



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 15, 2010

Ms. Leticia D. McGowan
School Attorney
Dallas Independent School District
3700 Ross Avenue
Dallas, Texas 75204

OR2010-10509

Dear Ms. McGowan:

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# 386622 (DISD ORR# 9340).

The Dallas Independent School District (the "district") received a request for information pertaining to a named teacher. You claim that the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

We first note that the United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code, 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.¹ 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"). The submitted information includes unredacted education records. Because our office is prohibited from reviewing these records

¹A copy of this letter may be found on the Office of the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

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 such records.² We will, however, address the applicability of the claimed exception to the submitted information.

Next, we note that portions of the submitted information are subject to section 552.022 of the Government Code, which provides in part:

(a) the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108; [and]

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(1), (3). You have submitted completed evaluations and a purchase order that are subject to sections 552.022(a)(1) and (a)(3). Although you seek to withhold this information under section 552.103 of the Government Code, that section is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See id.* § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions). As such, section 552.103 is not "other law" that makes information confidential for the purposes of section 552.022(a)(1) and (a)(3). Therefore, the district may not withhold the information at issue under section 552.103, and as you raise no further exceptions to disclosure for this information, which we have marked, it must be released to the requestor. However, we will address your claim under section 552.103 for the remaining information.

Section 552.103 of the Government Code provides in part:

²In 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.

(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 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).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. See Open Records Decision No. 452 at 4 (1986). To establish that litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture."³ *Id.* You inform us that the remaining information relates to a teacher whose termination has been recommended. You state that the teacher, through his representative, has appealed the recommendation for termination and requested the appointment of an independent hearing officer. You indicate that the hearing would be conducted under chapter 21 of the Education Code.

Section 21.256 of the Education Code provides that hearings requested under section 21.253 of the Education Code "shall be conducted in the same manner as a trial without a jury in a

³Among other examples, this office has concluded that litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission ("EEOC"), see Open Records Decision No. 336 (1982); (2) hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, see Open Records Decision No. 346 (1982); and (3) threatened to sue on several occasions and hired an attorney, see Open Records Decision No. 288 (1981).

district court of [Texas].” Educ. Code § 21.256(e). Section 21.256 also specifically affords a teacher the right to be represented by a representative of the teacher’s choice; to hear the evidence on which the charges are based; to cross-examine each adverse witness; and to present evidence. *See id.* § 21.256(c). Section 21.256(d) provides that the Texas Rules of Evidence apply at the hearing. *See id.* § 21.256(d). We also note that, in a chapter 21 hearing, the hearing examiner may issue subpoenas for the attendance of witnesses and the production of documents; an appeal of the proceedings to the commissioner of education is based only on the record of the local hearing; and in a judicial appeal of the commissioner’s decision, the court must review the evidence pursuant to the substantial evidence rule. *Id.* §§ 21.255(a) (subpoena power of examiner), 21.301(c) (appeal based solely on local record), 21.307(e) (substantial evidence rule for judicial review). Having considered your arguments, we find that litigation in the form of a hearing under chapter 21 of the Education Code was reasonably anticipated when the district received the request for information. *See* Open Records Decision Nos. 588 (1991) (contested case under Administrative Procedure Act, Gov’t Code ch. 2001, qualifies as litigation under statutory predecessor to section 552.103), 301 (1982) (litigation includes contested case before administrative agency). Additionally, you state, and we agree, that the information at issue is related to the anticipated litigation because it pertains to the teacher named in the request, who is also the opposing party in the hearing. Therefore, section 552.103 is generally applicable to the remaining information.

We note, however, that the opposing party in the litigation has seen or had access to some of the information at issue. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* ORD 551 at 4-5. Therefore, if the opposing party has seen or had access to information relating to 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). Accordingly, the portions of the remaining information that the opposing party in the litigation has seen or had access to, which we have marked, may not be withheld under section 552.103. As you raise no further exceptions to disclosure for this information, it must be released. However, the district may withhold the remaining information under section 552.103. We note the applicability of this exception ends once the litigation has been concluded or is no longer pending. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, this ruling does not address the applicability of FERPA to the submitted information. Determinations under FERPA must be made by the district. The district must release the information we have marked under sections 552.022(a)(1) and (a)(3) of the Government Code. Except for information that the opposing party in the anticipated litigation has seen or had access to, the remaining information may be withheld under

section 552.103 of the Government Code. The information the opposing party has seen, which we have marked, must be released to the requestor.⁴

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,



James McGuire
Assistant Attorney General
Open Records Division

JM/dls

Ref: ID# 386622

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁴We note the information being released may contain confidential information to which the requestor has a right of access. See Gov't Code § 552.023(a); Open Records Decision No. 481 at 4 (1987). Thus, if the district receives another request for this particular information from a different requestor, then the district should again seek a decision from this office.