



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

October 27, 2022

Mr. Montgomery Meitler  
Deputy General Counsel for Public Information  
Texas Education Agency  
1701 North Congress Avenue  
Austin, Texas 78701-1497

OR2022-33393

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# 977377 (TEA PIR# 55073).

The Texas Education Agency (the "agency") received a request for all information concerning the investigation of a named educator. You state the agency will redact student-identifying 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 state you will withhold certain information pursuant to the previous determination issues in Open Records Letter No. 2020-03195 (2020).<sup>2</sup> You claim the submitted information is excepted from

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<sup>1</sup> The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office FERPA does not permit state and local educational authorities to disclose to this office, without parental or student 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 FERPA determinations must be made by the educational authority in possession of the education records. A copy of this letter may be found on the Office of the Attorney General's website: <https://www.texasattorneygeneral.gov/files/og/20060725usdoe.pdf>.

<sup>2</sup> Open Records Letter No. 2020-03195 authorizes the agency to withhold certain information concerning open investigations of educator misconduct under section 552.101 of the Government Code in conjunction with section 21.062(d) of the Education Code without the necessity of requesting a ruling from this office. See Gov't Code § 552.301(a); Open Records Decision No. 673 at 7-8 (2001) (delineating elements of second type of previous determination under Gov't Code § 552.301(a)).

disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the representative sample of the submitted information.<sup>3</sup>

Section 552.103 provides 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). The governmental body has the burden of providing relevant facts and documents to show that 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, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas 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 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 with "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) (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 "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 submitted information relates to an open investigation of allegations that an educator engaged in inappropriate conduct. You state alleged misconduct may require the agency to file a petition for sanctions against the educator pursuant to the provisions of the Education Code and title 19 of the Texas Administrative Code. *See* Educ. Code §§21031(a) (the agency shall regulate and oversee standards of conduct of public school

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<sup>3</sup> We assume that 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.

educators), .041(b)(the agency shall propose rules providing for disciplinary proceedings); 19 T.A.C. §§274.2. 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* 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. §21.047(b)(7); 19 T.A.C. §249(a)(1); Open Records Division No. 588 (1991) (contested case under APA constitutes litigation for purposes of statutory predecessor Gov’t Code §552.103). Upon review, we determine the agency reasonably anticipated litigation when it received the request for information. Furthermore, you state the information at issue was compiled for the purpose of investigating the alleged educator misconduct. We agree the information at issue relates to the anticipated litigation. Therefore, we conclude the agency may withhold the submitted information under section 552.103 of the Government Code.

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 anticipated litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, applicability of section 552.101 (a) ends once the litigation has been concluded. *See* Attorney General Opinion MW-575; *see* also Open Records Decision No. 350 (1982).

Finally, you ask this office to issue a previous determination permitting the agency to withhold certain information under section 552.103 of the Government Code without the necessity of requesting a decision under section 552.301 of the Government Code. *See* Gov’t Code § 552.301(a) (allowing a governmental body to withhold information subject to previous determination); ORD 673 (listing elements of second type of previous determination under section 552.301(a) of the Government Code). We decline to issue such a previous determination at this time. Accordingly, this letter ruling is limited to the particular information at issue in this respect and limited to the facts as presented to us; therefore, the 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 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,

Melanie J. Villars  
Assistant Attorney General  
Open Records Division

MJV/eb

Ref: ID# 977377

c: Requestor