



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 2, 2005

Mr. S. Anthony Safi  
Mounce, Green, Meyers, Safi & Galatzan  
P.O. Box 1977  
El Paso, Texas 79950-1977

OR2005-08072

Dear Mr. Safi:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code, the Public Information Act (the "Act"). Your request was assigned ID# 231566.

The El Paso Independent School District (the "district"), which you represent, received a request for copies of all allegations, grievances, and complaints pertaining to two named district employees. You state that the requested information is excepted from disclosure under sections 552.101, 552.102, and 552.103 of the Government Code.<sup>1</sup> 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[.]

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<sup>1</sup>We note that you inform us that the district is not withholding the requestor's own EEOC Charge of Discrimination and grievance from her.

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>2</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>3</sup> Accordingly, we conclude that the district may not withhold the completed evaluations under section 552.103 of the Government Code. However, since sections 552.101 and 552.102 do constitute such "other law" for purposes of section 552.022, we will address these claims with regard to the completed evaluations.

We now address the district's section 552.103 for the information that is not subject to section 552.022. Section 552.103 of the Government Code provides in relevant part 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 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 government body receives the request for information,

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<sup>2</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>3</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.

and (2) the information at issue is related to that litigation. *Univ. 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 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 588 (1991). This office has concluded that litigation was reasonably anticipated when a potential opposing party filed a complaint with the Equal Employment Opportunity Commission (“EEOC”). Open Records Decision No. 336 (1982). You state that the submitted information relates to a pending EEOC complaint. After reviewing your arguments and the information at issue, we agree that you have established that litigation was reasonably anticipated when the district received this request for information. We also find that the submitted information is related to the litigation for purposes of section 552.103(a).

We note, however, that 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 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).

We now address your section 552.101 claim for the information that is subject to section 552.022. 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 such as section 21.355 of the Education Code. Section 21.355 of the Education Code 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 administrator. *See* Open Records Decision No. 643 (1996). In that decision, we determined that the word “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* Open Records Decision No. 643 at 4. We also concluded that the word “administrator” in section 21.355 means a person who is required to and does 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. *Id.*

In this instance, we note that the submitted evaluations relate to a school nurse, performing the duties of a nurse, rather than a teacher or an administrator. Consequently, we find that section 21.355 of the Education Code is not applicable to the submitted evaluations of the school nurse, and thus, the evaluations are not excepted from disclosure under section 552.101 of the Government Code. *See* Educ. Code § 21.355; Open Records Decision No. 643 at 4. *See also* Educ. Code § 21.003(a) (person may not be employed as a teacher, teacher intern or teacher trainee, librarian, education aide, administrator, or counselor by a

school district unless the person holds an appropriate certificate or permit issued as provided by Subchapter B); *compare* Educ. Code § 21.003(b) (person may not be employed by a school district as an audiologist, occupational therapist, physical therapist, physician, nurse, school psychologist, associate school psychologist, social work, or speech language pathologist unless the person is licensed by the state agency that licenses that profession).

You also claim that the submitted evaluations are excepted under 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). 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 under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101 of the act. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Accordingly, we will consider your section 552.101 and section 552.102 claims together.

For information to be protected from public disclosure by the common law right of privacy under section 552.101, the information must meet the criteria set out in *Industrial Foundation*. In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Id.* at 685. We understand you to assert that release of the evaluations is an unwarranted invasion of personal privacy. However, the evaluations relate to a district employee and there is a legitimate public interest in the qualifications of a public employee and how that employee performs job functions and satisfies employment conditions. *See generally* Open Records Decision Nos. 470 at 4 (1987) (public has legitimate interest in job performance of public employees), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (1984) (scope of public employee privacy is narrow). Therefore, the district may not withhold the evaluations from public disclosure based on the common law right to privacy.

We note that the evaluations contain social security numbers. Section 552.147 of the Government Code<sup>4</sup> provides that “[t]he social security number of a living person is excepted from” required public disclosure under the Act. Therefore, the district must withhold the social security numbers contained in the evaluations under section 552.147.<sup>5</sup>

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<sup>4</sup>Added by Act of May 23, 2005, 79th Leg., R.S., S.B. 1485, § 1, sec. 552.147(a) (to be codified at Tex. Gov’t Code § 552.147).

<sup>5</sup>We note that section 552.147(b) of the Government Code authorizes a governmental body to redact a living person’s social security number from public release without the necessity of requesting a decision from this office under the Act.

In summary, the district may withhold the submitted information that is not subject to section 552.022 under section 552.103. The district must withhold the social security numbers in the evaluations. 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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).

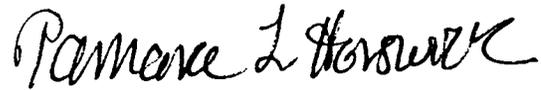
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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,

A handwritten signature in black ink that reads "Tamara L. Harswick". The signature is written in a cursive style with a large initial 'T'.

Tamara L. Harswick  
Assistant Attorney General  
Open Records Division

TLH/sdk

Ref: ID# 231566

Enc. Submitted documents

c: Ms. Nikki Shaleen  
701 Tayopa Court  
El Paso, Texas 79952  
(w/o enclosures)