



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 18, 2012

Mr. Scott McDonald  
Counsel for the Lancaster Independent School District  
O'Hanlon, McCollom & Demerath  
808 West Avenue  
Austin, Texas 78701

OR2012-20315

Dear Mr. McDonald:

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# 475380.

The Lancaster Independent School District (the "district"), which you represent, received two requests from the same requestor for (1) organizational charts, compensation plans, human resources audits, and communications regarding unprofessional conduct or violations of local, state, or federal guidelines and statutes from specified time periods; (2) contracts and other information involving STEM Implementation Staff members, head coaches, and athletic directors; (3) contracts and other information involving master teachers, principals, assistant/associate principals, and central office administrative staff from specified time periods; (4) records of stipends, extra-duty pay, and pay increases from specified time periods; (5) the names of employees whose contracts exceed one year, (6) communications involving a named employee regarding his receipt of a gift from parents or any other conduct deemed unprofessional or in violation of local, state, or federal guidelines or statutes; (7) records of payout involving the TAP program from a specified time period; and (8) records of requests for salary compensation reviews and the results of the requests from a specified time period. You state some of the requested information is being released. You claim the submitted information is excepted from disclosure under

sections 552.101, 552.102, 552.103, and 552.117 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the information you submitted.<sup>2</sup> We also have considered the comments we received from the requestor.<sup>3</sup>

We note much of the submitted information falls within the scope of section 552.022 of the Government Code, which provides in part:

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

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body;

...

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

...

(15) information regarded as open to the public under an agency's policies[.]

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<sup>1</sup>As you raise section 552.024 of the Government Code, which is not an exception to disclosure under subchapter C of the Act, we understand you to claim section 552.117 of the Government Code. Section 552.024 enables current or former officials and employees of a governmental body to request confidentiality for information encompassed by section 552.117(a)(1). See Gov't Code § 552.024. Although you did not claim sections 552.102 and 552.117 of the Government Code within the ten-business-day period prescribed by section 552.301(b) of the Government Code, we will consider your claims under those sections, as they are mandatory exceptions to disclosure. See *id.* §§ 552.007, .301, .302, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions). This decision does not address your claims under sections 552.107(1) and section 552.111 of the Government Code and Texas Rule of Evidence 503, which you initially asserted but have since withdrawn.

<sup>2</sup>This letter ruling assumes the submitted representative samples of information are truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the district to withhold any information that is substantially different from the submitted information. See Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

<sup>3</sup>See Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

Gov't Code § 552.022(a)(1), (3), (15). In this instance, the submitted information includes a completed report made for the district and completed evaluations made by the district that are subject to section 552.022(a)(1) and employment contracts that are subject to section 552.022(a)(3). Thus, the report, the evaluations, and the contracts, which we have marked, must be released pursuant to section 552.022(a), unless they are made confidential under the Act or other law. Likewise, the submitted job descriptions we have marked must be released pursuant to section 552.022(a)(15), if the district considers them to be open to the public under its policies, unless they are made confidential under the Act or other law. You seek to withhold the submitted information under section 552.103 of the Government Code, which is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See id.* § 552.007; *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); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 does not make information confidential for purposes of section 552.022(a)(1), (3), or (15). Therefore, the district may not withhold any of the information encompassed by section 552.022(a)(1) or (3) under section 552.103. Likewise, the job descriptions may not be withheld under section 552.103 if they are considered to be open to the public under the district's policies for purposes of section 552.022(a)(15). Although sections 552.102 and 552.117 of the Government Code, which you also claim, are confidentiality provisions for purposes of section 552.022(a), neither of those exceptions is applicable to any of the information in the report, the evaluations, the contracts, or the job descriptions. Thus, none of the submitted information encompassed by section 552.022(a) may be withheld under sections 552.102 or 552.117. We note the evaluations may fall within the scope of section 552.101 of the Government Code, which is a confidentiality provision for purposes of section 552.022(a)(1). Therefore, we will determine whether the district must withhold the evaluations under section 552.101. Additionally, we will consider your claims under sections 552.102, 552.103, and 552.117 for the submitted information that is not subject to section 552.022(a), including the job descriptions if they are not considered to be open to the public under the district's policies. The district must release the completed report and the employment contracts pursuant to section 552.022(a)(1) and (3) of the Government Code.

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 other statutes, including 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 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). We have determined that "teacher," for purposes of section 21.355, 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 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 id.* at 4. We also have determined that “administrator,” for purposes of section 21.355, means a person who is required to and does in fact hold an administrator’s certificate under subchapter B of chapter 21 of the Education Code and 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 a written reprimand constitutes an evaluation for purposes of section 21.355, because “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.). We conclude the district must withhold the marked evaluations under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code to the extent the employee to whom they pertain held a teacher’s or administrator’s certificate under subchapter B of chapter 21 of the Education Code or a school district teaching permit under section 21.055 and was functioning as an administrator or teacher at the time of the evaluations. To the extent the employee did not hold a teacher’s or administrator’s certificate under subchapter B of chapter 21 or a school district teaching permit under section 21.055 or was not functioning as an administrator or teacher at the time of the evaluations, they are not confidential under section 21.355, may not be withheld on that basis under section 552.101, and must be released.

Section 552.103 of the Government Code 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 section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information at issue. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of 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 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1<sup>st</sup> Dist.] 1984, writ ref’d n.r.e.). Both elements of the test must be

met in order for information to be excepted from disclosure under section 552.103. *See* Open Records Decision No. 551 at 4 (1990).

You contend the submitted information is related to anticipated litigation to which the district would be a party. Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To establish that litigation is reasonably anticipated, a governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *Id.* This office has determined a pending Equal Employment Opportunity Commission (“EEOC”) complaint indicates litigation is reasonably anticipated. *See* Open Records Decision Nos. 386 at 2 (1983), 336 at 1(1982).

You inform us the requestor, an employee of the district, has filed pending charges of alleged employment discrimination by the district. You have provided copies of charges filed by the requestor with the EEOC and the Civil Rights Division of the Texas Workforce Commission. The charges reflect they were filed prior to the district’s receipt of the present requests for information. You contend the submitted information that is not subject to section 552.022(a), including the job descriptions if they are not considered to be public under the district’s policies, is related to the requestor’s charges of discrimination. Based on your representations and documentation and our review, we find the information at issue is related to litigation the district reasonably anticipated when it received the present requests. We therefore conclude the district may withhold the submitted information that is not subject to section 552.022(a) under section 552.103 of the Government Code.<sup>4</sup>

In reaching this conclusion, we assume the requestor, as the opposing party in the anticipated litigation, has not seen or had access to any of the information that is not subject to section 552.022(a). The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information related to litigation through discovery procedures. *See* ORD 551 at 4-5. Thus, if the opposing party has seen or had access to information related to anticipated litigation, through discovery or otherwise, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). We note the applicability of this exception ends once the related litigation concludes or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the district (1) must withhold the marked evaluations under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code to the extent the employee to whom they pertain held a teacher’s or administrator’s certificate under subchapter B of chapter 21 of the Education Code or a school district teaching permit under

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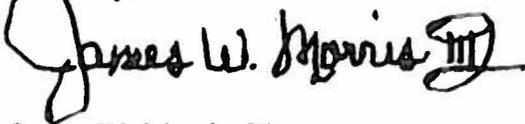
<sup>4</sup>As we are able to make this determination, we need not address your claims under sections 552.102 and 552.117 of the Government Code.

section 21.055 and was functioning as an administrator or teacher at the time of the evaluations; (2) must release the marked report and the marked contracts pursuant to section 552.022(a)(1) and (3) of the Government Code; (3) must release the marked job descriptions pursuant to section 552.022(a)(15) if they are considered to be public under the district's policies; and (4) may withhold the submitted information that is not subject to section 552.022(a) under section 552.103 of the Government Code, including the job descriptions if they are not considered to be public under the district's policies.

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 "James W. Morris III". The signature is written in a cursive style with a large initial "J" and a stylized "M".

James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/bhf

Ref: ID# 475380

Enc: Submitted documents

c: Requestor  
(w/o enclosures)