ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 17, 2006

Mr. Kevin W. Cole
Austin Independent School District
Cole & Powell, P.C.
Wells Fargo Tower
400 West 15th Street, Suite 304
Austin, Texas 78701

OR2006-12159

Dear Mr. Cole:

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# 262416.

The Austin Independent School District (the "district"), which you represent, received a request for information pertaining to the requestor. You indicate that some of the requested information will be made available to the requestor, but claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304.

We first note that the United States Department of Education Family Policy Compliance Office recently informed this office that the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code, does not permit state and local educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act.[1] Consequently, state and local educational authorities that receive a request for education records from a member of the

[1]A copy of this letter may be found on the OAG's website: http://www.oag.state.tx.us/opinopen/og_resources.shtml.

public under the Act must not submit education records to this office in unredacted form, that is, in a form in which "personally identifiable information" is disclosed. *See* 34 C.F.R. § 99.3 (defining "personally identifiable information"). You have submitted, among other things, unredacted education records for our review. Because our office is prohibited from reviewing these education records to determine the applicability of whether appropriate redactions under FERPA have been made, we will not address the applicability of FERPA to any of the submitted records. Such determinations under FERPA must be made by the educational authority in possession of the education records.[2] However, we will address the applicability of your claimed exceptions to the submitted information.

Next, we note that although you raise sections 552.101 and 552.107 of the Government Code, you have not submitted arguments explaining how these exceptions apply to the submitted information. *See* Gov't Code § 552.301(e)(1) (requiring the governmental body to explain the applicability of the raised exception). Therefore, we assume that you have withdrawn your claims under these sections. *See id.* §§ 552.301, .302. We will address your arguments under section 552.103.

We also note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides in part:

> 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:
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> (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;
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> . . .
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> (8) a statement of the general course and method by which an agency's functions are channeled and determined, including the nature and requirements of all formal and informal policies and procedures;
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> . . .

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[2]In the future, if the agency does obtain parental consent to submit unredacted education records and the agency seeks a ruling from this office on the proper redaction of those education records in compliance with FERPA, we will rule accordingly.

(17) information that is also contained in the public court record[.]

Id. § 552.022(a)(1), (3), (8), (17). The submitted information includes teacher evaluations, invoices and checks, district policies and procedures, and court filed documents, which are all subject to section 552.022. The district must release this information, all of which we have marked, unless it is expressly confidential under other law. You claim that this information is excepted from disclosure under section 552.103 of the Government Code. We note that section 552.103 is a discretionary exception that protects the governmental body's interests and may be waived. *See 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); Open Records Decision Nos. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived). As such, the district may not withhold the information subject to section 552.022 under section 552.103.

We note, however, that the teacher evaluations may be excepted from disclosure under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information made confidential by statute, such as section 21.355 of the Education Code, which provides that "a document evaluating the performance of a teacher or administrator is confidential." Educ. Code § 21.355. 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). This office has determined 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 the evaluation. Open Records Decision No. 634. The submitted teacher evaluations, which we have marked, are confidential under section 21.355 of the Education Code. However, section 21.352(c) of the Education Code specifically provides that "[e]ach teacher is entitled to receive a written copy of the evaluation on its completion." Therefore, to the extent the evaluations are the type contemplated in section 21.352, the requestor has a right of access under section 21.352(c) to her evaluations. If the requestor does not have a right of access under section 21.352(c), the evaluations are excepted from disclosure pursuant to section 552.101 in conjunction with section 21.355 of the Education Code.

We also note that the information subject to section 552.022 of the Government Code includes an account number. Section 552.136 of the Government Code states that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136. Section 552.136 makes information confidential for purposes of section 552.022. Therefore, the district must withhold the account number we have marked under section 552.136 of the Government Code. The remaining information subject to section 552.022 of the Government Code must be released. We will address your arguments against the disclosure of the remaining 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 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.

Id. § 552.103(a), (c). A governmental body 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 request for information is received; 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). A government body must meet both prongs of this test for information to be excepted under section 552.103(a).

You assert that the submitted information relates to pending litigation proceedings initiated by the requestor against the district, styled *Hicks v. Austin Independent School District*, Cause No. 280517 (County Ct. No. 2, Travis County, Tex.). You also state, and provide documentation showing, that the district received the present request after the requestor initiated the pending litigation. Based on your representations and our review, we find that the submitted information does relate to litigation that was pending when the request for information was received.

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103 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. We also note that the applicability of section 552.103 ends once the litigation has been concluded. We have marked the information that may be withheld under section 552.103. We note, however, that the remaining information has been provided by or to the requestor or her counsel; this information may therefore not be withheld under section 552.103.

We note that some of the remaining information may be excepted from disclosure under sections 552.101, 552.117, 552.137 and 552.147 of the Government Code. Section 552.101 of the Government Code encompasses information made confidential by section 201.402 of the Occupations Code. Chapter 201 of the Occupations Code governs the practice of chiropractic treatment. Section 201.402 of the Occupations Code provides in relevant part as follows:

> (a) Communications between a chiropractor and a patient relating to or in connection with any professional services provided by a chiropractor to the patient are confidential and privileged and may not be disclosed except as provided by this subchapter.
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> (b) Records of the identity, diagnosis, evaluation, or treatment of a patient by a chiropractor that are created or maintained by a chiropractor are confidential and privileged and may not be disclosed except as provided by this subchapter.
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> (c) A person who receives information from the confidential communications or records, excluding a person listed in Section 201.404(a) who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 201.402(a)-(c). We note that chapter 201 includes exceptions to confidentiality and consent provisions. *See id.* §§ 201.403,.404,.405. The chiropractor record we have marked is subject to chapter 201 of the Occupations Code. Accordingly, the district may release this information only if chapter 201 of the Occupations Code permits the district to do so.

Section 552.117(a)(1) of the Government Code provides that information is excepted from disclosure if it relates to a current or former employee's home address, home telephone number, social security number, or reveals whether the employee has family members. *See* Gov't Code § 552.117(a)(1). The district is required to withhold this information if the employee timely requested that this information be kept confidential under section 552.024 of the Government Code. *See* Open Records Decision Nos. 622 (1994), 455 (1987); *see generally* Open Records Decision No. 530 (1989) (stating that whether particular piece of information is public must be determined at time request for it is made). We note that the requestor has a special right of access to her personal information. *See* Gov't Code § 552.023(b) (governmental body may not deny access to person to whom information relates or person's agent on grounds that information is considered confidential by privacy principles). Pursuant to section 552.117(a)(1), the district must withhold the personal information we have marked if the employees at issue made a timely election under section 552.024 of the Government Code. If these employees did not make a proper election under section 552.024, this personal information must be released.

Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See id.* § 552.137(a)-(c). We note that section 552.137 does not apply to a government employee's work e-mail address because such an address is not that of the employee as a "member of the public" but is instead the address of the individual as a government employee. We have marked the e-mail addresses that must be withheld under section 552.137 of the Government Code, unless the district receives consent for their release.

Section 552.147 of the Government Code 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 number we have marked under section 552.147.[3]

In summary, this ruling does not address the applicability of FERPA to the submitted information. Should the district determine that all or portions of the submitted information consists of "education records" that must be withheld under FERPA, the district must dispose of that information in accordance with FERPA, rather than the Act. The teacher evaluations we have marked are confidential under section 21.355 of the Education Code and must be withheld under section 552.101 of the Government Code, unless the district determines that the requestor has a right of access to them under section 21.352(c). The district must withhold the account number we have marked under section 552.136 of the Government Code. The remaining information subject to section 552.022 of the Government Code must be released. The district may withhold the information we have marked under section 552.103 of the Government Code. The chiropractor record we have marked may only be released in accordance with chapter 201 of the Occupations Code. The personal information we have marked must be withheld under section 552.117 of the Government Code if the employees at issue made a timely election under section 552.024 of the Government Code. The e-mail addresses we have marked must be withheld under section 552.137 of the Government Code, unless the district received consent for their release. The district must withhold the social security number we have marked under section 552.147 of the Government Code. The remaining 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

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[3]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.

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); *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 Office of the Attorney General 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. 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,

James A. Person III
Assistant Attorney General
Open Records Division

JAP/dh

Ref: ID# 262416

Enc. Submitted documents

c: Ms. Katrina Hicks
P.O. Box 141203
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(w/o enclosures)