



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 24, 2012

Ms. Lynn Rossi Scott
Counsel for the Lake Worth Independent School District
Brackett & Ellis, P.C.
100 Main Street
Fort Worth, Texas 76102-3090

OR2012-07961

Dear Ms. Scott:

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# 454535.

The Lake Worth Independent School District (the "district"), which you represent, received a request for eleven categories of information pertaining to a named individual's employment with the district. You state you are making some of the requested information available to the requestor. You also state you have no information responsive to some of the requested categories.¹ You further state you are withholding closed session meeting minutes of school board meetings pursuant to section 552.101 of the Government Code in conjunction with section 551.104 of the Open Meetings Act,² personally-identifiable information of students

¹The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

²We note the district is not required to submit the certified agenda or tape of a closed meeting to this office for review. *See* Open Records Decision No. 495 at 4 (1988) (attorney general lacks authority to review certified agendas or tapes of executive sessions to determine whether a governmental body may withhold such information under statutory predecessor to Gov't Code § 552.101). We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies, which authorizes the withholding of ten categories of information, including a certified agenda of a closed meeting under section 552.101 in conjunction with section 551.104 of the Government Code, without the necessity of requesting an attorney general decision.

under the Family Educational Rights and Privacy Act (“FERPA”), section 1232g of title 20 of the United States Code,³ personal information of district employees subject to section 552.117 of the Government Code as permitted by section 552.024(c) of the Government Code,⁴ and personal e-mail addresses of members of the public under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).⁵ You claim that portions of the submitted information are excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, and 552.135 of the Government Code.⁶ We have considered the exceptions you claim and reviewed the submitted representative sample of information.⁷

Initially, we note that portions of the submitted information are subject to 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 made confidential under the Act or “other law” or is excepted from disclosure under section 552.108 of the Government Code. Gov’t Code § 552.022(a)(1). The submitted information includes completed evaluations subject

³We note the United States Department of Education Family Policy Compliance Office (the “DOE”) informed this office that FERPA, 20 U.S.C. § 1232g(a), 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. The DOE has determined that FERPA determinations must be made by the educational authority in possession of the education records. We have posted a copy of the letter from the DOE to this office on the Attorney General’s website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

⁴Section 552.117 of the Government Code 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. *See* Gov’t Code § 552.117(a)(1). Section 552.024 of the Government Code authorizes a governmental body to withhold information subject to section 552.117 without requesting a decision from this office if the current or former employee or official timely elected not to allow public access to the information. *See id.* § 552.024(c).

⁵As previously noted, this office issued Open Records Decision No. 684, a previous determination to all governmental bodies, which authorizes the withholding of ten categories of information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

⁶Although you also raise section 552.101 of the Government Code in conjunction with Texas Rules of Evidence 503 and Texas Rule of Civil Procedure 192.5, this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). We further note the proper exceptions to raise when asserting the attorney-client privilege and the work product privilege for information not subject to section 552.022 of the Government Code are sections 552.107 and 552.111 of the Government Code, respectively. *See* Open Records Decision Nos. 676 at 1, 677 (2002).

⁷We assume the “representative sample” of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

to section 552.022(a)(1). Although you assert the information at issue is excepted from disclosure under section 552.103 of the Government Code, that exception is discretionary and does not make information confidential under the Act. *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). Therefore, the district may not withhold the evaluations under section 552.103. However, you also raise sections 552.101 and 552.135 of the Government Code for this information. Because sections 552.101 and 552.135 make information confidential under the Act, we will address their applicability to the information at issue. We will also address your arguments for the remaining information not subject to section 552.022 of the Government Code.

Next, you claim the marked information not subject to section 552.022 is excepted from disclosure under section 552.103 of the Government Code, which provides:

(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 has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing 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 that litigation. *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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

To demonstrate litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and 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 specific threat to sue the governmental body from an

attorney for a potential opposing party. Open Records Decision No. 555 (1990). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* ORD 452 at 4.

This office has long held that for purposes of section 552.103, "litigation" includes "contested cases" conducted in a quasi-judicial forum. *See* Open Records Decision Nos. 474 (1987), 368 (1983), 336 (1982), 301 (1982). In determining whether an administrative proceeding is conducted in a quasi-judicial forum, this office has focused on the following factors: (1) whether the dispute is, for all practical purposes, litigated in an administrative proceeding where (a) discovery takes place, (b) evidence is heard, (c) factual questions are resolved, and (d) a record is made; and (2) whether the proceeding is an adjudicative forum of first jurisdiction, *i.e.*, whether judicial review of the proceeding in district court is an appellate review and not the forum for resolving a controversy on the basis of evidence. *See* Open Records Decision No. 588 (1991).

You inform us that, prior to the receipt of the present request, the named employee was put on administrative leave by the district. You also state the district believes "there is good cause for mid-contract termination and is prepared to proceed with a mid-contract termination of [the employee's] contract with [the district] pursuant to Chapter 21 of the Texas Education Code." You further inform us that the employee's attorney has sent a settlement offer, which has not been accepted by the district.

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 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), .301(c) (appeal based solely on local record), .307(e) (substantial evidence rule for judicial review). Having considered your arguments, we find that, when the district received the request for information, litigation in the form of hearings under chapter 21 of the Education Code was reasonably anticipated for the employee at issue. *See* ORD 301 (litigation includes contested case before administrative agency). Further, we find the information at issue relates to the anticipated litigation because the information pertains to the subject that is the basis of the litigation. Based on your representations and our review, we find the information at issue is related to the anticipated litigation. Accordingly, the district may withhold the information

not subject to section 552.022, which you have marked, under section 552.103 of the Government Code.⁸

We note, however, that once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Finally, we note the applicability of section 552.103 ends when the litigation is concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

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 exception encompasses information made confidential by statute. You raise section 552.101 in conjunction with 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(a). This section applies 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). We have determined the word “administrator” for purposes of section 21.355 means a person who (1) is required to, and does in fact, hold an administrator’s certificate under subchapter B of chapter 21 of the Education Code, and (2) is performing the functions of an administrator, as that term is commonly defined, at the time of the evaluation. *Id.* 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 state the information at issue consists of the district’s formal annual appraisals for a certified employee who was employed as a Curriculum Specialist for the district at the time the evaluations were conducted. However, you make no representation, nor are we able to discern, that at the time of these evaluations, the employee at issue was certified as an administrator and was performing the functions of an administrator. Therefore, we are unable to determine that section 21.355 is applicable to these evaluations. Accordingly, to the extent the employee was certified as an administrator and was evaluated for her performance as an administrator in the marked evaluations, they are confidential under section 21.355 and must be withheld under section 552.101. *See* ORD 643 at 4. To the extent the employee was not certified as an administrator or was not performing the functions of an administrator at the time of the evaluations at issue, they may not be withheld under

⁸As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

section 552.101 in conjunction with section 21.355, and we will address your remaining argument for this information.

Section 552.135 of the Government Code provides the following:

(a) "Informer" means a student or a former student or an employee or former employee of a school district who has furnished a report of another person's 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(a)-(b). 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. In this instance, you claim the information at issue reveals the identities of informers. Upon review, we find that you have failed to demonstrate that any of the information at issue identifies informers for purposes of section 552.135. Thus, the district may not withhold any of the information at issue under section 552.135 of the Government Code.

In summary, the district may withhold the information not subject to section 552.022 you have marked under section 552.103 of the Government Code. To the extent the employee was certified as an administrator and was evaluated for her performance as an administrator in the evaluations, the evaluations we have marked are confidential under section 21.355 of the Education Code and must be withheld under section 552.101 of the Government Code. 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, 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, appearing to read "Sarah Casterline", with a large, stylized flourish at the end.

Sarah Casterline
Assistant Attorney General
Open Records Division

SEC/som

Ref: ID# 454535

Enc. Submitted documents

c: Requestor
(w/o enclosures)