



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 18, 2011

Dr. Carol Simpson  
Schwartz & Eichelbaum Wardell Mehl and Hanson, P.C.  
5300 Democracy Drive, Suite 200  
Plano, Texas 75024

OR2011-15197

Dear Dr. Simpson:

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# 433351.

The Lovejoy Independent School District (the "district"), which you represent, received a request for the personnel file of a named individual. You state you have redacted student identifying information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232 of title 20 of the United States Code.<sup>1</sup> You claim that the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.<sup>2</sup>

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<sup>1</sup>We note the United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that FERPA does not permit a state educational agency or institution 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. See 34 C.F.R. § 99.3 (defining "personally identifiable information"). The DOE has determined that FERPA determinations must be made by the educational institution from which the education records were obtained. A copy of the DOE's letter to this office may be found on the Office of the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

<sup>2</sup>This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling does not reach, and therefore does not authorize, the withholding of any other requested information to the extent that the other information is substantially different than that submitted to this office. See Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

Initially, we note some of the information at issue is subject to section 552.022 of the Government Code. Section 552.022(a)(1) provides for required public 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). The submitted information includes a coaching evaluation and a teaching evaluation that are both subject to section 552.022(a)(1). Although you raise section 552.103 of the Government Code, section 552.103 is a discretionary exception and does not make information confidential; therefore, the district may not withhold the completed evaluations under this exception. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 439, 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). However, we note the teaching evaluation may be subject to section 552.101 of the Government Code, which is “other law” for the purposes of section 552.022. Therefore, we will address the applicability of this exception to that evaluation.<sup>3</sup> As you raise no further exception to disclosure of the coaching evaluation, it must be released. We will consider your argument under section 552.103 for the information that is not subject to section 552.022.

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, recently amended by the 82nd Legislature, provides, in relevant part, as follows:

(a) A document evaluating the performance of a teacher or administrator is confidential.

Act of May 25, 2011, 82nd Leg., R.S., H.B. 2971, § 1 (to be codified at Educ. Code § 21.355(a)). 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 administrator. *See* Open Records Decision No. 643 (1996). In that decision, we concluded a “teacher” for purposes of section 21.355 means a person who is required to and does in fact 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.* at 4. Upon review, we find one of the evaluations, which we have marked, consists of an evaluation of a teacher; therefore, provided the teacher was required to hold and did hold the appropriate certificate and was teaching at the time of

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<sup>3</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. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

the evaluation, the information that we have marked is generally confidential under section 21.355.

However, we note section 21.352(c) of the Education Code provides that “[e]ach teacher is entitled to receive a written copy of the evaluation on its completion.” Educ. Code § 21.352(c); *see id.* § 21.352(a) (prescribing appraisal process and performance criteria each school district shall use). In this instance, the requestor is the attorney for the teacher whose evaluation is at issue. Therefore, to the extent the evaluation we have marked is of the type that is contemplated by section 21.352, the requestor has a right of access to his client’s information under section 21.352(c). However, if the requestor does not have a right of access under section 21.352(c), then the teaching evaluation we have marked is confidential under section 21.355 of the Education Code and must be withheld under section 552.101 of the Government Code on this basis.

We now address your argument under section 552.103 of the Government Code for the information that is 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). A governmental body that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to the pending or anticipated litigation. *See 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 governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a). *See* ORD 551 at 4.

In order to demonstrate that litigation is reasonably anticipated, the governmental body must provide this office “concrete evidence showing that the claim that litigation might ensue is

more than a mere conjecture.” Open Records Decision No. 452 at 4 (1986). This office has concluded that litigation was reasonably anticipated when the potential opposing party filed a complaint with the Equal Employment Opportunity Commission (the “EEOC”). *See* Open Records Decision No. 336 (1982).

You state, and provide documentation reflecting, the requestor’s client filed a complaint against the district with the EEOC and received a right to sue letter before the date the district received the present request for information. Based on your representation and our review, we agree the district reasonably anticipated litigation on the date the district received the present request. We also agree the information at issue is related to the anticipated litigation. As such, we conclude the district may withhold the information that is not subject to section 552.022 under section 552.103 of the Government Code.

We note that once the information has been obtained by all parties to the anticipated litigation, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note that the applicability of section 552.103(a) ends when the litigation is concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

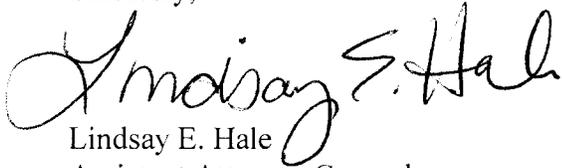
In summary, the district must release the coaching evaluation we have marked under section 552.022 of the Government Code. Provided the teacher was required to hold and did hold the appropriate certificate and was functioning as a teacher at the time of the evaluation, to the extent the teaching evaluation we have marked is of the type contemplated by section 21.352 of the Education Code, the requestor has a right of access to this information and it 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 teaching evaluation, the teaching evaluation we have marked must be withheld under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. The district may withhold the information that is 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](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,

A handwritten signature in black ink that reads "Lindsay E. Hale". The signature is written in a cursive style with a large, looping initial "L".

Lindsay E. Hale  
Assistant Attorney General  
Open Records Division

LEH/ag

Ref: ID# 433351

Enc. Submitted documents

c: Requestor  
(w/o enclosures)