



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 29, 2009

Ms. Leticia D. McGowan
Dallas Independent School District
3700 Ross Avenue
Dallas, Texas 75204

OR2009-05711

Dear Ms. McGowan:

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# 341327.

The Dallas Independent School District (the "district") received a request for the following categories of information: 1) all Franklin D. Roosevelt High School walk-through visitation forms from April 1, 2008 to May 9, 2008; 2) performance evaluations during the academic years of 2004 through 2008; 3) a list of teachers who signed up for a particular interview at a district job fair; and 4) all e-mail correspondence between several named individuals pertaining to various subject matter from October 2007 to August 2008. You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the representative sample of information.¹ We have also received comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit written comments regarding availability of requested information).

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Initially, we note that the submitted information includes education records. The United States Department of Education Family Policy Compliance Office has informed this office that the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code, 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.² 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"). You have submitted, among other things, unredacted education records for our review. Because our office is prohibited from reviewing these education records to determine the applicability of FERPA, we will not address FERPA with respect to these records. *See* 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.3. Such determinations under FERPA must be made by the educational authority in possession of the education records.³ However, we will consider the exceptions to disclosure under the Act that you have raised for the information at issue.

Next, we note that some of the requested information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2009-05127 (2009). In that ruling, we concluded the district may withhold some of the submitted information under section 552.103 of the Government Code. Thus, to the extent the requested information contains the same information previously ruled upon, we conclude that, as we have no indication that the law, facts, and circumstances on which the prior ruling was based have changed, the district may continue to rely on that ruling as a previous determination and withhold or release the requested information in accordance with Open Records Letter No. 2009-05127. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). To the extent the requested information is not encompassed by the previous ruling, we will address the submitted arguments.

We next note some of the remaining information is subject to disclosure under section 552.022 of the Government Code. Section 552.022(a)(1) provides for required public

²A copy of this letter may be found on the attorney general's website, <http://www.oag.state.tx.us/open/2006725usdoe.pdf>.

³In 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.

disclosure of “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body,” unless the information is expressly confidential under other law or excepted from disclosure under section 552.108 of the Government Code. Gov’t Code § 552.022(a)(1). In this instance, the submitted information includes a completed evaluation and a completed report. Although you seek to withhold the submitted information under section 552.103 of the Government Code, that section is a discretionary exception to disclosure that protects a governmental body’s interests and may be waived. *See id.* § 552.007; *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 Gov’t Code § 552.103); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions). As such, section 552.103 is not “other law” that makes information confidential for the purposes of section 552.022(a)(1). Therefore, the district may not withhold the completed evaluation and the completed report under section 552.103. However, we note that the information subject to 552.022, in addition to a portion of the remaining information, may be subject to section 552.101 of the Government Code.⁴ Because section 552.101 is other law that makes information confidential for the purposes of section 552.022(a)(1), we will address this exception.

Before addressing the confidentiality of the completed evaluation and completed report subject to section 552.022(a)(1), we will address your argument under section 552.103 for the remaining information. Section 552.103 provides 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 state or a political subdivision, as a consequence 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

⁴The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

pending or reasonably anticipated on the date 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).

You state, and provide documentation showing, that prior to the district's receipt of this request, a lawsuit styled *Stephen Wilson v. Dallas Independent School District*, Cause No. DC-08-08604-L, was filed, and is currently pending, in the District Court of Dallas County, Texas, 193rd Judicial District. You explain that the submitted information relates to the retaliation, whistleblower, and harassment claims at issue in the litigation. Accordingly, we find that litigation was pending when the district received this request for information and that the information at issue relates to the pending litigation. Therefore, section 552.103 is generally applicable to the information not subject to section 552.022(a)(1).

We note, however, the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information that is related to litigation through discovery procedures. *See* ORD 551 at 4-5. If the opposing party has obtained or otherwise been given access to the information, then there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). In this instance, we note that some of the submitted information was provided to the requestor, who is the opposing party in the pending litigation. Accordingly, these documents may not be withheld from the requestor under section 552.103. Thus, with the exception of the documents provided to the opposing party and the information subject to section 552.022(a)(1), the district may withhold the remaining information, which we have marked, under section 552.103 of the Government Code.

Finally, we address the information subject to section 552.022(a)(1) of the Government Code, along with the documents that are not excepted under section 552.103. Section 552.101 of the Government Code exempts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."⁵ Gov't Code § 552.101. This section encompasses information protected by other statutes, such as section 21.355 of the Education Code. Section 21.355 provides that "[a] document evaluating the performance of a teacher or administrator is confidential." Educ. Code § 21.355. Additionally, the court has concluded that a written reprimand constitutes an evaluation for purposes of section 21.355 as it "reflects the principal's judgment regarding

⁵The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

[a teacher's] actions, 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 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 concluded that a "teacher" for purposes of section 21.355 means a person who (1) is required to, and does in fact, hold a certificate or permit required under chapter 21 of the Education Code and (2) is teaching at the time of his or her evaluation. *Id.*

You do not indicate whether the individual whose evaluation is at issue held a teacher's certificate or permit under chapter 21 of the Education Code and was performing the functions of a teacher at the time of the evaluations. Therefore, we must rule conditionally. To the extent the individual in question did hold a teacher's certificate or permit and was functioning as a teacher at the time of the evaluation, then the district must withhold the documents we have marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. To the extent the individual in question did not hold a teacher's certificate or permit or was not functioning as a teacher at the time of the evaluation, then the information at issue is not confidential under section 21.355 of the Education Code and may not be withheld under section 552.101 of the Government Code. As you raise no other exception to disclosure of this information, it must be released to the requestor.

In summary, to the extent the submitted information is identical to the information previously requested and ruled upon by this office in Open Records Letter No. 2009-05127, the district may continue to rely upon that ruling as a previous determination and withhold or release the identical information in accordance with that ruling. The district may withhold the information we have marked under section 552.103 of the Government Code. To the extent the individual in question did hold a teacher's certificate or permit and was functioning as a teacher at the time of the evaluation, then the district must withhold the remaining information, which we have marked, under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. To the extent the individual in question did not hold a teacher's certificate or permit or was not functioning as a teacher at the time of the evaluation, then the remaining information is not confidential under section 21.355 of the Education Code and may not be withheld under section 552.101 of the Government Code. The remaining information must be released.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php.

or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Christina Alvarado
Assistant Attorney General
Open Records Division

CA/rl

Ref: ID# 341327

Enc. Submitted documents

cc: Requestor
(w/o enclosures)