



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 22, 2008

Mr. William M. Buechler  
Buechler & Associates  
3660 Stoneridge Road, Suite D-101  
Austin, Texas 76746

OR2008-09952

Dear Mr. Buechler:

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# 316459.

The Mount Pleasant Independent School District Police Department (the "department"), which you represent, received a request for "all written material associated and gathered by [the department]" in a specified case. You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.108 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 (interested party may submit comments stating why information should or should not be released).

Initially, we note that the requestor contends that he was not properly notified of the department's request for a ruling from this office as required by section 552.301(d)(2) of the Government Code. *See id.* § 552.301(d)(2) (governmental body must provide requestor with copy of governmental body's written communication to attorney general asking for decision no later than 10 business days after receiving request for information). Pursuant to section 552.302, a governmental body's failure to timely provide the requestor with a copy of its written communication to this office results in the presumption that the information is public.

The department states that it received the written request for information on May 2, 2008. Thus, the 10-day deadline for requesting a ruling was May 16, 2008. We received the department's request for a decision from our office on May 15, 2008. You state that the

department sent a copy of the request for a decision to the requestor. However, the requestor indicates to this office that he received his copy of the department's request for this decision in an envelope postmarked May 20, 2008, and has provided documentation in support. Accordingly, we conclude that, in sending the requestor a copy of the ruling request, the department did not comply with section 552.301 of the Government Code. *See* Gov't Code § 552.308 (describing rules for calculating submission dates of documents sent via first-class United States mail, common or contract carrier, or interagency mail).

In addition, we note that you have redacted portions of the submitted information. You appear to have redacted at least some of this information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232(a). Recently, the United States Department of Education Family Policy Compliance Office informed this office that the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232(a), 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. However, FERPA is not applicable to law enforcement records maintained by the district police department that were created by the department for a law enforcement purpose. *See* 20 U.S.C. § 1232g(a)(4)(B)(ii); 34 C.F.R. §§ 99.3, 99.8. The redacted information is contained in police reports and records prepared by the district police department. Thus, the redacted information is not subject to FERPA and no portion of it may be withheld on that basis.

Pursuant to section 552.301 of the Government Code, a governmental body that seeks to withhold requested information must submit to this office a copy of the information, labeled to indicate which exceptions apply to which parts of the copy, unless the governmental body has received a previous determination for the information at issue. Gov't Code §§ 552.301(a), .301(e)(1)(D). You do not assert, nor does our review of our records indicate, that you have been authorized to withhold any of the redacted information without seeking a ruling from this office. *See id.* § 552.301(a); Open Records Decision No. 673 (2000). As such, these types of information must be submitted in a manner that enables this office to determine whether the information comes within the scope of an exception to disclosure. In this instance, we are unable to discern the nature of all of the redacted information. Thus, the department has failed to comply with section 552.301 for the redacted information.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the information is public and must be released, unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). Generally, a governmental body may demonstrate a compelling reason to withhold information by a showing that the information is made confidential by another source of law or affects third party interests. *See* Open Records Decision No. 630 (1994).

Although you raise section 552.108 of the Government Code, section 552.108 is a discretionary exception to disclosure that protects a governmental body's interests and may be waived by the governmental body. *See* Open Records Decision No. 177 (1977) (governmental body may waive statutory predecessor to section 552.108 ); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the department may not withhold any of the submitted information under section 552.108 of the Government Code. However, because section 552.101 of the Government Code can provide a compelling reason to withhold information, we will address your arguments concerning this exception.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that other statutes make confidential. You assert that Exhibit B consists of documents that are excepted from disclosure under section 552.101 in conjunction with 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 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). We also 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; *Abbott v. North East Independent School District*, 212 S.W.3d 364, 367 (Tex. App.—Austin 2006, no pet.) (holding that a document evaluates a teacher when it "reflects the principal's judgment regarding [the teacher's] actions, gives corrective direction, and provides for further review."). Upon review of the information submitted as Exhibit B, we conclude this information does not constitute an evaluation of the employee's performance for purposes of section 21.355. Thus, you may not withhold the submitted information under section 552.101 in conjunction with section 21.355 of the Education Code. As you raise no further exceptions, the submitted information must be released in its entirety, including the redacted information.<sup>1</sup>

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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<sup>1</sup>We note that the submitted information contains social security numbers. 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. Gov't Code § 552.147(b).

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). If the governmental body does not file suit over 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).

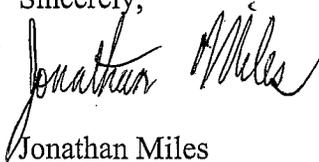
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records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



Jonathan Miles  
Assistant Attorney General  
Open Records Division

JM/jh

Ref: ID# 316459

Enc. Submitted documents

c: Mr. Joseph D. Hayes  
P.O. Box 2140  
Mount Pleasant, Texas 75456  
(w/o enclosures)