



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 21, 2012

Mr. Eric G. Rodriguez
For Northside Independent School District
Walsh, Anderson, Gallegos, Green and Treviño, P.C.
P.O. Box 460606
San Antonio, Texas 78246-0606

OR2012-13164

Dear Mr. Rodriguez:

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# 462740.

The Northside Independent School District (the "district") received a request for multiple categories of information pertaining to a specified student, information pertaining to teacher in-service training, and any peer-reviewed studies showing the "efficacy" of school programs.¹ You claim that the submitted information is not subject to the Act. In the alternative 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.²

¹You state the district sought and received clarification of the request for information. *See* Gov't Code § 552.222(b) (stating that if information requested is unclear to governmental body or if a large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding that when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date the request is clarified or narrowed).

²We 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.

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 a pending due process hearing involving the requestor's client. You state discovery in a due process hearing is "limited to those [methods] 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 argue 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 the 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, nothing 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 information at issue.

Next, we note the requestor states that "this request for documents should be considered to be continuing in nature." It is implicit in several provisions of the Act that the Act applies only to information already in existence. See Gov't Code §§ 552.002, .021, .227, .351. The Act does not require a governmental body to prepare new information in response to a request. See Open Records Decision Nos. 572 at 1 (1990), 555 at 1-2 (1990), 452 at 2-3 (1986), 87 (1975). Consequently, a governmental body is not required to comply with a standing request to supply information prepared in the future. See Attorney General Opinion JM-48 at 2 (1983); see also Open Records Decision Nos. 476 at 1 (1987), 465 at 1 (1987).

Thus, the only information encompassed by the present request consists of documents the district maintained or had a right of access to as of the date it received this request.

You state you have redacted student-identifying information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code. The United States Department of Education Family Policy Compliance Office has informed this office that the Family Educational Rights and Privacy Act ("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 purpose of our review in the open records ruling process under the Act.³ 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"). Because our office is prohibited from reviewing these records to determine whether appropriate redactions under FERPA should be made, we will not address the applicability of FERPA to the submitted information, other than to note that parents have a right of access to their own child's education records. 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.3. The DOE has also informed this office that if a state law prohibits a school district from providing a parent with access to the education records of his or her child and an opportunity to inspect and review the record, then the state statute conflicts with FERPA, and an educational agency or institution must comply with FERPA if it wishes to continue to receive federal education funds. Letter advisement from Ellen Campbell, Family Compliance Office, U.S. Department of Education to Robert Patterson, Open Records Division, Office of the Texas Attorney General (April 9, 2001). See *Equal Employment Opportunity Comm'n v. City of Orange*, 905 F. Supp 381, 382 (E.D. Tex. 1995); Open Records Decision No. 431 (1985) (FERPA prevails when in conflict with state law). Because the educational authority in possession of the education records is now responsible for determining the applicability of FERPA, we will only consider the claimed exception under the Act for the requested information.

Section 552.103 of the Government Code provides, in 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.

...

³A copy of this letter may be found on the Office of the Attorney General's website at <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

(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 that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information it seeks to withhold. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

You state the requestor, on behalf of his clients, has filed a due process complaint against the district with the Texas Education Agency, docketed as *K.W. b/n/f A.H. v. Northside ISD*; Docket No. 296-SE-0512. We understand the due process hearing is a contested case hearing, which is governed by the Administrative Procedure Act (“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 involving the district 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 concerns issues identified in the requestor’s complaint. Therefore, we conclude the district may withhold the submitted information under section 552.103 of the Government Code.

We note, however, that once information has been obtained by all parties to the pending 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). Further, 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.*

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,

A handwritten signature in black ink, appearing to read "Jeffrey W. Giles". The signature is written in a cursive style with a large initial "J".

Jeffrey W. Giles
Assistant Attorney General
Open Records Division

JWG/dls

Ref: ID# 462740

Enc. Submitted documents

c: Requestor
(w/o enclosures)