ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 9, 2003

Ms. Mia M. Martin
General Counsel
Richardson Independent School District
400 South Greenville Avenue
Richardson, Texas 75081-4198

OR2003-8830

Dear Ms. Martin:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 192396.

The Richardson Independent School District (the "district") received two requests from the same requestor for a named individual's file and the file "of the substitute clerk at Berkner High School from December 2002–January 2003, including all documents, materials, and/or information of all kinds relating thereto." (Emphasis in original). You claim that the requested information is excepted from disclosure under sections 552.024, 552.101, 552.102, 552.103, 552.107, 552.117, 552.130, and 552.136 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.[1]

We first note that some of the requested information is subject to section 552.022 of the Government Code. Section 552.022 provides that:

> the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

[1]We assume that the 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.

> (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]
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> . . .
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> (3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(1), (3). In this instance, the requested information includes completed evaluations made of, for, or by the district, and a contract relating to the expenditure of public or other funds by the district. The district must release the completed evaluations under section 552.022(a)(1) unless they are excepted from disclosure under section 552.108 or expressly confidential under other law. You do not claim that the evaluations are excepted under section 552.108. Therefore, you may withhold this information only if it is confidential under other law. Further, the district must release the submitted contract, unless it is expressly confidential under other law.

Although you argue that the information at issue is excepted under section 552.103 and/or section 552.107 of the Government Code, these sections are discretionary exceptions and not "other law" for the purposes of section 552.022. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.–Dallas 1999, no pet.) (governmental body may waive section 552.103; Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (discretionary exceptions generally), 630 at 4 (1994) (attorney-client privilege under Gov't Code § 552.107(1) may be waived). Thus, the district may not withhold the evaluations or the contract under section 552.103 or section 552.107. However, sections 552.101, 552.102, and 552.117 constitute "other law" for purposes of section 552.022; therefore, we will consider whether these exceptions apply to the information subject to section 552.022.

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 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* Open Records Decision No. 643. You state that the individual who is the subject of the evaluations is a "certified teacher who holds a certificate from the Texas Education Agency and she serves in an administrative capacity in addition to her role

as legal council." Thus, provided this individual was teaching or administering at the time of her evaluations, the submitted evaluations, which we have marked, are excepted from disclosure under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. If the individual at issue was not teaching or evaluating at the time of her evaluations, then the evaluations may not be withheld under section 552.101 in conjunction with section 21.355 of the Education Code.

In the event the submitted evaluations are not excepted under section 21.355, you also claim that this information, as well as the social security numbers contained within the submitted contracts, is excepted from disclosure pursuant to section 552.102 of the Government Code. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). Section 552.102(a) is generally applicable to information relating to a public official or employee. *See* Open Records Decision No. 327 at 2 (1982) (anything relating to employee's employment and its terms constitutes information relevant to person's employment relationship and is part of employee's personnel file). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.–Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected from disclosure under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976) for information claimed to be protected from disclosure under the common-law right to privacy as incorporated by section 552.101 of the Government Code. *See* 540 S.W.2d at 683-85. Accordingly, we address the district's section 552.102 claim under section 552.101 of the Government Code in conjunction with the common-law right to privacy.

Information must be withheld from disclosure under the common-law right to privacy when it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *See Industrial Foundation,* 540 S.W.2d at 685. The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *See id.* at 683. However, this office has previously determined that the common-law right of privacy does not protect social security numbers from disclosure. *See* Open Records Decision Nos. 226 (1979) (noting social security numbers not protected under privacy), 169 (1977). Accordingly, we conclude that the district may not withhold the social security numbers contained within the submitted contracts under section 552.102 of the Government Code. Likewise, we conclude the district may not withhold the evaluations under section 552.102 of the Government Code. *See* Open Records Decision Nos. 470 at 4 (1987) (employee's job performance does not generally constitute that person's private affairs), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of governmental employees), 423 at 2 (1984) (statutory predecessor applicable when information would reveal intimate details of highly personal nature), 405 at 2 (1983) (manner in which employee performed his job cannot be

said to be of minimal public interest). Thus, the submitted evaluation must be released if they are not confidential under section 21.355 of the Education Code.

You also claim that the social security number contained within the submitted contract and evaluations is excepted from disclosure pursuant to section 552.117 of the Government Code. Section 552.117 excepts from disclosure social security numbers of employees of a governmental body who timely request that this information be kept confidential pursuant to section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1).[2] Whether a social security number is protected by section 552.117(a)(1), however, must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Accordingly, we conclude that the district must withhold the social security number contained within the submitted contract and evaluations pursuant to section 552.117(a)(1) of the Government Code, but only if the employee with whom it is associated elected prior to the district's receipt of these requests to keep it confidential. Otherwise, we conclude that the district may not withhold this social security number under section 552.117(a)(1) of the Government Code.

In the event that this social security number is not excepted from disclosure under section 552.117(a)(1) of the Government Code, you also claim that it is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). These amendments make a social security number confidential if it was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 at 2-4 (1994). We have no basis for concluding that the social security number in question is confidential under section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code. We caution the district, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing any social security number, the district should ensure that it was not obtained and is not maintained by the district pursuant to any provision of law enacted on or after October 1, 1990. In any event, the district must release the remaining portions of the submitted contract to the requestor.

For the remaining submitted information, which is not subject to section 552.022, we address your claim under section 552.103 of the Government Code. 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

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[2]In Senate Bill 1388, which became effective on June 20, 2003, the Seventy-eighth Legislature recently amended section 552.117 of the Government Code by adding "(a)" to the relevant language of this provision. *See* Act of May 30, 2003, 78th Leg., R.S., ch. 947, 2003 Tex. Sess. Law Serv. 2822 (Vernon) (to be codified as an amendment to Gov't Code sec. 552.117).

> employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.
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> ....
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> (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.

The district 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, no pet.); *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 district must meet both prongs of this test for information to be excepted under section 552.103(a).

To demonstrate that litigation is reasonably anticipated, the district must furnish concrete evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 at 5 (1989). 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.[3] Open Records Decision No. 555 (1990); *see also* 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).

Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). You state that the submitted information relates to complaints and grievances filed against the district. We find that the totality of the circumstances demonstrates the district reasonably anticipated litigation relating to the grievances on the date the district received the present requests. Furthermore, after a review of your arguments and the submitted information, we find that the requested information is related to the reasonably anticipated litigation. Therefore, the district may withhold the remaining submitted information under section 552.103 of the Government Code.

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[3]In 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).

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. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, we conclude that provided the individual who is the subject of the submitted evaluations was teaching or administering at the time of the submitted evaluations, the district must withhold the evaluations, which we have marked, under section 552.101 of the Government Code in conjunction with section 21.355 of the Government Code. If the individual was not teaching or administering at the time of the submitted evaluations, the district must release these documents. The district must also withhold the social security number contained within the submitted contract and evaluations pursuant to section 552.117(a)(1) of the Government Code, but only if the employee with whom it is associated elected prior to the district's receipt of these requests to keep it confidential. Nevertheless, these social security numbers may be confidential under federal law. In any event, the district must release the remaining portions of the submitted contract to the requestor. The remaining submitted information may be withheld under section 552.103 of the Government Code.

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

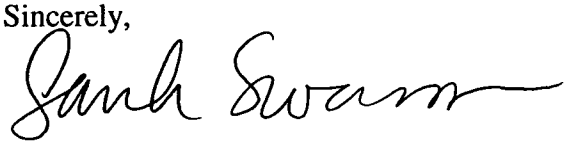
that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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,



Sarah I. Swanson
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SIS/lmt

Ref: ID# 192396

Enc. Submitted documents

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