



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 16, 2010

Ms. Mari McGowan
Abernathy, Roeder, Boyd & Joplin, P.C.
P.O. Box 1210
McKinney, Texas 75070-1210

OR2010-17342

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# 400251.

The Tioga Independent School District (the "district"), which you represent, received a request from an investigator with the Texas Education Agency ("TEA") for six categories of information pertaining to a former employee of the district. You state the district has released some of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.111, 552.116, and 552.135 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

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. Section 552.101 of the Government Code encompasses information made confidential by other statutes, such as 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. Additionally, the court has concluded that a written reprimand

¹You also claim this information is protected under the attorney-client privilege based on Texas Rule of Evidence 503 and under the attorney work product privilege based on Texas Rule of Civil Procedure 192.5. In this instance, however, the information is properly addressed here under section 552.107, rather than rule 503, and section 552.111, rather than rule 192.5. Open Records Decision No. 676 at 3 (2002).

constitutes an evaluation for purposes of section 21.355 as 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.). 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.*

Upon review, we find that you have failed to demonstrate how the submitted information constitutes an evaluation as contemplated by section 21.355. Accordingly, the district may not withhold any of the submitted information under section 552.101 in conjunction with section 21.355 of the Education Code.

You also assert the submitted information is excepted from disclosure pursuant to section 552.101 in conjunction with the common-law informer’s privilege and section 552.135 of the Government Code. Section 552.101 also encompasses the common-law informer’s privilege, which Texas courts have long recognized. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). The common-law informer’s privilege protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer’s identity. Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978).

Section 552.135 of the Government Code provides the following:

- (a) “Informer” means a student or former student or an employee or former employee of a school district who has furnished a report of another person’s or persons’ possible violation of criminal, civil, or regulatory law to the school district or the proper regulatory enforcement authority.
- (b) An informer’s name or information that would substantially reveal the identity of an informer is excepted from [required public disclosure].

Gov’t Code § 552.135. Because the legislature limited the protection of section 552.135 to the identity of a person who reports a possible violation of “law,” a school district that seeks to withhold information under the exception must clearly identify to this office the specific civil, criminal, or regulatory law that is alleged to have been violated. *See id.* §§ 552.301(e)(1)(A). Additionally, individuals who provide information in the course of an investigation, but do not make the initial report are not informants for purposes of section 552.135 of the Government Code. In this instance, you indicate the submitted

information reveals the identities of informers. However, you have not identified the individuals whose identities you seek to withhold under section 552.135. *See id.* §§ 552.301(e)(1)(A), 552.135. Upon review, we find that the district has failed to demonstrate how the submitted information reveals the identity of an informer for the purposes of the common-law informer's privilege or section 552.135. Thus, the district may not withhold the submitted information under section 552.101 of the Government Code in conjunction with the common-law informer's privilege or section 552.135 of the Government Code.

Section 552.116 of the Government Code provides:

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, a school district, or a joint board operating under Section 22.074, Transportation Code, including any audit relating to the criminal history background check of a public school employee, is excepted from the requirements of Section 552.021. If information in an audit working paper is also maintained in another record, that other record is not excepted from the requirements of Section 552.021 by this section.

(b) In this section:

(1) "Audit" means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, a resolution or other action of a board of trustees of a school district, including an audit by the district relating to the criminal history background check of a public school employee, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.

(2) "Audit working paper" includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116. For purposes of section 552.116, a school district must establish that an audit is authorized by a resolution or other action of a board of trustees of the school district. *Id.* § 552.116(b)(1). You state that the submitted information is related to an

investigation conducted pursuant to section 21.041 of the Education Code and section 249.14 of title 19 of the Texas Administration Code. We note that section 21.041 of the Education Code and section 249.14 of title 19 of the Texas Administration Code authorize the Texas Education Agency, and not the district, to investigate an educator. *See* Educ. Code § 21.041; 19 T.A.C. ch. 249. You have provided no arguments that the information at issue constitutes working papers of an audit conducted by the district. Thus, we conclude that you have failed to establish that section 552.116 of the Government Code is applicable to any of the submitted information, and it may not be withheld under this exception.

As previously noted, the requestor is a staff investigator with the TEA. The TEA's request states that it is seeking this information under the authority provided to the State Board for Educator Certification ("SBEC") by section 249.14 of title 19 of the Texas Administrative Code. Chapter 249 of title 19 of the Texas Administrative Code governs disciplinary proceedings, sanctions, and contested cases involving SBEC. *See* 19 T.A.C. § 249.4. Section 249.14 provides in relevant part:

(a) [TEA] staff may obtain and investigate information concerning alleged improper conduct by an educator, applicant, examinee, or other person subject to this chapter that would warrant the [SBEC] denying relief to or taking disciplinary action against the person or certificate.

...

(c) The TEA staff may also obtain and act on other information providing grounds for investigation and possible action under this chapter.

19 T.A.C. § 249.14(a), (c). In this instance, the TEA requestor states that she is investigating alleged improper conduct by or criminal history information of the named district employee and that she needs to review the requested records to determine whether disciplinary action related to the employee's certification is warranted. Thus, we find that the information at issue is subject to the general right of access afforded to the TEA under section 249.14.

You assert that some of the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code.² However, these sections are general exceptions to disclosure. Therefore, the TEA requestor has a right of access to the submitted information pursuant to section 249.14. *See* Open Records Decision No. 525 (1989) (exceptions to disclosure do not apply to information made public by other statutes).

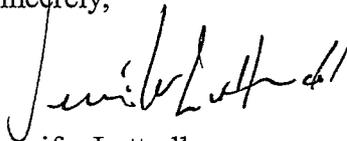
²Section 552.107 protects information that "an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Evidence or the Texas Disciplinary Rules of Professional Conduct." Gov't Code § 552.107. Section 552.111 of the Government Code excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." *Id.* § 552.111.

As no further exceptions to disclosure have been raised, the district must release the submitted information, in its entirety, to this requestor.³

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

Sincerely,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/dls

Ref: ID# 400251

Enc. Submitted documents

c: Requestor
(w/o enclosures)

³Because the TEA has a right of access to certain information in the submitted documents that otherwise would be excepted from release under the Act, the district must again seek a decision from this office if it receives a request for this information from a different requestor without such a right of access.