



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 4, 2011

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

OR2011-16257

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# 435231 (TEA PIR Nos. 16016, 16021).

The Texas Education Agency (the "agency") received two requests from different requestors for information pertaining to the investigation of a named individual. The first requestor seeks all documents related to the pending investigation against the individual and the second requestor seeks all documents received by the State Board for Educator Certification ("SBEC") that prompted the notice of investigation and, additionally, all documents received by the SBEC since a certain date that are relevant to the investigation. You state you will release some of the requested information. You state you have redacted student-identifying information from the information submitted to this office pursuant to the federal Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.¹ You state the agency has redacted personal e-mail addresses under section 552.137 of the Government Code pursuant to the previous determination issued in Open Records Decision No. 684 (2009).² You claim the submitted information is excepted from disclosure under sections 552.102 and 552.103 of the Government Code. We have

¹The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that FERPA 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. The DOE has determined that 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>.

²Open Records Decision No. 684 is a previous determination issued by this office authorizing all governmental bodies to withhold ten categories of information, including 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.

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

Section 552.103 of the Government Code provides, in part, the following:

(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 agency 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 agency must meet both prongs of this test for information to be excepted under section 552.103(a).

To establish 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). In the context of anticipated litigation in which the governmental body is the prospective plaintiff, the concrete evidence must at least reflect that litigation 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 ORD 452 at 4.

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.

You inform us the requested information relates to an open investigation of allegations an educator engaged in inappropriate conduct. You state the alleged misconduct may require the agency to file a petition for sanctions against the educator pursuant to provisions of the Education Code and title 19 of the Texas Administrative Code. *See* Educ. Code §§ 21.031(a) (agency shall regulate and oversee standards of conduct of public school educators), .041(b) (agency shall propose rules providing for disciplinary proceedings); 19 T.A.C. §§ 247.2, 249.15(c). You explain if the educator files an answer to the petition, the matter will be referred 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 Gov’t Code § 552.103). Based on your representations and our review, we determine the agency reasonably anticipated litigation when it received the requests for information. Furthermore, you explain the requested information was compiled for the purpose of investigating the alleged educator misconduct. Upon review, we agree the requested information relates to the anticipated litigation. We, therefore, conclude the agency may generally withhold the requested information under section 552.103 of the Government Code.

We note, and you acknowledge, that once the submitted information has been obtained by the potential opposing party 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). You state the agency will release the information the potential opposing party has seen or accessed, which you have indicated. Accordingly, with the exception of the information the opposing party has seen or accessed, the agency may withhold the submitted information under section 552.103 of the Government Code. We note 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; Open Records Decision Nos. 350 at 3 (1982), 349 at 2. We now address your argument against disclosure of the information the potential opposing party has seen or accessed.

You claim the transcripts submitted as responsive to the first request are excepted from disclosure under section 552.102(b) of the Government Code. Section 552.102(b) excepts from disclosure all information from higher education transcripts of professional public school employees other than the employee’s name, the courses taken, and the degree obtained. Gov’t Code § 552.102(b); Open Records Decision No. 526 (1989). Upon review, we agree the submitted transcripts fall within the scope of section 552.102(b). We note, however, this exception protects personal privacy. Thus, the first requestor, as the spouse of the individual whose transcripts are at issue, has a right of access to the transcripts under section 552.023 of the Government Code. *See* Gov’t Code § 552.023 (person or person’s authorized representative has special right of access, beyond right of general public, to information held by governmental body that relates to person and is protected from disclosure by laws intended to protect person’s privacy interests). Accordingly, the

submitted transcripts may not be withheld from the first requestor under section 552.102(b) of the Government Code.

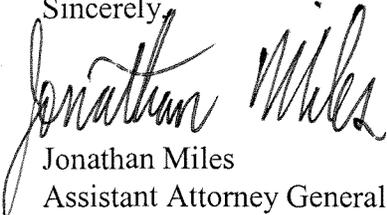
We note you have redacted a social security number from the information to be released pursuant to section 552.147 of the Government Code. Section 552.147(b) authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. However, we note the requestors are the authorized representatives of the individual at issue and thus have a special right of access to the social security number at issue. *See generally id.* Accordingly, the agency may not withhold the social security number you have marked under section 552.147(b) of the Government Code.

In summary, with the exception of the information the opposing party has seen or accessed, the agency may withhold the submitted information under section 552.103 of the Government Code. The remaining information must be released to the respective requestors.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,



Jonathan Miles
Assistant Attorney General
Open Records Division

JM/em

⁴The first requestor has a special right of access to the information being released. *See* Gov't Code § 552.023. Accordingly, if the agency receives another request for the same information from an individual who does not have a right of access to the information, the agency should request another ruling. *See id.* §§ 552.301, .302; Open Records Decision No. 673 (2001).

Ref: ID# 435231

Enc. Submitted documents

c: Requestor
(w/o enclosures)