ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 20, 2007

Mr. Robert Viña, III
Walsh, Anderson, Brown, Schulze & Aldridge, P.C.
6521 North 10th Street, Suite C
Mcallen, Texas 78504

OR2007-15313

Dear Mr. Viña:

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# 295163.

The Raymondville Independent School District (the "district"), which you represent, received a request for six categories of information pertaining to the district's policies, service proposals, spending, hiring recommendations, contact information, and specified e-mail correspondence. You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that you did not submit information responsive to any of the requested categories other than the e-mail correspondence. Further, you have not indicated that such information does not exist or that you wish to withhold any such information from disclosure. Therefore, to the extent information responsive to these categories of the request existed on the date the request was received, we assume that you have released it to the requestor. If you have not released any such information, you must release it to the requestor at this time. *See* Gov't Code §§ 552.301(a), .302; Open Records Decision No. 664 (2000) (noting that if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible under circumstances).

Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses information protected by other

statutes. You raise this exception in conjunction with section 21.256 of the Education Code, which permits a teacher to request that a hearing held under that subchapter be public rather than private. *See* Educ. Code § 21.256. However, this statute does not make information confidential. *See* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality must be express, and confidentiality requirement will not be implied from statutory structure), 478 at 2 (1987) (statutory confidentiality requires express language making certain information confidential or stating that information shall not be released to the public). Therefore, the district may not withhold any of the requested information under section 552.101 in conjunction with section 21.256.

Section 552.101 also encompasses 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). In Open Records Decision No. 643, we determined that a "teacher" for purposes of section 21.355 means a person who (1) 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 (2) 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 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.* You assert that the submitted information includes evaluations that are confidential under section 21.355; however, you do not state or provide evidence that the employee who was the subject of these evaluations held a teacher's certificate or permit or administrator's certificate under subchapter B of chapter 21 of the Education Code and was performing the functions of a teacher or administrator at the time of the evaluations. Thus, we are unable to conclude that section 21.355 is applicable in this instance. If the employee held a teacher's certificate or permit or an administrator's certificate and was performing the functions of a teacher or administrator at the time of the evaluation, the information we have marked is confidential under section 21.355, and must be withheld under section 552.101 of the Government Code. To the extent that the employee does not satisfy these criteria, the submitted information is not confidential under section 21.355 and may not be withheld under section 552.101 on that ground.

We next address your claim that the submitted information is excepted from disclosure in its entirety 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(a) 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). Accordingly, we will consider your privacy claims under section 552.101 and section 552.102(a) together.

In order for information to be protected from public disclosure by the doctrine of common-law 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. You assert that release of the personnel information at issue is an invasion of personal privacy. However, this information relates solely to questions regarding whether particular job functions have been performed and conditions for continued employment. Since, the public has a legitimate interest in the qualifications of a public employee and how that employee performs job functions and satisfies employment conditions, the district may not withhold any of the remaining submitted information from public disclosure based on the common-law right to privacy under section 552.101 or section 552.102. *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).

Section 552.111 of the Government Code excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." Gov't Code § 552.111. Section 552.111 encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as:

> (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
>
> (2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5(a). A governmental body seeking to withhold information under this exception bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. *Id.*; ORD 677 at 6-8. In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied that 1) a reasonable person

would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and 2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and created or obtained the information for the purpose of preparing for such litigation. *Nat'l Tank Co. v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204; ORD 677 at 7.

You argue that the submitted information consists of "communications of the thoughts and recommendations of the Superintendent and the Business Manager which will be entered as evidence for consideration by the Independent Hearing Officer in a confidential hearing." However, upon review of your arguments and the information at issue, we find that you have not demonstrated that any of the submitted information consists of communications made in anticipation of litigation or for trial between a party and a representative of a party or among a party's representatives. *See* TEX. R. CIV. P. 192.5. We therefore conclude that the district may not withhold any of the submitted information on the basis of the attorney work product privilege under section 552.111 of the Government Code.

In summary, if the employee at issue held a teacher's certificate or permit or an administrator's certificate and was performing the functions of a teacher or administrator at the time of the correspondence, the information we have marked is confidential under section 21.355 of the Education Code, and must be withheld under section 552.101 of the Government Code. To the extent that the employee does not satisfy these criteria, this information, together with 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 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,

Heather Pendleton Ross
Assistant Attorney General
Open Records Division

HPR/mcf

Ref: ID# 295163

Enc: Submitted documents

c: Mr. Robert H. Wilcox
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