

The ruling you have requested has been amended as a result of litigation and has been attached to this document.



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 17, 2003

Ms. Jo Ann Collier  
Feldman & Rogers, L.L.P.  
5718 Westheimer, Suite 1200  
Houston, Texas 77057

OR2003-8217

Dear Ms. Collier:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 191081.

The North East Independent School District (the "district"), which you represent, received a request for "any and all records concerning" a named district employee. You state that "[t]he District has produced [the employee's] personnel file except for her transcripts and evaluations." You claim that the information you have withheld is excepted from disclosure under sections 552.101 and 552.102 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Section 21.355 of the Education Code provides, "A document evaluating the performance of a teacher or administrator is confidential." In Open Records Decision No. 643 (1996), this office interpreted this section to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. In that opinion, this office also concluded that a teacher is someone who is required to hold and does hold a certificate or permit required under chapter 21 of the Education Code and is teaching at the time of his or her evaluation and that an administrator is someone who is required to hold and does hold a certificate required under chapter 21 of the Education Code and is administering at the time of his or her evaluation. *See* ORD No. 643. Based on the reasoning set out in Open Records Decision No. 643, we conclude that most of the submitted information constitutes evaluations of a certified teacher that are confidential under section 21.355 of the Education Code and must therefore be withheld pursuant to section 552.101 of the Government Code. We have marked the documents that you must withhold. We conclude, however, that the letter dated May 20, 2003 does not

constitute an evaluation for purposes of section 21.355 of the Education Code and thus is not made confidential by this provision and must be released.

We turn now to your arguments regarding the submitted transcripts. Section 552.102(b) of the Government Code protects from public disclosure:

a transcript from an institution of higher education maintained in the personnel file of a professional public school employee, except that this section does not exempt from disclosure the degree obtained or the curriculum on a transcript in the personnel file of the employee.

Accordingly, we conclude that the district must release those portions of the transcripts that reveal the teacher's name, degree obtained, and courses taken. The remaining information on the transcripts must be withheld pursuant to section 552.102(b).

In summary, we have marked the documents that constitute teacher evaluations that are confidential under section 21.355 of the Education Code and must therefore be withheld under section 552.101 of the Government Code. Other than the teacher's name, degree obtained, and courses taken, the submitted transcripts must be withheld pursuant to section 552.102(b) of the Government Code. The remaining submitted 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

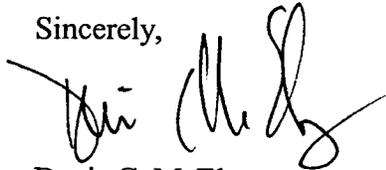
body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may 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 Dep't of Pub. 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,



Denis C. McElroy  
Assistant Attorney General  
Open Records Division

DCM/lmt

Ref: ID# 191081

Enc. Submitted documents

c: Ms. Jacqueline Blackmon  
2602 Waterford  
San Antonio, Texas 78217  
(w/o enclosures)

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

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JUDGMENT RENDERED MAY 12, 2006

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NO. 03-04-00744-CV

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**Greg Abbott, Attorney General of the State of Texas, Appellant**

v.

**North East Independent School District and Dr. Richard A. Middleton, in his Official  
Capacity as Custodian of Public Records for North East  
Independent School District, Appellees**

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**APPEAL FROM 345TH DISTRICT COURT OF TRAVIS COUNTY  
BEFORE CHIEF JUSTICE LAW, JUSTICES B. A. SMITH AND PEMBERTON  
AFFIRMED -- OPINION BY JUSTICE PEMBERTON**

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**THIS CAUSE** came on to be heard on the record of the court below, and the same being considered, because it is the opinion of this Court that there was no error in the trial court's summary judgment: **IT IS THEREFORE** considered, adjudged and ordered that the summary judgment of the trial court is in all things affirmed. It is **FURTHER** ordered that the appellant pay all costs relating to this appeal, both in this Court and the court below; and that this decision be certified below for observance.



All relief not granted herein is DENIED.

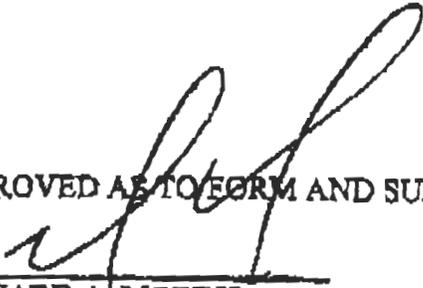
THIS IS A FINAL JUDGMENT.

Signed this 28<sup>th</sup> day of October, 2004.



PRESIDING JUDGE

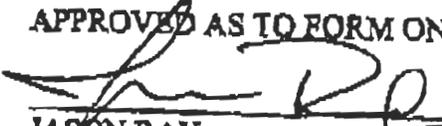
APPROVED AS TO FORM AND SUBSTANCE:



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**TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN**

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**NO. 03-04-00744-CV**

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**Greg Abbott, Attorney General of the State of Texas, Appellant**

**v.**

**North East Independent School District and Dr. Richard A. Middleton, in his Official  
Capacity as Custodian of Public Records for North East  
Independent School District, Appellees**

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**FROM THE DISTRICT COURT OF TRAVIS COUNTY, 345TH JUDICIAL DISTRICT  
NO. GN304566, HONORABLE PATRICK O. KEEL, JUDGE PRESIDING**

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**OPINION**

In this case, we decide whether a memorandum from a school principal to a teacher concerning complaints about the teacher and directing corrective action is “a document evaluating the performance of a teacher” that is confidential and exempt from disclosure under the Texas Public Information Act. *See* Tex. Educ. Code Ann. § 21.355 (West 1996); Tex. Gov’t Code Ann. § 552.101 (West 2004). We have reviewed the document, and we agree that it is “a document evaluating the performance of a teacher.” *See* Tex. Educ. Code Ann. § 21.355. As a result, we affirm the district court’s summary judgment in favor of North East Independent School District.

North East Independent School District (NEISD) received a request under the Texas Public Information Act for all records concerning an NEISD teacher. NEISD provided some of the requested documents but withheld, among others, a memorandum dated May 20, 2003. This memorandum is the only document at issue in this case.<sup>1</sup>

NEISD requested a ruling from the Attorney General concerning the memorandum, asserting that the memorandum was exempt from disclosure under education code section 21.355. In response, the Attorney General issued a memorandum ruling, finding that the memorandum was not “a document evaluating the performance of a teacher” and thus not confidential. *See id.* NEISD<sup>2</sup> filed suit in Travis County, challenging the Attorney General’s determination and seeking a declaration that the memorandum is confidential and thus exempt from disclosure. NEISD filed a traditional motion for summary judgment, and the Attorney General filed a cross-motion. The district court granted NEISD’s motion and denied that of the Attorney General. This appeal followed.

The Attorney General presents one issue on appeal, arguing that the district court erred in granting summary judgment in favor of NEISD because the memorandum is not “a document evaluating the performance of a teacher” excepted from disclosure under the Texas Public Information Act (TPIA). *See id.*; Tex. Gov’t Code Ann. § 522.101.

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<sup>1</sup> This document remains under seal. We have reviewed it fully and refer to its contents only as necessary to resolve the dispute before us.

<sup>2</sup> Both NEISD and Dr. Richard A. Middleton, NEISD’s custodian of public records, filed suit. For sake of simplicity, we refer to both parties as NEISD.

We review the district court's summary judgment *de novo*. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005); *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). Summary judgment is proper when there are no disputed issues of material fact and the movant is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c); *Shell Oil Co. v. Khan*, 138 S.W.3d 288, 291 (Tex. 2004) (citing *Knott*, 128 S.W.3d at 215-16). Where, as here, both parties move for summary judgment and the district court grants one motion and denies the other, we review the summary-judgment evidence presented by both sides, determine all questions presented, and render the judgment that the district court should have rendered. *Texas Workers' Comp. Comm'n v. Patient Advocates of Tex.*, 136 S.W.3d 643, 648 (Tex. 2004); *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 872 (Tex. 2000). We must affirm the summary judgment if any of the grounds asserted in the motion are meritorious. *Patient Advocates*, 136 S.W.3d at 648; *FM Props.*, 22 S.W.3d at 872.

“It is the policy of this state that each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees.” Tex. Gov't Code Ann. § 552.001(a) (West 2004). The provisions of the TPIA are to be “liberally construed in favor of granting a request for information.” *Id.* § 552.001(b). To withhold information under the TPIA, a governmental body must establish that the requested information is not subject to the Act or that withholding the information is permitted by one of the TPIA's enumerated exceptions to disclosure. *City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 323 (Tex. App.—Austin 2002, no pet.) (citing *Thomas v. Cornyn*, 71 S.W.3d 473, 490 (Tex. App.—Austin 2002, no pet.)). Whether information is subject to the Act and whether an exception

to disclosure applies are questions of law. *A & T Consultants v. Sharp*, 904 S.W.2d 668, 674 (Tex. 1995).

Here, the parties agree that this case concerns only whether the memorandum is “a document evaluating the performance of a teacher” under section 21.355 of the education code, thus rendering the document confidential by law. This issue requires us to construe the word “evaluating” in section 21.355, a task that presents a question of law, which we review *de novo*. See *In re Forlenza*, 140 S.W.3d 373, 376 (Tex. 2004); *McIntyre v. Ramirez*, 109 S.W.3d 741, 745 (Tex. 2003). When interpreting a statutory provision, we must ascertain and effectuate legislative intent. *Tex. Dep’t of Protective & Regulatory Servs. v. Mega Child Care, Inc.*, 145 S.W.3d 170, 176 (Tex. 2004). We first look to the plain and common meaning of the words the legislature used. *Tex. Gov’t Code Ann. § 311.011* (West 2005); *Kroger Co. v. Keng*, 23 S.W.3d 347, 349 (Tex. 2000); *Texas Workers’ Comp. Comm’n v. Texas Builders Ins. Co.*, 994 S.W.2d 902, 908 (Tex. App.—Austin 1999, pet. denied). In ascertaining legislative intent, we may consider the evil sought to be remedied, the legislative history, and the consequences of a particular construction. See *Liberty Mut. Ins. Co. v. Garrison Contractors, Inc.*, 966 S.W.2d 482, 484 (Tex. 1998). Further, we read every word, phrase, and expression in a statute as if it were deliberately chosen and presume the words excluded from the statute are done so purposefully. See *Gables Realty Ltd. P’ship v. Travis Cent. Appraisal Dist.*, 81 S.W.3d 869, 873 (Tex. App.—Austin 2002, pet. denied); see also 2A Norman J. Singer, *Sutherland Statutory Construction* § 47.25 (6th ed. 2000). When the statute does not define a term, as in this case, we may rely on definitions listed in commonly used dictionaries to discern the plain

meaning. See *Powell v. Stover*, 165 S.W.3d 322, 326 (Tex. 2005); *Mega Child Care, Inc.*, 145 S.W.3d at 196.

Education code section 21.355 provides that a “document evaluating the performance of a teacher or administrator is confidential.” Tex. Educ. Code Ann. § 21.355. However, the statute does not define “evaluating.” Dictionary definitions of “to evaluate” include “1. To ascertain or fix the value or worth of. 2. To examine and judge; appraise; estimate.” *American Heritage Dictionary* 453 (1973). The Attorney General has recognized “that the legislature intended to make confidential any document that evaluates the performance of a teacher or administrator” and that such categorization includes a broader range of documents than formal appraisals provided by the education code. Op. Tex. Att’y Gen. No. ORD-643, at \*2 (1996); see also Tex. Educ. Code Ann. §§ 21.351-.357 (West 1996 & Supp. 2005).

The Attorney General argues that the memorandum at issue in this case is merely a teacher reprimand, a document that cannot be an evaluation as a matter of law because it only recites allegations and metes out discipline but contains no evaluative information.<sup>3</sup> In response, NEISD asserts that distinguishing between “evaluations” and “reprimands” is an empty distinction. Our review of the document at issue in this case reveals that the school principal was memorializing a meeting with the teacher concerning performance issues. In addition, the principal reported additional information that she had received after the meeting concerning the same performance issues. The principal then gave performance directives and referred the teacher to various NEISD

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<sup>3</sup> We note that the Commissioner of Education has determined separately that teacher reprimands are confidential under education code section 21.355. See *Teva v. Alanis*, 109 S.W.3d 890, 894 (Tex. App.—Dallas 2003, no pet.).

board policies and reformed communications procedures. Finally, the principal referred to the teacher's status under NEISD's formal appraisal system and gave further directives.

After careful review, we find that the memorandum evaluates the teacher because it reflects the principal's judgment regarding her actions, gives corrective direction, and provides for further review. Therefore, we find it confidential and exempt from disclosure. *See* Tex. Educ. Code Ann. § 21.355. We overrule the Attorney General's issue on appeal. We affirm the district court's grant of summary judgment.

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Bob Pemberton, Justice

Before Chief Justice Law, Justices B. A. Smith and Pemberton

Affirmed

Filed: May 12, 2006