(1)(A); Gov’t Code §§ 552.301(a), .302; 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).

Section 552.103 of the Government Code 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 district 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 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 district must meet both prongs of this test for information to be excepted under section 552.103(a).

You inform us, and the request reflects, that simultaneously with the submission of the request for information, the requestor requested a due process hearing before the Texas Education Agency. You explain the due process hearing is a contested case hearing, which is governed by the APA, chapter 2001 of the Government Code. This office has concluded a contested case under the APA constitutes litigation for purposes of the statutory predecessor to section 552.103. Open Records Decision No. 588 (1991). Based on your representations and our review, we determine litigation was pending on the date the district received the request for information. Furthermore, upon review of the submitted training records and education materials, we find the information relates to the pending litigation because it pertains to the basis of the litigation. Accordingly, the submitted information may be withheld under section 552.103 of the Government Code.

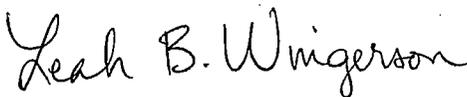
However, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information.

Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the pending 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. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

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,



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/dls

Ref: ID# 382580

Enc. Submitted documents

c: Requestor
(w/o enclosures)