



**ATTORNEY GENERAL OF TEXAS**  
**GREG ABBOTT**

June 28, 2004

Mr. Kevin B. Laughlin  
Atkins & Peacock, L.L.P.  
823 Central  
Odessa, Texas 78761

OR2004-5260

Dear Mr. Laughlin:

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# 204171.

The Ector County Independent School District (the "district"), which you represent, received a request for "personnel files of the non-administrative employees . . . recommended for termination during the annual review of contracts in March [and] any grievances and complaints filed against the said employees during their employment" with the district. You state that some responsive information has been released to the requestor. You claim that the remaining requested information, or portions thereof, is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides in part 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) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The submitted information includes completed evaluations made of, for, or by the district, which must be released pursuant to section 552.022(a)(1), unless they are excepted from disclosure under section 552.108 or are expressly confidential under other law.<sup>1</sup> Although the district claims that the completed evaluations are excepted from disclosure under section 552.103 of the Government Code, we note that this exception is a discretionary exception to disclosure that does not constitute "other law" for the purposes of section 552.022.<sup>2</sup> Accordingly, we conclude that the district may not withhold any portion of the completed evaluations under section 552.103 of the Government Code. However, since the district also claims that the completed evaluations are excepted from disclosure under section 552.101 of the Government Code, we will address this claim with regard to this particular information as well as for the information not 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," and encompasses information protected by other statutes, such as the Family Educational Rights and Privacy Act of 1974 ("FERPA"). *See* 20 U.S.C. § 1232g(b)(1). FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information (other than directory information) contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1); *see also* 34 C.F.R. § 99.3 (defining personally identifiable information).

Under FERPA, "education records" means those records that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. *See id.* § 1232g(a)(4)(A). Section 552.026 of the Government Code provides that "information contained in education records of an educational agency or institution" may only be released under the Act in accordance with FERPA. Information must be withheld from required public disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." *See* Open Records Decision Nos. 332 (1982), 206 (1978). Such information includes

---

<sup>1</sup>We note that the district does not claim that any portion of the submitted information is excepted from disclosure under section 552.108 of the Government Code.

<sup>2</sup>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. 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), 522 at 4 (1989) (discretionary exceptions in general); *see also 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 section 552.103). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

information that directly identifies a student as well as information that, if released, would allow the student's identity to be easily traced. *See* Open Records Decision No. 224 (1979) (finding student's handwritten comments protected under FERPA because they make identity of student easily traceable through handwriting, style of expression, or particular incidents related). The submitted information is maintained by the district and a portion of the information is related a student; that information is therefore subject to FERPA.

The requestor in this instance does not appear to be among the individuals or entities authorized by section 1232g(b) to receive this information. *See* 20 U.S.C. § 1232g(b)(1) (listing individuals and entities to whom release of education records is authorized). Furthermore, you also have not informed us that the requestor has provided the district with written authorization from any student's parent or legal guardian in compliance with section 1232g(b)(2). *See* 20 U.S.C. § 1232g(b)(2) (prescribing elements of proper written authorization by student's parent or legal guardian). We therefore conclude that the district must withhold the information that we have marked pursuant to section 552.101 and FERPA.

You claim that some of the submitted information is excepted from disclosure pursuant to section 552.101 in conjunction with section 21.355 of the Education Code. Section 21.355 provides that "[a] document evaluating the performance of a teacher or administrator is confidential." Educ. Code § 21.355. This office has interpreted section 21.355 to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or an administrator. *See* Open Records Decision No. 643 (1996). In that decision, we determined that a "teacher," for purposes of section 21.355, is a person who is required to and does in fact hold a teaching certificate under subchapter B of chapter 21 of the Education Code, or a school district teaching permit under section 21.055, and who is engaged in the process of teaching, as that term is commonly defined, at the time of the evaluation. *See id.* at 4. We also concluded that an "administrator" in section 21.355 means a person who is required to and does in fact hold an administrator's certificate under subchapter B of chapter 21 of the Education Code and is performing the functions of an administrator, as that term is commonly defined, at the time of the evaluation. *See id.* Based on your arguments and our review of the information at issue, we find that the evaluations we have marked constitute evaluations of a certified teacher of the district. Accordingly, we conclude that the district must withhold these completed evaluations pursuant to section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. The remainder of the information at issue, however, does not consist of the types of records made confidential by section 21.355. We therefore determine that the district may not withhold any of the remaining submitted information pursuant to section 552.101 in conjunction with section 21.355 of the Education Code.

We now turn to your other arguments for the information not subject to section 552.022 of the Government Code. You seek to withhold some of the remaining submitted information pursuant to the Family and Medical Leave Act, section 2654 of title 29 of the United States Code (the "FMLA"). Section 825.500 of title 29 of the Code of Federal Regulations

provides record-keeping requirements for employers that are subject to the FMLA. Subsection (g) of section 825.500 provides:

Records and documents relating to medical certifications, recertifications or medical histories of employees or employees' family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files, and if ADA is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements . . . , except that:

- (1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;
- (2) First aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatment; and
- (3) Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

29 C.F.R. § 825.500(g). A portion of the information you seek to withhold under section 552.101 relates to medical certifications created for purposes of the FMLA. Therefore, this information is confidential under section 825.500 of title 29 of the Code of Federal Regulations. Further, we find that none of the release provisions of the FMLA apply to this information. Thus, we conclude that the marked documents are excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with the FMLA.<sup>3</sup>

The district next asserts that all remaining documents related to a particular individual are excepted from disclosure under 552.103. Section 552.103 provides in part:

- (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.

....

---

<sup>3</sup>Because we are able to make this determination, we need not address your additional arguments under sections 552.101 and 552.102 of the Government Code for this information.

(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 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 on the date the governmental body received the request and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. 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).

In this case, you state that the subject information relates to a pending teacher non-renewal hearing before the district Board of Trustees (the "board"). You contend that this hearing constitutes litigation to which the subject information relates. This office has focused on the following factors in determining whether an administrative proceeding is conducted in a quasi-judicial forum: (1) whether the dispute is, for all practical purposes, litigated in an administrative proceeding where (a) discovery takes place, (b) evidence is heard, (c) factual questions are resolved, and (d) a record is made; and (2) whether the proceeding is an adjudicative forum of first jurisdiction. *See* Open Records Decision No. 588 (1991). This office has also held that contested cases conducted under the Administrative Procedure Act, chapter 2001 of the Government Code, (the "APA"), are considered litigation under section 552.103. Open Records Decision No. 588 at 7 (1991). You contend that the application of section 21.207 of the Education Code places the subject hearing in a similar position. That statute provides in relevant part:

(b) The hearing must be conducted in accordance with rules adopted by the board. The board may use the process established under Subchapter F.

(c) At the hearing, the teacher may:

- (1) be represented by a representative of the teacher's choice;
- (2) hear the evidence supporting the reason for nonrenewal;
- (3) cross-examine adverse witnesses; and
- (4) present evidence.

You relate that a non-renewal hearing before the board provides for “the right to counsel, the right to present evidence, and the right to cross-examine witnesses.” However, given the language of the statute and your assertions, we conclude that you have failed to show that the non-renewal hearing is a forum that parallels hearings conducted under the APA or in a quasi-judicial forum. Therefore, you have not demonstrated that litigation is pending or is reasonably anticipated. The subject information may not be withheld under section 552.103(a) of the Government Code.

Next, you claim that a portion of the remaining submitted information is excepted from public disclosure under section 552.107 of the Government Code, which protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002).

First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5).

Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state that a portion of the submitted information consists of communications between district employees and attorneys for the district, and you represent that these communications were made in furtherance of the rendition of professional legal services to the district. Upon review of your arguments and this information, we conclude that it is protected by the attorney-client privilege, and thus may be withheld under section 552.107(1) of the Government Code. We have marked this information accordingly.<sup>4</sup>

In summary, the district must withhold the information that we have marked pursuant to section 552.101 of the Government Code and FERPA. The district must withhold the marked evaluations under section 552.101 in conjunction with section 21.355 of the Education Code. We have marked the documents that are confidential under the FMLA. The district may withhold the information that we have marked under section 552.107 of the Government Code. The remaining submitted information must be released to the requestor.

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).

---

<sup>4</sup>As section 552.107 is dispositive, we do not address your section 552.111 claim for this information.

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,



Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/jh

Ref: ID# 204171  
Enc. Submitted documents

c: Ms. Raechal Leone  
Odessa American  
222 East 4<sup>th</sup> Street  
Odessa, Texas 78761  
(w/o enclosures)