



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 26, 2007

Ms. Mari McGowan
Abernathy Roeder Boyd & Joplin
P.O. Box 1210
McKinney, Texas 75070-1210

OR2007-02245

Dear Ms. McGowan:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 272137.

The McKinney Independent School District (the "District"), which you represent, received several requests for a copy of a certain investigation report regarding McKinney North High School and any complaints filed against a named District employee. You state that "[t]he documents subject to this request are [two documents you] enclosed as Exhibits 'B' and 'C'."¹ You claim that these documents are excepted from required public disclosure under sections 552.101, 552.102, and 552.135 of the Government Code. In addition, you have notified twenty three third parties of these requests to give them an opportunity to assert any proprietary or privacy interest in the information. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to Government Code section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act

¹We note that the submitted information is not responsive to Mr. Ortiz's second request dated December 29, 2006, which is for information concerning fees, costs, and expenses charged to the District in connection with the investigation and for written materials dealing with all charges from Harry Jones to the District related to his work in connection with the investigation. Because the District has not submitted information responsive to Mr. Ortiz's second request, we have no basis for finding such information excepted from disclosure. Accordingly, to the extent such information exists, you must release this information to the requestor at this time. *See* Gov't Code §§ 552.301, 552.302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible under circumstances).

in certain circumstances). We have received comments from several third parties. We have considered the third parties' comments, the exceptions you claim and reviewed the submitted information.

You state that, in accordance with the Family Education Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code, and section 552.026 of the Government Code,² the District redacted and will withhold from public disclosure all student identifiable information in the submitted information. The United States Department of Education Family Policy Compliance Office recently informed this office that FERPA 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.³ Consequently, state and local educational authorities that receive a request for education records from a member of the 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").⁴ Accordingly, you state that the District is not submitting the information at issue for a ruling under FERPA. We will therefore address the applicability of your claimed exceptions to the redacted records.

You acknowledge that the information at issue, the Executive Summary of the investigation which you submitted to this office as Exhibit B, and the full investigation report which you submitted as Exhibit C, is subject to section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) states that

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required public 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.

²Section 552.026 of the Government Code states that the Public Information Act does not require the release of information contained in education records of an educational agency or institution, except in conformity with FERPA. *See* Gov't Code § 552.026

³A copy of this letter may be found on the Office of the Attorney General's website: http://www.oag.state.tx.us/opinopen/og_resources.shtml.

⁴In the future, if the District does obtain parental consent to submit unredacted education records and the district seeks a ruling from this office on the proper redaction of those education records in compliance with FERPA, we will rule accordingly.

Gov't Code § 552.022(a)(1). Here, the information pertains to a completed investigation conducted for the District. Thus, under section 552.022(a)(1), the District may withhold the information only to the extent it is made confidential under other law or is otherwise protected by section 552.108 of the Government Code.

You assert that section 21.355 of the Education Code makes confidential the information at issue. You bring your section 21.355 claim under section 552.101 of the Government Code. Section 552.101 excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101.

Section 21.355 provides that "[a] document evaluating the performance of a teacher or administrator is confidential." Educ. Code § 21.355. The statute does not define "evaluating." 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). Thus, the attorney general has interpreted section 21.355 to apply to a broader range of documents than just the formal appraisals contemplated in Subchapter H of chapter 21 of the Education Code. *See id.* at 2.

In Open Records Decision No. 643, we determined that for purposes of section 21.355, the word "teacher" means 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 determined that the word "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. *Id.*

In considering the applicability of section 21.255 to a memorandum from a principal to a teacher concerning complaints about the teacher, the Austin Court of Appeals considered the AMERICAN HERITAGE DICTIONARY 453 (1973) definition of "to evaluate," which is "1. To ascertain or fix the value or worth of. 2. To examine and judge; appraise; estimate." *Abbott v. North East Indep. Sch. Dist.*, No. 03-04-00744-CV, 2006 WL 1293545, at 4 (Tex. App.—Austin 2006, no pet. h.) (rejecting attorney general's argument that memorandum was merely a teacher reprimand that cannot be an evaluation). The court concluded that a principal's written memorandum to the teacher was a "document that evaluates" for purposes of section 21.355 because it reflected the principal's judgment regarding her actions, gave corrective direction, and provided for further review. *See id.*

You state that the individuals identified in exhibit D were required to be, and were, certified under chapter 21 of the Education Code at the time they performed the duties outlined in the investigation report. You have identified in Exhibit D the individuals who were District administrators and the individuals who were District teachers at the time they performed the

duties detailed in the report. You assert that the information at issue contains evaluative documentation and assessment information regarding these individuals' performance.

After review of exhibits B and C, we determine that both are documents that evaluate the performance of a teacher or an administrator. We therefore conclude that section 21.355 of the Education Code makes confidential both documents. Consequently, the District must withhold both documents from required public disclosure under section 552.101 of the Government Code.⁵

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); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

⁵In light of our conclusion under section 21.355, we need not address the District's or third parties' other claims for protection of the information.

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,



Kay Hastings
Assistant Attorney General
Open Records Division

KH/sdk

Ref: ID# 272137

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