ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 19, 2007

Ms. Lisa R. McBride
Bracewell & Giuliani, LLP
711 Louisiana Street, Suite 2300
Houston, Texas 77002-2770

OR2007-12207

Dear Ms. McBride:

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# 289462.

The Columbia-Brazoria Independent School District (the "district"), which you represent, received a request for the names, applications, certification records, college transcripts, years of service records, and PDAS evaluations for individuals who were hired by the district for six specified teaching positions. You state that the district is redacting some information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232(a).[1] You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.117, 552.130,[2] 552.137, and 552.147 of the

[1]We note that our office is prohibited from reviewing these education records to determine whether appropriate redactions under FERPA have been made; therefore, we will not address the applicability of FERPA to any of the submitted records. Accordingly, we also do not address your arguments under section 552.114 of the Government Code. *See* Gov't Code §§ 552.026 (incorporating FERPA into the Act), .114 (excepting from disclosure "student records"); Open Records Decision No. 539 (1990) (determining the same analysis applies under section 552.114 of the Government Code and FERPA).

[2]We note that you did not raise section 552.130 as an exception to disclosure within ten business days of the date the district received the present request. *See* Gov't Code §§ 552.301(b), .302. However, because section 552.130 is a mandatory exception that can provide a compelling reason to withhold information from disclosure, we will address your claim under section 552.130. *See id.*; *see also* Open Records Decision Nos. 150 at 2 (1977), 319 (1982).

Government Code.[3] We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that some of the submitted information is subject to required public disclosure under section 552.022 of the Government Code, which provides in relevant 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:
>
> > (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[.]

Gov't Code § 552.022(a)(1). The submitted information contains completed teacher evaluations. Therefore, pursuant to section 552.022, the district must release the completed teacher evaluations unless they are confidential under other law. The district raises sections 552.101 and 552.103 for this information. Section 552.103 is a discretionary exception to disclosure that protects a 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. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 does not qualify as "other law" that makes information confidential for the purposes of section 552.022. Therefore, the district may not withhold the teacher evaluations under section 552.103 of the Government Code. However, section 552.101 is "other law" for the purpose of section 552.022. Therefore, we address your argument under this section for the completed teacher evaluations.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes. 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 an administrator. *See* Open Records Decision No. 643 (1996). 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* ORD 643 at 4.

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[3]Although you also raise section 552.024, we note that this section is not an exception to public disclosure under the Act.

You assert that the submitted teacher evaluations are confidential under section 21.355. You inform us that the district employees at issue were required to hold and did hold teaching certificates and were engaged in the activity of teaching at the time of the submitted evaluations. Therefore, we conclude that the information you have marked is confidential under section 21.355, and the district must withhold it under section 552.101 of the Government Code.

We now turn to your argument under section 552.103 with regard to the remaining information. Section 552.103 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.
>
> . . .
>
> (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). 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 was pending or reasonably anticipated on the date that the governmental body received the request for information, 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 governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To establish that litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *Id.* This office has found that a pending EEOC complaint indicates litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982), 281 at 1 (1981).

In this instance, you state that the requestor's wife filed a charge of discrimination with the EEOC against the district on September 15, 2006. You further explain that before the EEOC

could complete its investigation of the charge, the requestor's wife requested a right to sue letter, triggering her ability to pursue these claims in state or federal court. The EEOC issued the Notice of Right to Sue letter on May 24, 2007. The letter indicates that the complainant has the right to sue on the claim for ninety days following the receipt of the notice. The current request was made on June 20, 2007. The district informs this office that upon attempting to contact the requestor regarding seeking a ruling from this office, the requestor informed it that all further communications should be directed to the attorney representing him and his wife. Upon review, we determine that the district has established that it reasonably anticipated litigation on the date that it received the request. Further, we determine that the submitted information relates to the anticipated litigation. Accordingly, the district may withhold the remaining information pursuant to section 552.103.[4]

However, once the information at issue has been obtained by all parties to the anticipated litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to the information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, any information that has either been obtained from or provided to all other parties 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 concluded or is no longer anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

In summary, the district must withhold the teacher evaluations it has marked pursuant to section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. The district may withhold the remaining information pursuant to section 552.103.

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).

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[4]As our ruling is dispositive, we do not address your remaining arguments against disclosure.

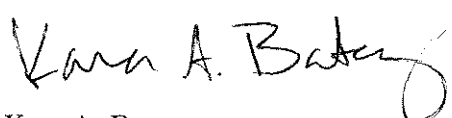
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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,



Kara A. Batey
Assistant Attorney General
Open Records Division

KAB/jh

Ref: ID# 289462

Enc. Submitted documents

c: Mr. Rusty Linney
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(w/o enclosures)