



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 8, 2009

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

OR2009-09421

Dear Ms. McGowan:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 348309.

The Dallas Independent School District (the "district") received a request for information related to teacher Charlie Brown. The district asserts the information is excepted from disclosure under section 552.103 of the Government Code. We have considered the district's claimed exception to disclosure and have reviewed the submitted information.

First, we note 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.¹ 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"). The district has submitted unredacted education records to this office. Because our office is prohibited from reviewing education records, we will not address the applicability of FERPA to the information at issue. Determinations

¹A copy of this letter may be found on the Office of the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

under FERPA must be made by the educational authority in possession of the education record. Because we are unable to make a decision under FERPA, we will address your claimed argument for the submitted information.

Next, we note the information includes the teacher's evaluations, which are subject to disclosure under section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) provides for required 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). Section 552.103 is a discretionary exception and does not make information confidential; therefore, the district may not withhold the completed evaluations under section 552.103. 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). However, section 552.101 is other law that makes information confidential. Thus, we will consider the applicability of section 552.101 to the evaluations.

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. Section 552.101 encompasses information protected by a confidentiality statute. Section 21.355 of the Education Code provides, "A document evaluating the performance of a teacher or administrator is confidential." This office 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 that opinion, this office also concluded a teacher is someone who is required to hold and does hold a certificate required under chapter 21 of the Education Code and is teaching at the time of his evaluation. *Id.* Here, the teacher at issue has a teaching certificate and was teaching at the time of his evaluations. Thus, the submitted evaluations are confidential under section 21.355. However, section 21.352(c) of the Education Code specifically provides "[e]ach teacher is entitled to receive a written copy of the evaluation on its completion." In this instance, the requestor represents the teacher whose evaluations are at issue. Therefore, to the extent the evaluations are the type contemplated in section 21.352, the requestor has a right of access to this information under section 21.352(c). However, if the requestor does not have a right of access under section 21.352(c), then the evaluations we marked are excepted from disclosure pursuant to section 552.101 in conjunction with section 21.355 of the Education Code.

We next address the district's claim under section 552.103 of the Government Code for the remaining information. Section 552.103 provides in part:

- (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). The governmental body has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to that litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To establish that litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *Id.* To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982).

The district informs us the requestor represents a teacher whose termination has been recommended. The teacher appealed the recommendation for termination and requested the appointment of an independent hearing officer on the date the district received the present request for information. The hearing will be conducted under chapter 21 of the Education Code. Section 21.256 of the Education Code provides hearings requested under section 21.253 of the Education Code "shall be conducted in the same manner as a trial without a jury in a district court of [Texas]." Educ. Code § 21.256(e). Section 21.256 also specifically

affords a teacher the right to be represented by a representative of the teacher's choice; the right to hear the evidence on which the charges are based; the right to cross-examine each adverse witness; and the right to present evidence. *Id.* § 21.256(c). Section 21.256(d) provides the Texas Rules of Evidence apply at the hearing. *Id.* § 21.256(d). We also note that, in a chapter 21 hearing, the hearing examiner may issue subpoenas for the attendance of witnesses and the production of documents; an appeal of the proceedings to the commissioner of education is based only on the record of the local hearing; and in a judicial appeal of the commissioner's decision, the court must review the evidence pursuant to the substantial evidence rule. *Id.* §§ 21.255(a) (subpoena power of examiner), 21.301(c) (appeal based solely on local record), 21.307(e) (substantial evidence rule for judicial review). Having considered the district's arguments, we find litigation in the form of a hearing under chapter 21 of the Education Code was reasonably anticipated on the date the district received the request for information. *See* Open Records Decision Nos. 588 (1991) (contested case under Administrative Procedure Act qualifies as litigation under statutory predecessor to section 552.103), 301 (1982) (litigation includes contested case before administrative agency).

We note, however, the opposing party in the anticipated litigation has seen or had access to most of the information at issue. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* ORD 551 at 4-5. Thus, when the opposing party has seen or had access to information relating to litigation, through discovery or otherwise, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, to the extent the opposing party in the anticipated litigation has seen or had access to the information at issue, any such information is not protected by section 552.103 and may not be withheld on that basis. Furthermore, the applicability of section 552.103(a) ends when the litigation has concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

In summary, to the extent the evaluations are the type contemplated in section 21.352, the requestor has a right of access to the evaluations of the teacher she represents under section 21.352(c). However, if the requestor does not have a right of access under section 21.352(c), then the evaluations are excepted from disclosure pursuant to section 552.101 in conjunction with section 21.355 of the Education Code. With the exception of most of the information that has either been obtained from or provided to the opposing party, the district may withhold the remaining information pursuant to 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,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/sdk

Ref: ID# 348309

Enc: Submitted documents

c: Requestor
(w/o enclosures)