



September 13, 2002

Mr. Cobby A. Caputo
Bickerstaff, Heath, Smiley, Pollan, Kever & McDaniel
1700 Frost Bank Plaza
816 Congress Avenue
Austin, Texas 78701-2443

OR2002-5133

Dear Mr. Caputo:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 168553.

The Eanes Independent School District (the "district"), which you represent, received a request for a copy of the most recent evaluation of the Superintendent of Schools, copies of all correspondence between the Superintendent and the School Board regarding the proposed 2002-2003 budget for the district, and copies of all correspondence between the Superintendent and the School Board regarding the Superintendent's evaluation. You state that the district has released some of the requested information to the requestor. You claim, however, that the submitted information is excepted from disclosure under sections 552.101, 552.104, 552.105 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, we address the district's obligations under section 552.301 of the Government Code. Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business-days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written

¹We 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.

request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. You did not, however, submit a copy of the written request for information.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Normally, a compelling interest exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Sections 552.104, 552.105, and 552.111 are discretionary exceptions under the Public Information Act that do not constitute compelling reasons sufficient to overcome the presumption that the requested information is public.² *See* Open Records Decision Nos. 592 (1991) (governmental body may waive section 552.104); 470 (1987) (statutory predecessor to section 552.111 is discretionary exception), 522 (1989) (discretionary exceptions in general). Thus, the district may not withhold any of the submitted information under sections 552.104, 552.105, or 552.111. On the other hand, as section 552.101 provides a compelling reason to overcome the presumption of openness, we will address your arguments under that exception. *See* Open Records Decision No. 150 (1977) (presumption of openness overcome by showing that information is made confidential by another source of law or affects third party interests).

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information made confidential by other statutes. Section 21.355 of the Education Code provides that "[a] document evaluating the performance of a teacher or administrator is confidential." This office has interpreted this section to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. Open Records Decision No. 643 (1996). In that opinion, this office also concluded that an "administrator" is someone who is required to hold and does hold a certificate or permit required under chapter 21 of the Education Code and is performing the functions of an administrator at the time of his or her evaluation. *Id.* at 4.

² Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential), 473 (1987) (governmental body may waive section 552.111), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

We note that with regard to the appraisal of administrators, section 21.354(c) of the Education Code provides

(c) Each school district shall appraise each administrator annually using either:

(1) the commissioner's recommended appraisal process and performance criteria; or

(2) an appraisal process and performance criteria:

(A) developed by the district in consultation with the district- and campus-level committees established under Section 11.251; and

(B) adopted by the board of trustees.

Educ. Code § 21.354(c). After reviewing the submitted information, we presume that it was developed pursuant to section 21.354 of the Education Code. Furthermore, based on the reasoning set out in Open Records Decision No. 643, we conclude that the documents submitted to this office in Exhibit 1 and one of the documents in Exhibit 2, which we have marked, evaluate the performance of an administrator and are therefore confidential under section 21.355 of the Education Code. Therefore, pursuant to section 552.101 of the Government Code, the district must withhold these documents. We find, however, that the remaining information does not evaluate the "performance of a teacher or administrator."

We note, however, that the submitted information contains an address, telephone number, and fax number that may be excepted under section 552.117 of the Government Code.³ It is unclear whether the individual to whom this information pertains is a current or former district employee or official. To the extent this individual is or was a district employee or official, his home address, home telephone number, and home fax number may be confidential under section 552.117. Section 552.117 excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who make a timely request that this information be kept confidential under section 552.024. Gov't Code § 552.117(1); *see id.* § 552.024; *see also* Open Records Decision No. 622 (1994). Whether information is protected under section 552.117(1) must be determined as of the time the information was requested. Open Records Decision No. 530 at 5 (1989). Thus, if the individual whose information is at issue is a current or former district employee or official,

³The Office of the Attorney General will raise a mandatory exception like section 552.117 on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

and he timely elected to keep this information confidential, the district must withhold it under section 552.117(1) of the Government Code. If he is not a current or former employee or official, or he did not make a timely election under section 552.024, then the district may not withhold this information under section 552.117 of the Government Code.

To summarize, (1) we have marked the information that the district must withhold under section 552.101 of the Government Code and section 21.355 of the Education Code; and (2) we have marked the information that must be withheld under section 552.117 of the Government Code if the individual to whom it pertains is a current or former district employee or official who made a timely election to keep such information confidential pursuant to 552.024. The remaining information must be released.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Karen A. Eckerle
Assistant Attorney General
Open Records Division

KAE/sdk

Ref: ID# 168553

Enc: Submitted documents

c: Ms. Janet Jacobs
Staff Writer
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(w/o enclosures)