



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 11, 2011

Mr. D. Craig Wood
Walsh, Anderson, Brown, Gallegos and Green, P.C.
P.O. Box 460606
San Antonio, Texas 78246

OR2011-05032

Dear Mr. Wood:

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# 414300.

The Northside Independent School District (the "district"), which you represent, received a request for all records pertaining to the requestor's clients' child for the past two years, all documents pertaining to in-service training in areas of the child's needs conducted and attended by district employees involved in the child's education, and "all peer-reviewed, scientifically based studies showing the efficacy" of the school's programming or methodologies regarding the student or similarly situated students. You claim the request is not a request for information under the Act. Alternatively, you claim 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 representative sample of information.¹

We begin by addressing your claim that the present request is not a request for information under the Act. You state discovery methods in a due process hearing are "limited to those 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 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 "[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

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.

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 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 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, you have not demonstrated, and the request does not indicate, the information was otherwise requested pursuant to the authority of a statute or a rule of civil or criminal procedure. Although discovery in a contested case is conducted under the Texas Rules of Civil Procedure, no law prevents the requestor from also submitting a request for information under the Act. Therefore, we find the district received the request for information under the Act, and we will address whether the district is required to release the requested information pursuant to chapter 552 of the Government Code.

Next, the requestor asserts his clients have a right of access to the responsive information pursuant to the Family Educational Rights and Privacy Act (“FERPA”), 20 U.S.C § 1232g. Open Records Decision No. 634 at 5 (1995). We note 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 or an adult student’s consent, unredacted, personally identifiable information contained in education records for the purposes of our review in the open records ruling process under the Act.² 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”); You state you have redacted some information pursuant to FERPA.³ Our

²We 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>.

³We note you have not submitted the requestor’s clients’ child’s records. 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 FERPA. *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”); Gov’t Code §§ 552.301(a), .302;

office is prohibited from reviewing education records. Determinations under FERPA must be made by the educational authority in possession of the education records. We must note, however, the requestor, as an attorney representing the parents of the child whose information is requested, may have a right of access to the child's education records, and that right prevails over a claim under section 552.103 of the Government Code. *See* Open Records Decision No. 431 (1985) (information subject to right of access under FERPA may not be withheld pursuant to statutory predecessor to Gov't Code Section 552.103); *see also* *Equal Employment Opportunity Comm'n v. City of Orange, Tex.*, 905 F. Supp. 381, 382 (E.D. Tex. 1995) (holding FERPA prevails over inconsistent provision of state law). Because we can make no determinations under FERPA, we will address your claim under section 552.103 of the Government Code.

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 claim the requested information pertains to pending litigation. You inform us that, at the time the district received the request for information, a due process hearing was pending

Open Records Decision No. 664 (2000) (if governmental body concludes no exceptions apply to requested information, it must release information as soon as possible); 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).

with the Texas Education Agency. You explain the due process hearing is a contested case hearing, which is governed by the APA. 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. You state the requested information is related to the pending litigation because it pertains to the issues that help form the basis of the litigation. Based on your representations and our review, we find the submitted information is related to the pending litigation for the purposes of section 552.103. Accordingly, the district may withhold the submitted information 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). 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,



Mack T. Harrison
Assistant Attorney General
Open Records Division

MTH/em

Ref: ID# 414300

Enc. Submitted documents

c: Requestor
(w/o enclosures)