



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 15, 2009

Ms. LeAnne Lundy
Feldman Rogers
5718 Westheimer Road, Suite 1200
Houston, Texas 77057

OR2009-08220

Dear Ms. Lundy:

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# 346010.

The Galveston Independent School District (the "district"), which you represent, received two requests from the same requestor for information related to individuals affected by the reduction in force declared by the Board of Trustees (the "board"), as well as information related to three named employees. You state the district has redacted student information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g.¹ You also state you have redacted social security numbers pursuant to section 552.147 of the Government Code.² You claim the remaining information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.111, 552.117, and 552.130 of the Government Code.³ We have considered the exceptions you claim and reviewed the submitted information.

¹We note that the United States Department of Education Family Policy Compliance Office (the "DOE") 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 purpose of our review in the open records ruling process under the Act. The DOE has determined that FERPA determinations must be made by the educational authority in possession of the education records. We have posted a copy of the letter from the DOE to this office on the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

²Section 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.

³Although you also raise sections 552.107, 552.115, and 552.136 of the Government Code, you have provided no arguments in support of withholding the submitted information under these exceptions. Therefore, we do not address the applicability of these exceptions to the submitted information. See Gov't Code §§ 552.301(e)(1)(A), .302.

Initially, we note the submitted information includes documents that are subject to section 552.022 of the Government Code. Section 552.022 provides, in relevant part:

(a) 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, except as provided by Section 552.108;

(2) the name, sex, ethnicity, salary, title, and dates of employment of each employee and officer of a governmental body;

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(1)-(3). The submitted information contains completed audits, evaluations, salary information, and contracts relating to the expenditure of public funds. This information, which we have marked, is expressly public under section 552.022. Although you claim this information is excepted from disclosure under section 552.103 of the Government Code, we note that this exception to disclosure is a discretionary exception under the Act that does not constitute "other law" for purposes of section 552.022.⁴ Thus, the district may not withhold the information subject to section 552.022 under section 552.103 of the Government Code. However, you also raise sections 552.101 and 552.117 of the Government Code for the information subject to section 552.022. These exceptions constitute "other law" for purposes of section 552.022. Therefore, we will consider your arguments under these exceptions.

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 that other statutes make confidential, such as section 21.355 of the Education Code. Section 21.355 provides "[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 [an administrator's] actions, gives corrective direction, and provides for further review." *North*

⁴Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or which implicates the interests of third parties. 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 No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

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). This office has determined 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 seek to withhold some of the information that is subject to section 552.022(a)(1) under section 21.355. You explain the information at issue was used to evaluate the administrators’ annual performance. You indicate the administrators held the appropriate administrator’s certificate at the time of the evaluations. Based on your representations and our review, we find the information we have marked is confidential under section 21.355 of the Education Code and must be withheld pursuant to section 552.101 of the Government Code.⁵

Next, we address your argument under section 552.117 of the Government Code for the remaining information subject to section 552.022. Section 552.117(a)(1) excepts from disclosure the current and former home addresses, telephone numbers, social security numbers, personal cellular telephone numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov’t Code § 552.117(a)(1). Whether a particular piece of information is protected under section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). You state the employee at issue elected to keep his information confidential. Thus, the district must withhold the information we have marked pursuant to section 552.117(a)(1) of the Government Code.

We next address your argument under section 552.103 of the Government Code for the information not subject to section 552.022. 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 state or a political subdivision, as a consequence of the person’s office or employment, is or may be a party.

⁵As our ruling is dispositive, we need not address your other argument against the disclosure of this information.

(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). The district has the burden of providing relevant facts and documents to show that the section 552.103 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). The district must meet both prongs of this test for information to be excepted under section 552.103.

This office has long held that for the purposes of section 552.103, "litigation" includes "contested cases" conducted in a quasi-judicial forum. *See* Open Records Decision Nos. 474 (1987), 368 (1983), 336 (1982), 301 (1982). Likewise, "contested cases" conducted under the Texas Administrative Procedure Act, chapter 2001 of the Government Code, constitute "litigation" for purposes of section 552.103. *See* Open Records Decision Nos. 588 (1991) (concerning former State Board of Insurance proceeding), 301 (1982) (concerning hearing before Public Utilities Commission). In determining whether an administrative proceeding is conducted in a quasi-judicial forum, this office has focused on the following factors: (1) whether the dispute is, for all practical purposes, litigated in an administrative proceeding where (a) discovery takes place, (b) evidence is heard, (c) factual questions are resolved, and (d) a record is made; and (2) whether the proceeding is an adjudicative forum of first jurisdiction, *i.e.*, whether judicial review of the proceeding in district court is an appellate review and not the forum for resolving a controversy on the basis of evidence. *See* Open Records Decision No. 588 (1991).

You state the requestor has filed two complaints with the district. You explain internal complaints filed with the district are "litigation" in that the district follows administrative procedures in handling such disputes. You further state the district's policy includes a three-level process wherein hearing officers hear the complaint at Levels I and II and the board hears the grievance if the grievant appeals to Level III. You explain that during these hearings, the grievant is allowed to be represented by counsel, present favorable evidence to the district, and present witnesses to "testify" on his behalf. You state the grievant must complete the grievance process before he can appeal to the Texas Education Agency, and eventually a court of competent jurisdiction. Based on your representations, we find you have demonstrated that the district's administrative procedure for disputes is conducted in a quasi-judicial forum, and thus, constitutes litigation for purposes of section 552.103. You state the requestor filed his first grievance on February 27, 2009. Thus, we determine that the district was involved in the pending litigation at the time it received the instant request for information. You state the information at issue directly relates to the pending litigation

against the district. Accordingly, we conclude section 552.103 is applicable to the information not subject to section 552.022 and it may be withheld on that basis.⁶

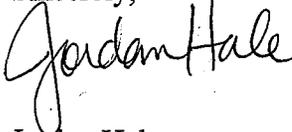
We note, however, that once information has been obtained by all parties to the pending litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the pending litigation is not excepted from disclosure under section 552.103(a) and it must be disclosed. Further, the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

In summary, the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code and the information we have marked pursuant to section 552.117(a)(1) of the Government Code. The remaining information subject to section 552.022 of the Government Code must be released. The district may withhold the information not subject to section 552.022 under section 552.103 of the Government Code.

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,



Jordan Hale
Assistant Attorney General
Open Records Division

JH/jb

⁶As our ruling is dispositive, we need not address your remaining arguments against disclosure.

Ref: ID# 346010

Enc. Submitted documents

cc: Requestor
(w/o enclosures)