



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 26, 2011

Mr. Humberto F. Aguilera  
For San Antonio Independent School District  
Escamilla, Poneck & Cruz, L.L.P.  
P.O. Box 200  
San Antonio, Texas 78291-0200

OR2011-12376

Dear Mr. Aguilera:

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# 428124.

The San Antonio Independent School District (the "district"), which you represent, received a request for information pertaining to elementary school teachers placed on administrative leave, taken off administrative leave, or under investigation. You state the district has released some responsive information to the requestor. You claim the remaining responsive information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, you state the district does not maintain a list that is directly responsive to the part of the request seeking the reason elementary teachers were put on leave, but does have documents that reflect those reasons. We note the Act does not require a governmental body to answer factual questions, conduct legal research, or create new information in responding to a request. *See* Open Records Decision Nos. 563 at 8 (1990), 555 at 1-2 (1990). The Act also does not require a governmental body to disclose information that did not exist when the request for information was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986). However, a governmental body must make a good-faith effort to relate a request to any responsive information that is within its possession or control. Open Records Decision No. 561 at 8-9 (1990). Therefore, while the district is not required to answer general questions or create documents that did not exist at the time of the request, documents from which this information may be derived are responsive to this

request. You state such information has been submitted for our review. Accordingly, we will consider your raised exception to its disclosure.

Next, we note you marked portions of the submitted information you state are non-responsive to the request for information. Upon review, we agree this information is not responsive to the request. This decision does not address the public availability of the non-responsive information, and such information need not be released.

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.<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"). Although you state the district has redacted information that identifies students from the submitted documents, we note some of the responsive information contains unredacted student-identifying information. Because this office is prohibited from reviewing an education record for the purpose of determining whether appropriate redactions have been made under FERPA, we will not address the applicability of FERPA to the submitted information. Such determinations under FERPA must be made by the educational authority in possession of the education records.<sup>2</sup> We will consider your exceptions to disclosure under the Act.

Section 552.101 of the Government Code exempts 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 other statutes, including section 21.355 of the Education Code, which provides in part that "[a] document evaluating the performance of a teacher or administrator is confidential." Act of May 25, 2011, 82<sup>nd</sup> Leg., R.S., H.B. 2971, § 1 (to be codified at Educ. Code § 21.355(a)). 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. In Open Records Decision No. 643 (1996), we determined for purposes of section 21.355, the word "teacher" means a person who is required to, and does in fact, hold a teaching certificate under subchapter B of chapter 21 of the Education Code or a school district teaching permit under

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

<sup>2</sup>If in the future the district does obtain parental consent to submit unredacted education records and seeks a ruling from this office on the proper redaction of those education records in compliance with FERPA, we will rule accordingly.

section 21.055, and who is engaged in the process of teaching, as that term is commonly defined, at the time of the evaluation. *See* ORD 643 at 4. As you point out, the Third Court of Appeals has concluded that a written reprimand constitutes an evaluation for the purposes of section 21.355 where “it reflects the principal’s judgment regarding [a teacher’s] actions, gives corrective direction, and provides for further review.” *Abbott v. North East Indep. Sch. Dist.*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.).

You contend the submitted information is confidential under section 21.355. You state the employees concerned were teachers who held the appropriate teaching certificate and assert the employees were teaching at the time the information was created. The submitted information includes witness statements, complaints, incident reports, and e-mails that describe incidents involving district teachers, a teacher’s response to a complaint, and a letter informing the Texas Education Agency of allegations made against a teacher involving test administration. These documents do not reflect any supervisor’s judgment regarding the teachers’ actions, give corrective direction to the teachers, or provide for further review of the teachers’ conduct. Although you generally state the submitted documents “are evaluative in nature,” you do not explain how any of these documents actually evaluate the performance of a teacher as contemplated by section 21.355. Therefore, we conclude you failed to demonstrate the applicability of section 21.355 of the Education Code to the submitted information, and none of the submitted documents may be withheld under section 552.101 on that basis.

Section 552.102(a) of the Government Code excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.”<sup>3</sup> Gov’t Code § 552.102(a). The Texas Supreme Court recently held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *See Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010). We have marked two district employees’ dates of birth the district must withhold under section 552.102(a) of the Government Code.

Section 552.117 of the Government Code may also be applicable to some of the submitted information. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security 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. Act of May 24, 2011, 82<sup>nd</sup> Leg., R.S., S.B. 1638, § 2 (to be codified as an amendment to Gov’t Code § 552.117(a)). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). The district may only withhold information under

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<sup>3</sup>The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

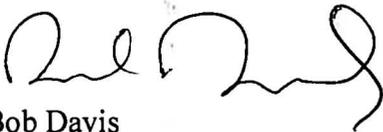
section 552.117(a)(1) on behalf of employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Thus, if the individual whose personal information we have marked elected to keep this information confidential, the district must withhold this information under section 552.117(a)(1) of the Government Code. The district may not withhold this information if the employee did not make a timely election to keep the information confidential.

In summary, the district must withhold the dates of birth we marked under section 552.102(a) of the Government Code. The district must also withhold the information we marked under section 552.117(a)(1) of the Government Code if the employee concerned elected to keep this information confidential prior to the district's receipt of the request for information. 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](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,



Bob Davis  
Assistant Attorney General  
Open Records Division

RSD/agn

Ref: ID# 428124

Enc. Submitted documents

c: Requestor  
(w/o enclosures)