

December 19, 2012

Ms. LeAnne Lundy  
Counsel for Alief Independent School District  
Rogers, Morris & Grover, L.L.P.  
5718 Westheimer Road, Suite 1200  
Houston, Texas 77057

OR2012-20457

Dear Ms. Lundy:

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# 474364.

The Alief Independent School District (the “district”), which you represent, received a request for twelve categories of information pertaining to the requestor and a specified hearing. We understand the district will redact the information it has marked under sections 552.130(c) and 552.147 of the Government Code; Open Records Decision No. 684 (2009); and the Family Educational Rights and Privacy Act (“FERPA”), 20 U.S.C. § 1232g.<sup>1</sup>

---

<sup>1</sup>Section 552.130 of the Government Code permits a governmental body to redact certain motor vehicle record information, such as driver’s license numbers, without seeking a ruling from this office. *See* Gov’t Code § 552.130(c); *see also id.* § 552.130(d)-(e) (requestor may appeal governmental body’s decision to withhold information under section 552.130(c) to attorney general and governmental body withholding information pursuant to section 552.130(c) must provide certain notice to requestor). Section 552.147 of the Government Code permits a governmental body to redact a living person’s social security number from public release without the necessity of requesting a decision from this office. *See id.* § 552.147(b). Open Records Decision No. 684 serves as a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision. ORD 684. The United States Department of Education Family Policy Compliance Office (the “DOE”) has informed this office that FERPA 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>.

You state the district does not have information responsive to portions of the request.<sup>2</sup> You claim the instant request is not a request to the district under the Act. In the alternative, you claim the request includes interrogatories to which the district need not respond. Further, you claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.108, and 552.117 of the Government Code.<sup>3</sup> We have considered your arguments and reviewed the submitted representative sample of information.<sup>4</sup>

Initially, we address the district's claim the instant request was not a request to the district. This office has held a written communication that reasonably can be judged to be a request for public information constitutes a request for information under the Act. *See* Open Records Decision Nos. 497 at 3 (1988), 44 at 2 (1974). In this regard, we note that a request for information need not refer to the Act or be addressed to the officer for public information. ORDs 497 at 3, 44 at 2. In this case, the request was addressed to the district, received by the district, and seeks information pertaining to a district employee. Further, we note the request specifically directs the district to timely deliver any documents or written communications in its possession to the requestor. Thus, we find the instant request to be a valid information request under the Act to the district, and we will address your arguments against disclosure.

Next, you assert portions of the request are “interrogatories to which [the district] need not respond.” The Act does not require a governmental body to answer factual questions, conduct legal research, or create new information in responding to a request for information. *See* ORDs 563 at 8, 555 at 1-2. Furthermore, as previously noted, the Act does not require a governmental body to make available information that did not exist when the request was received, nor does it require a governmental body to compile information or prepare new information. *See Bustamante*, 562 S.W.2d 266; ORD 452 at 3. However, a governmental body must make a good-faith effort to relate a request to information that is within its possession or control. *See* Open Records Decision No. 561 at 8-9 (1990). In this instance, the request for information does not ask the district to answer questions; rather, the request requires the district to locate specified documents. Because the district has submitted

---

<sup>2</sup>The Act does not require a governmental body that receives a request for information to create information that did not exist when the request 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 Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

<sup>3</sup>We note you do not raise section 552.117 of the Government Code in your brief; however, we understand you to raise this exception based on your markings. Further, although you raise sections 552.107 and 552.111 of the Government Code in your initial brief to this office, you have not submitted arguments explaining how these sections apply to the submitted information; therefore, you have waived your arguments under these exceptions. *See* Gov't Code §§ 552.301, .302.

<sup>4</sup>We assume the “representative sample” of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decisions 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.

information for our review, we believe the district has made a good faith effort to submit information responsive to the request. Therefore, we will consider your arguments to withhold the submitted information.

We note portions of the submitted information are subject to section 552.022 of the Government Code. This section provides, in pertinent part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the 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;

...

(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). The submitted information contains completed evaluations and a completed report that are subject to subsection 552.022(a)(1). The district must release the completed evaluations and report pursuant to subsection 552.022(a)(1) unless they are excepted from disclosure under section 552.108 of the Government Code or are made confidential under the Act or other law. *See id.* § 552.022(a)(1). The submitted information also contains contracts that are subject to subsection 552.022(a)(3), which the district must release unless it is made confidential under the Act or other law. *See id.* § 552.022(a)(3). Although you raise section 552.103 of the Government Code for this information, section 552.103 is a discretionary exception to disclosure and does not make information confidential under the Act. *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 section 552.103); Open Records Decision Nos. 665 at 2 n.5 (discretionary exceptions generally), 663 (1999) (governmental body may waive section 552.103). Therefore, none of the information subject to subsections 552.022(a)(1) and 552.022(a)(3), which we have marked, may be withheld under section 552.103 of the Government Code. However, you also claim section 552.108 for the completed report subject to section 552.022(a)(1). Therefore, we will consider whether the completed report may be withheld under section 552.108 of the Government Code. In addition, because sections 552.101, 552.102, and 552.117 make information confidential under the Act, we will address their applicability to the information subject to section 552.022. We will also address all of your arguments for the information 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. Section 552.101 encompasses section 21.355 of the Education Code, which provides, “[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 administrator. *See* Open Records Decision No. 643 at 3 (1996). Additionally, the Third Court of Appeals has concluded a written reprimand constitutes an evaluation for purposes of section 21.355 as 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.). We have also determined a “teacher” for purposes of section 21.355 means a person who is required to and does in fact hold a certificate or permit under chapter 21 of the Education Code and is teaching at the time of the evaluation. *See* ORD 643 at 4. Upon review, we find the information we have marked constitutes evaluations of a teacher. Therefore, provided the teacher was required to hold and did hold the appropriate certificate and was engaged in the process of teaching at the time of the evaluations at issue, the evaluations are generally confidential under section 21.355 of the Education Code.

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 teacher whose evaluations are at issue. Therefore, to the extent the evaluations we have marked are of the type that is contemplated by section 21.352, the requestor has a right of access to her own information under section 21.352(c) of the Education Code. However, 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 engaged in the process of teaching at the time of the evaluations at issue, 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.

Section 552.101 of the Government Code also encompasses section 261.201(a) of the Family Code, which provides:

(a) Except as provided by Section 261.203, the following information is confidential, is not subject to public release under chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers

used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). We note the district is not an agency authorized to conduct a chapter 261 investigation. *See id.* § 261.103 (listing agencies that may conduct child abuse investigations). However, you explain Exhibit C was used or developed in an investigation of suspected child abuse by the district's police department. Thus, we find that the information at issue was used or developed in an investigation of alleged or suspected child abuse under chapter 261 of the Family Code, so as to fall within the scope of section 261.201(a). *See id.* § 261.001 (defining "abuse" for purposes of chapter 261 of the Family Code); *see also id.* § 101.003(a) (defining "child" for purposes of this section as person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes). You have not indicated the district's police department has adopted a rule that governs the release of this type of information. Therefore, we assume no such regulation exists. Given that assumption, Exhibit C is confidential under section 261.201 of the Family Code and must be withheld under section 552.101 of the Government Code.<sup>5</sup>

Next, we address your claim under section 552.103 of the Government Code for the remaining information not subject to section 552.022 of the Government Code. Section 552.103 of the Government Code provides, in part, as follows:

(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 it seeks to withhold. 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.*

---

<sup>5</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure for this information.

*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 [1st 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).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To demonstrate that 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. *Id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. ORD 555; *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

You inform us, and the request reflects, that simultaneously with the submission of the request for information, the requestor requested a due process hearing involving the district before the Texas Education Agency. We understand the due process hearing is a contested case hearing, which is governed by the Administrative Procedure Act ("APA"), chapter 2001 of the Government Code. This office has concluded a contested case under the APA constitutes litigation for purposes of the statutory predecessor to section 552.103. Open Records Decision No. 588 (1991). Based on your representations and our review, we find the district has established that it reasonably anticipated litigation on the date the district received the request for information. You state the requested information is related to the anticipated litigation because it concerns issues identified in the requestor's complaint. Therefore, we conclude section 552.103 is applicable and the district may withhold the information not subject to section 552.022 under section 552.103 of the Government Code.<sup>6</sup>

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 anticipated litigation is not excepted from disclosure under section 552.103(a). Further, the applicability of section 552.103(a) ends when the litigation has concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

---

<sup>6</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure.

In summary, to the extent the evaluations we have marked are of the type that is contemplated by section 21.352, the requestor has a right of access to her own information under section 21.352(c) of the Education Code. However, 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 engaged in the process of teaching at the time of the evaluations at issue, the evaluations we have marked are confidential under section 552.101 in conjunction with section 21.355 of the Education Code. Exhibit C must be withheld under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. The district may withhold the remaining information not subject to section 552.022 under section 552.103 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](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,

Michelle R. Garza  
Assistant Attorney General  
Open Records Division

MRG/som

Ref: ID# 474364

Enc. Submitted documents

c: Requestor  
(w/o enclosures)