



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 2, 2020

Ms. Elaine F. Edwards
Counsel for the San Antonio Independent School District
Escamilla & Poneck, L.L.P.
700 North St. Mary's Street, Suite 850
San Antonio, Texas 78205

OR2020-29951

Dear Ms. Edwards:

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# 856411.

The San Antonio Independent School District (the "district"), which you represent, received a request for twenty-three categories of information pertaining to a specified investigation, specified policies and procedures, and specified training materials. You state the district will release some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.111, and 552.135 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the United States Department of Education Family Policy Compliance Office has informed this office the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code, 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.² Consequently,

¹ Although you raise Texas Rule of Civil Procedure 192.5, we note the proper exception to raise when asserting the attorney work product privilege in this instance is section 552.111 of the Government Code. *See* Open Records Decision No. 677 (2002).

² A copy of this letter may be found on the Office of the Attorney General's website at <https://www.texasattorneygeneral.gov/sites/default/files/files/divisions/open-government/20060725-USDOE-FERPA.pdf>.

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”). In this instance, some of the information you have submitted for our review may constitute education records. Because our office is prohibited from reviewing education records to determine the applicability of FERPA, we will not address the applicability of FERPA to any of the submitted records. *See* 20 U.S.C. § 1232g(a)(1)(A). However, we note parents and their legal representatives have a right of access to their child’s education records and their right of access prevails over a conflicting state law. *See id.*; 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) (holding FERPA prevails over inconsistent provisions of state law). Such determinations under FERPA must be made by the educational authority in possession of the education records.³ The DOE also has informed our office, however, a parent’s right of access under FERPA to information about the parent’s child does not prevail over an educational institution’s right to assert the work product privilege. Accordingly, we will consider the submitted arguments to the extent the student’s legal representative does not have a right of access to the submitted information under FERPA.

Next, we note some of the submitted information is subject to section 552.022 of the Government Code, which provides in pertinent part:

- (a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

...

(15) information regarded as open to the public under an agency’s policies[.]

Gov’t Code § 552.022(a)(15). The submitted information includes district policies and handbooks that are available online, which are subject to section 552.022(a)(15). *Id.* You seek to withhold the information subject to section 552.022 under sections 552.103 and 552.111 of the Government Code. However, sections 552.103 and 552.111 are discretionary in nature and do not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov’t Code § 552.103); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 470 at 7 (1987) (statutory predecessor to section 552.111 subject to waiver). Accordingly, the district may not withhold this information, which we marked, under section 552.103 or section 552.111 of the

³ In the future, if the district does obtain parental or an adult student’s consent to submit education records and the district seeks a ruling from this office on the proper redaction of those education records in compliance with FERPA, we will rule accordingly.

Government Code. As you raise no further exceptions to disclosure of this information, the district must release the information we marked pursuant to section 552.022(a)(15) of the Government Code. However, we will consider your submitted arguments for the remaining information.

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 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 section 552.103(a) 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. *See 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). *See* ORD 551.

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." *See* Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim 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. *See* Open Records Decision No. 555 (1990); *see also* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, or when an individual threatened to sue on several occasions and hired an attorney. *See* Open Records Decision Nos. 346 (1982), 288 (1981). 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.

If a governmental body does not make this representation, the claim letter is a factor that this office will consider in determining whether a governmental body has established litigation is reasonably anticipated based on the totality of the circumstances. On the other hand, this office has determined 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 a potential opposing party has hired an attorney who makes a request for information does not establish litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983).

You state, and provide documentation showing, simultaneous with the instant request for information, the district received a notice of claim from an attorney representing an individual in an injury claim against the district. You do not affirmatively represent to this office the notice of claim meets the requirements of the TTCA; 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. Nevertheless, based upon your representation, our review of the information at issue, and the totality of the circumstances, we find the district reasonably anticipated litigation on the date it received the instant request. We further find the information at issue is related to the anticipated litigation for purposes of section 552.103. Therefore, the district may withhold the remaining information under section 552.103 of the Government Code.⁴

Generally, however, 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). Thus, information that has either been obtained from or provided to all parties to the pending or anticipated litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

In summary, the district must release the information we marked pursuant to section 552.022(a)(15) of the Government Code. The district may withhold the remaining information under section 552.103 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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable

⁴ As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

Gerald A. Arismendez
Assistant Attorney General
Open Records Division

GAA/jxd

Ref: ID# 856411

Enc. Submitted documents

c: Requestor
(w/o enclosures)