



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 15, 2010

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

OR2010-10553

Dear Ms. McGowan: *Attorney General Greg Abbott*

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# 386615 (DISD ORR# 9339).

The Dallas Independent School District (the "district") received a request for the Legal Review Committee files, campus files, and evaluation history for a named district employee. You claim 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 submitted information.

Initially, we note that the United States Department of Education Family Policy Compliance Office has informed this office that the Family Education Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g, does not permit state and local educational authorities to disclose to this office, without parental or an adult student's consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act.<sup>1</sup> 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 whether appropriate redactions under FERPA should be

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

made, we will not address the applicability of FERPA to any of the submitted records. Such determinations under FERPA must be made by the educational authority in possession of the education records. However, we will consider your argument against disclosure of the submitted information.

We next note that a portion of the submitted information is subject to required public disclosure under section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) provides for the required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]" Gov't Code § 552.022(a)(1). Some of the submitted information consists of completed evaluations that are subject to section 552.022(a)(1) of the Government Code. Therefore, the district may only withhold this information if it is confidential under "other law." Although you raise section 552.103 of the Government Code, this section is a discretionary exception to disclosure that protects the governmental body's interests and may be waived. 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); see also Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 (1999) (governmental body may waive section 552.103). As such, section 552.103 is not "other law" that makes information confidential for the purposes of section 552.022. Therefore, the district may not withhold any of the information that is subject to section 552.022 under section 552.103. However, section 552.101 of the Government Code is "other law" for the purposes of section 552.022, and we will address whether it applies to the information subject to section 552.022.<sup>2</sup>

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 protected by other statutes. Section 21.355 of the Education Code provides that "[a] document evaluating the performance of a teacher or administrator is confidential." Educ. Code § 21.355. 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 that opinion, we concluded that a teacher is someone who is required to hold and does hold a certificate or permit required under chapter 21 of the Education Code and is teaching at the time of his or her evaluation. *Id.* In addition, the Third Court of Appeals 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, 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.). We find that the completed evaluations subject to section 552.022 consist of evaluations of a teacher; therefore, provided the teacher

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<sup>2</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

was required to hold and did hold the appropriate certificate and was teaching at the time of the submitted teaching evaluations, the information that we have marked is generally confidential under section 21.355.

However, we note that section 21.352(c) of the Education Code specifically provides that "[e]ach teacher is entitled to receive a written copy of the evaluation on its completion." In this instance, the requestor represents the employee whose evaluations are at issue. Therefore, to the extent the evaluations we have marked 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 have marked are excepted from disclosure pursuant to section 552.101 in conjunction with section 21.355 of the Education Code.

We next address your claim under section 552.103 of the Government Code for the remaining information not subject to section 552.022. 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) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) that 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 [1<sup>st</sup> 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.

You inform us that the remaining information not subject to section 552.022 relates to a teacher whose termination has been recommended. You state that the teacher, through her

representative, has appealed the recommendation for termination and requested the appointment of an independent hearing officer. You indicate that the hearing would be conducted under chapter 21 of the Education Code. Section 21.256 of the Education Code provides that 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. *See id.* § 21.256(c). Section 21.256(d) provides that the Texas Rules of Evidence apply at the hearing. *See 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 your arguments, we find that litigation in the form of a hearing under chapter 21 of the Education Code was pending when the district received the request for information. *See* Open Records Decision Nos. 588 (1991) (contested case under Administrative Procedure Act, Gov't Code ch. 2001, qualifies as litigation under statutory predecessor to section 552.103), 301 (1982) (litigation includes contested case before administrative agency). We also find that the information at issue is related to the pending litigation. Therefore, section 552.103 is generally applicable to the remaining information.

We note, however, some of the remaining information consists of correspondence between the named teacher and the district and an oath signed by the teacher. 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, if the opposing party has seen or had access to information relating to litigation, through discovery or otherwise, 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). Therefore, to the extent that the opposing party in the pending 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. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

In summary, provided the teacher was required to hold and did hold the appropriate certificate and was teaching at the time of the submitted teaching evaluations, to the extent the evaluations we have marked are the type contemplated in section 21.352 of the Education Code, the requestor has a right of access to this information, and they must be released pursuant to section 21.352(c). If the requestor does not have a right of access under section 21.352(c), then, provided the teacher was required to hold and did hold the

appropriate certificate and was teaching at the time of the submitted teaching evaluations, the evaluations we have marked must be withheld under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. Except for information that the opposing party in the pending litigation has seen or had access to, the remaining submitted information not subject to section 552.022 of the Government Code may be withheld under section 552.103 of the Government Code.<sup>3</sup>

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](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, toll free at (888) 672-6787.

Sincerely,



Kate Hartfield  
Assistant Attorney General  
Open Records Division

KH/dls

Ref: ID# 386615

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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<sup>3</sup>We note, however, that the information being released contains information that may be confidential with respect to the general public. *See* Gov't Code § 552.023 (person's authorized representative has special right of access to information that is excepted from public disclosure under laws intended to protect person's privacy interest as subject of the information); *see also* Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when person asks governmental body for information concerning the person himself or herself). Thus, in the event the district receives another request for this information from someone other than this requestor or the individual who she represents, the district must ask this office for a decision whether the information is subject to public disclosure.