



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 18, 2017

Ms. Blaire B. Craven
Counsel for the Wills Point Independent School District
Karczewski Bradshaw L.L.P.
315 North Church Street
Nacogdoches, Texas 75961-5001

OR2017-18904

Dear Ms. Craven:

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# 671533 (OR 67153317).

The Wills Point Independent School District (the "district"), which you represent, received a request for all records of complaints or disciplinary actions pertaining to three named individuals. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.114, and 552.135 of the Government Code.¹ You state release of this information may implicate the interests of the State Board for Educator Certification (the "SBEC"). Accordingly, you state, and provide documentation showing, you notified the SBEC of the request for information and of its right to submit arguments to this office as to why the information at issue should not be released. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should

¹Although you also raise section 552.026 of the Government Code, we note section 552.026 is not an exception to disclosure. Rather, this provision provides the Act does not require the release of information containing in education records except in conformity with the Family Educational Rights and Privacy Act of 1974. *See* Gov't Code § 552.026.

not be released). We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

We understand you have redacted information you claim is protected by the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g. The United States District of Education Family Policy Compliance Office 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.³ We note a parent has a right of access to his own child's education records and FERPA prevails over inconsistent provisions of state law. *See Equal Employment Opportunity Comm'n v. City of Orange, Tex.*, 905 F. Supp. 381, 382 (E.D. Tex. 1995); 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 section 552.103 of the Government Code). Such determinations under FERPA must be made by the district, so we will not address the applicability of FERPA to this information. Likewise, we do not address your argument under section 552.114 of the Government Code. *See Gov't Code §§ 552.026* (incorporating FERPA into the Act), .114 (excepting from disclosure "student records"); Open Records Decision No. 539 (1990) (determining the same analysis applies under section 552.114 of the Government Code and FERPA). However, we will consider your other arguments against disclosure of the submitted information.

Section 552.103 of the Government Code provides, in part:

(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

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 that those records contain substantially different types of information than that submitted to this office.

³A copy of this letter may be found on the Office of the Attorney General's website: <https://www.texasattorneygeneral.gov/files/og/20060725usdoe.pdf>.

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 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 (1) litigation was 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *See* Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body’s receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.⁴ Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983). In Open Records Decision No. 638 (1996), this office stated a governmental body has met its burden of showing litigation is reasonably anticipated when it received a notice of claim letter, and the governmental body represents the notice of claim letter is in compliance with the requirements of the Texas Tort Claims Act (“TTCA”), Civ. Prac. & Rem. Code, ch. 101, or an applicable municipal ordinance. This office has also stated a pending complaint with the Equal Employment Opportunity Commission (the “EEOC”) indicates litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982).

⁴In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

You state, and provide supporting documentation showing, prior to the district's receipt of the instant request, the district received a notice of claim from an attorney. In the letter, the attorney states he is notifying the district of a possible claim against the district regarding injuries allegedly sustained by his client's child, under the supervision of two of the named individuals, while in the custody of the district. Additionally, the notice of claim states that the attorney has filed a request for mediation with the Texas Education Agency on the matter that gave rise to the request for information. Thus, you state on the date the district received the request for information, the district reasonably anticipated litigation to which the district would be a party. You do not affirmatively represent to this office the notice of claim complies with the TTCA or an applicable ordinance; therefore, we will only consider the notice of claim as a factor in determining whether the district reasonably anticipated litigation over the incident in question. Based on your representations, our review of the information at issue, and the totality of the circumstances, we find the district reasonably anticipated litigation pertaining to the notice of claim letter on the date the request was received. You also represent, and we agree, Exhibits D through G are related to the anticipated litigation for purposes of section 552.103. Accordingly, the district may generally withhold the information at issue under section 552.103 of the Government Code.

Additionally, you state, and provide documentation showing, prior to the district's receipt of the instant request for information, a district employee filed a discrimination claim against the district with the EEOC, and the EEOC issued a notice of the complainant's right to sue within a 90-day period. We understand on the date the district received the instant request, the 90-day period had not run. You state Exhibits H through N are directly related to the anticipated litigation. Based on your representations and our review of the information at issue, we find the district reasonably anticipated litigation pertaining to the discrimination claim on the date this request was received, and the information at issue is related to the anticipated litigation. Therefore, the district may generally withhold the information at issue under section 552.103 of the Government Code.

We note, however, it appears the opposing party has seen or had access to some of the information and it may not be withheld under section 552.103. The purpose of section 552.103 of the Government Code is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to the litigation to obtain such information through discovery procedures. *See* ORD 551 at 4-5. Thus, 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. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, the information we marked for release may not be withheld under section 552.103(a). Further, the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

Section 552.135 of the Government Code provides, in relevant part, the following:

(a) "Informer" means a student or a former student or an employee or former employee of a school district who has furnished a report of another person's or persons' possible violation of criminal, civil, or regulatory law to the school district or the proper regulatory enforcement authority.

(b) An informer's name or information that would substantially reveal the identity of an informer is excepted from [required public disclosure].

(c) Subsection (b) does not apply:

(1) if the informer is a student or former student, and the student or former student, or the legal guardian, or spouse of the student or former student consents to disclosure of the student's or former student's name; or

(2) if the informer is an employee or former employee who consents to disclosure of the employee's or former employee's name; or

(3) if the informer planned, initiated, or participated in the possible violation.

Gov't Code § 552.135(a)-(c). Because the legislature limited the protection of section 552.135 to the identity of a person who reports a possible violation of "law," a school district that seeks to withhold information under that exception must clearly identify to this office the specific civil, criminal, or regulatory law that is alleged to have been violated. *See id.* § 552.301(e)(1)(A). Additionally, individuals who provide information in the course of an investigation, but do not make the initial report are not informants for purposes of section 552.135 of the Government Code. You state the remaining information identifies students and employees who reported an alleged violation of criminal and civil laws. However, the district has failed to demonstrate any of the remaining information reveals the identity of an informer for the purposes of section 552.135 of the Government Code. Therefore, the district may not withhold any of the remaining information on that ground.

In summary, with the exception of the information we marked for release, the district may withhold the submitted information under section 552.103 of the Government Code. The district must release the remaining information.

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, 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,



Ashley Crutchfield
Assistant Attorney General
Open Records Division

AC/tdw

Ref: ID# 671533

Enc. Submitted documents

c: Requestor
(w/o enclosures)