



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

March 3, 2008

Mr. David G. Petter  
Hoodenpyle & Lobert, P.C.  
Commerce Center  
519 East Border Street  
Arlington, Texas 76010-7402

OR2008-02845

Dear Mr. Petter:

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# 303509.

The Glen Rose Independent School District (the "district"), which you represent, received a request for a specified former employee's 1) hiring date, beginning and ending salaries, and date his contract ended, 2) number of written and/or verbal complaints against him, 3) disciplinary actions against him, and 4) nature and reasons for his departure. You state that the district has released information responsive to item one and the former employee's resignation letter to the requestor. You claim that the submitted information is excepted from disclosure under section 552.101 of the Government Code, as well as the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232(a). We have considered the exceptions you claim and reviewed the submitted information.

We note that the United States Department of Education Family Policy Compliance Office (the "DOE") has 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 purposes of our review in the open records ruling process under the Act.<sup>1</sup> Consequently, state and local educational

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<sup>1</sup>A copy of this letter may be found on the attorney general's website, available at [http://www.oag.state.tx.us/opinopen/og\\_resources.shtml](http://www.oag.state.tx.us/opinopen/og_resources.shtml).

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”). You have submitted unredacted education records for our review. Because our office is prohibited from reviewing education records, we will not address the applicability of FERPA to the information at issue. Such determinations under FERPA must be made by the educational authority in possession of the education record.<sup>2</sup> We will, however, address your remaining argument against the disclosure of the submitted information.

Next, we address your assertion that the district does not have to create documents that show the number of complaints against the former employee. We note that the Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex.Civ.App.—San Antonio 1978, writ dism’d); Open Records Decision No. 452 at 3 (1986). Likewise, a governmental body is not required to produce the responsive information in the format requested, a list, or create new information to respond to the request for information. *AT&T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 676 (Tex.1995); *Fish v. Dallas Indep. Sch. Dist.*, 31 S.W.3d 678, 681 (Tex. App.—Eastland 2000, pet. denied); Attorney General Opinion H-90 (1973); Open Records Decision Nos. 452 at 2-3 (1986), 342 at 3 (1982), 87 (1975). In this instance, the requestor asks for the “number of complaints” but does not request that such information be supplied as a “list” or in any other particular format. You make no assertion that the district does not maintain the requested information. Instead, you state that the district “has attached information that might be potentially interpreted as complaints” and you ask this office to determine which of these documents are responsive complaints. Based on your statements, and the submitted information, it is clear that the district does maintain the requested complaint numbers. Thus, while the district need not distill the requested information into the form of a list, it must nevertheless release information that it in good faith believes to be responsive to the request unless such information may or must be withheld pursuant to one of the Act’s exceptions to disclosure.

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. Section 552.101 encompasses information protected by other statutes, 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. In addition, the court has concluded a written reprimand constitutes an evaluation for purposes of section 21.355 because “it reflects the principal’s judgment regarding [a teacher’s] actions,

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<sup>2</sup>In 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.

gives corrective direction, and provides for further review.” *North East Indep. Sch. Dist. v. Abbott*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.). 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 documents 4 through 30 consist of evaluations that are confidential under section 21.355. Upon review, we agree that documents 4-18, 22-26, and 28-30 fall within the scope of section 21.355; however, you do not state or provide documentation 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 to this information. 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 evaluations, documents 4-18, 22-26, and 28-30 are 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, documents 4-18, 22-26, and 28-30 are not confidential under section 21.355 and may not be withheld under section 552.101 on that ground. We find, however, that documents 19-21 and 27 do not evaluate the performance of a teacher or administrator as provided by section 21.355 of the Education Code. Therefore, none of the information in documents 19-21 and 27 may be withheld under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.

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).<sup>3</sup> *See Gov’t Code* § 552.137(a)-(c). The e-mail addresses at issue are not of a type specifically excluded by section 552.137(c). Thus, the district must withhold the e-mail addresses we have marked

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<sup>3</sup>The Office of the Attorney General will raise a mandatory exception like section 552.137 of the Government Code on behalf of a governmental body, but ordinarily will not raise other exceptions. *See Gov’t Code* §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001).

under section 552.137, unless the owners of the e-mail addresses have affirmatively consented to their release. *See id.* § 552.137(b).

In summary, the district must withhold: (1) documents 4-18, 22-26, and 28-30 under section 21.355 of the Education Code in conjunction with section 552.101 of the Government Code, to the extent that the employee in question held a teacher's certificate or permit or an administrator's certificate and was functioning as a teacher or administrator at the time of the evaluations and (2) the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses have affirmatively consented to their release. The remaining information must be released to the requestor. 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 consist of "education records" that must be withheld under FERPA, the district must dispose of that information in accordance with FERPA, rather than the Act.

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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).

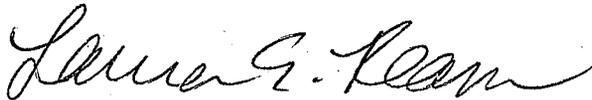
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can challenge that decision by suing the governmental

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,



Laura E. Ream  
Assistant Attorney General  
Open Records Division

LER/jb

Ref: ID# 303509

Enc. Submitted documents

c: Ms. Martha Deller  
Star-Telegram  
P.O. Box 1870  
Fort Worth, Texas 76101  
(w/o enclosures)