



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 1, 2013

Mr. W. Montgomery Meitler  
Assistant Counsel  
Texas Education Agency  
1701 North Congress Avenue  
Austin, Texas 78701-1494

OR2013-11190

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# 491814 (TEA PIR No. 19514).

The Texas Education Agency (the "agency") received a request for incident reports and documents containing investigative findings pertaining to testing irregularities at four specified school districts from a specified date to the date of the request. You state some of the requested information, including final audit reports, will be released to the requestor. You state the agency has redacted some information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.<sup>1</sup> You claim the remaining requested information is excepted from disclosure under

---

<sup>1</sup>The 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>.

sections 552.103 and 552.116 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>2</sup>

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

---

<sup>2</sup>We 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 those submitted to this office.

“reasonably likely to result”). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* ORD 452 at 4.

You inform us the information you have marked 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 request for information. Furthermore, you explain the information at issue was compiled for the purpose of investigating the alleged educator misconduct. Upon review, we agree the information at issue relates to the anticipated litigation. Therefore, we conclude the agency may withhold the information you have marked under section 552.103 of the Government Code.

We note 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. Thus, once information has been obtained by all parties 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). 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.

Section 552.116 of the Government Code provides:

(a) An audit, working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, a school district, a hospital district, or a joint board operating under Section 22.074, Transportation Code, including any audit relating to the criminal history background check of a public school employee, is excepted from [required public disclosure]. If information in an audit working paper is also maintained in another record, that other record is not excepted from [public disclosure] by this section.

(b) In this section:

(1) "Audit" means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, the bylaws adopted by or other action of the governing board of a hospital district, a resolution or other action of a board of trustees of a school district, including an audit by the district relating to the criminal history background check of a public school employee, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.

(2) "Audit working paper" includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116(a)-(b). You state the remaining information consists of "audit working papers prepared or maintained by [the agency's] Student Assessment Division Security Task Force in conducting investigations of testing irregularities in the administration of statewide assessment instruments." You inform us the investigations were "authorized by section 39.057(a)(8) of the Education Code, which permits the [c]ommissioner of [e]ducation to authorize special accreditation investigations to be conducted in response to an allegation regarding or an analysis using a statistical method result indicating a possible violation of an assessment instrument security procedure." *See* Educ. Code § 39.057 (listing circumstances in which the commissioner of education shall authorize investigations). Based on your representations and our review, we agree the information at issue constitutes audit working papers under section 552.116. Thus, the agency may withhold the remaining information under section 552.116 of the Government Code.

In summary, the agency may withhold the information you have marked under section 552.103 of the Government Code. The agency may withhold the remaining information under section 552.116 of the Government Code.

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.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml), 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read "Michelle R. Garza". The signature is fluid and cursive, with a large initial "M" and "G".

Michelle R. Garza  
Assistant Attorney General  
Open Records Division

MRG/som

Ref: ID# 491814

Enc. Submitted documents

c: Requestor  
(w/o enclosures)