



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 12, 2012

Mr. Dennis J. Eichelbaum
Counsel for the IDEA Public Schools
Eichelbaum Wardell Hansen Powell & Mehl, P.C.
5300 Democracy Drive, Suite 200
Plano, Texas 75024

OR2012-10825

Dear Mr. Eichelbaum:

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# 458692.

IDEA Public Schools ("IDEA"), which you represent, received a request for (1) the name, ethnicity, beginning and ending salary, degree or highest level attained, title, reasons for salary increase, performance evaluations, stipends, bonuses, dates of employment and terms of separation or transfer of each employee of the business and human resource departments during the tenure of a named individual and of each employee of the senior management during the tenure of another named individual; (2) administrative staff manuals or instructions to staff that affect the requestor; (3) settlement agreements to which IDEA is a party and voluntary exit agreements; and (4) the requestor's personnel file. You state IDEA does not have any information responsive to item 2 of the request.¹ You further state IDEA will release item 4 to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.

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).

Initially, we note the submitted information does not include the name, ethnicity, beginning and ending salary, degree or highest level attained, title, reasons for salary increase, stipends, bonuses, and dates of employment of specified employees sought in the present requests for information. Thus, although you state IDEA has submitted representative samples of the requested information, the submitted information is not representative of the requested names, ethnicities, beginning and ending salaries, degrees or highest levels attained, titles, reasons for salary increase, stipends, bonuses, and dates of employment. This open records letter ruling is applicable only to the types of information you have submitted for our review. See Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988). This ruling does not authorize IDEA to withhold any types of information that are substantially different from the types of information IDEA has submitted to this office. See Gov't Code §§ 552.301(e)(1)(D), .302 (where request for attorney general decision does not comply with requirements of Gov't Code § 552.301, information at issue is presumed to be public). Therefore, we assume IDEA has released any other types of information that are responsive to the present request, to the extent such information existed when IDEA received the request. If not, then IDEA must release any such information immediately.² See *id.* §§ 552.221, .301, .302; Open Records Decision No. 664 (2000).

Next, we note the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108; [and]

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(1), (3). Portions of the submitted information consist of completed evaluations subject to subsection 552.022(a)(1). IDEA must release this information pursuant to subsection 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or is made confidential under the Act or other law.

²As previously noted, the Act does not require the institute to release information that did not exist when it received these requests or create responsive information. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266; ORDs 605 at 2, 555 at 1, 452 at 3, 362 at 2.

See id. § 552.022(a)(1). The remaining information consists of a separation agreement relating to the expenditure of public funds that is subject to subsection 552.022(a)(3). This information must be released unless it is made confidential under the Act or other law. *See id.* § 552.022(a)(3). You seek to withhold the submitted information under section 552.103 of the Government Code. However, section 552.103 is a discretionary exception and does not make information confidential under the Act. *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 Gov't Code § 552.103); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the submitted information may not be withheld under section 552.103 of the Government Code. However, you claim portions of the submitted information are subject to section 552.101 of the Government Code. As this section makes information confidential under the Act, we will address its applicability.

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 performance evaluations of an administrator. 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 whether 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 section 552.101 in conjunction with section 21.355 and must be released. As no further exceptions to disclosure are raised, 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,



Sarah Casterline
Assistant Attorney General
Open Records Division

SEC/som

Ref: ID# 458692

Enc. Submitted documents

c: Requestor
(w/o enclosures)