



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

January 29, 2016

Mr. John M. Muñiz  
Counsel for Northside Independent School District  
Walsh Gallegos Treviño Russo & Kyle, P.C.  
P.O. Box 460606  
San Antonio, Texas 78246

OR2016-02274

Dear Mr. Muñiz:

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# 596302.

The Northside Independent School District (the "district"), which you represent, received a request for all records pertaining to an individual, information pertaining to employee in-service training, and any studies pertaining to programming or methodologies used by the district regarding students with disabilities. You contend that the request for information is not a proper request under the Act to which the district is required to respond. Alternatively, you claim the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered your claims and reviewed the submitted information.

Initially, we address the district's claim the instant request was not a request for information to the district under the Act. This office has held a written communication that reasonably can be judged to be a request for public information constitutes a request for information under the Act. *See* Open Records Decision Nos. 497 at 3 (1988), 44 at 2 (1974). In this regard, we note a request for information need not refer to the Act or be addressed to the officer for public information. ORDs 497 at 3, 44 at 2. In this case, the request was submitted to and received by the district and seeks information in the district's custody. Thus, we find the instant request to be a valid information request under the Act to the district, and we will address the arguments against disclosure.

We note the United States Department of Education Family Policy Compliance Office 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 purpose of our review in the open records ruling process under the Act.<sup>1</sup> 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"); *see also* Open Records Decision No. 224 (1979) (student's handwritten comments protected under FERPA because they would make identity of student easily traceable through handwriting, style of expression, or particular incidents related in the comments). You have submitted redacted education records for our review. Because our office is prohibited from reviewing these records to determine whether appropriate redactions under FERPA have been made, we will not address the applicability of FERPA to any of the submitted records, except to note the requestor, as the attorney for the parents of a child, has a right under FERPA to the child's education records, and the right of access prevails over claims under section 552.103 of the Government Code. *See* 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.3; 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 § 552.103); *see also* *Equal Employment Opportunity Comm'n v. City of Orange, Tex.*, 905 F. Supp. 381, 382 (E.D. Tex. 1995) (FERPA prevails over inconsistent provision of state law). Such determinations under FERPA must be made by the educational authority in possession of the education records. However, we will consider the district's claimed exceptions to the extent the requestor does not have a right of access to the submitted information under FERPA.

Section 552.103 of the Government Code provides, in relevant 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.

...

(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

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<sup>1</sup>A 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>.

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 governmental body 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 is 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, orig. proceeding); *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 governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a). *See* ORD 551.

You state, and provide documentation showing, prior to receiving the present request for information, the requestor “filed a Request for a Due Process Hearing with the Texas Education Agency.” We understand the due process hearing is a contested case hearing, which is governed by the Administrative Procedure Act, 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). You further state the matter is still pending. You also state the due process hearing “centers on allegations the district has violated the law” regarding the named individual’s education and that the requested information is relevant to this hearing. Based on your representations and our review, we determine litigation involving the district was pending on the date it received the request for information. We also find the district has established the information at issue is related to pending litigation for purposes of section 552.103(a). Therefore, the district may withhold the submitted information under section 552.103(a) of the Government Code.

We note, however, the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to that litigation to obtain it through discovery procedures. *See* ORD 551 at 4-5. Thus, if the opposing party has seen or had access to information relating to the litigation through discovery or otherwise, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982); 320 (1982). We also note the applicability of section 552.103 ends once the litigation concludes. *See* 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.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 "Ashley Crutchfield", written in a cursive style.

Ashley Crutchfield  
Assistant Attorney General  
Open Records Division

AC/som

Ref: ID# 596302

Enc. Submitted documents

c: Requestor  
(w/o enclosures)