



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 19, 2013

Ms. Bonnie Hungerford
For the Ysleta Independent School District
ScottHulse, P.C.
P.O. Box 99123
El Paso, Texas 79999-9123

OR2013-02729

Dear Ms. Hungerford:

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# 479048.

The Ysleta Independent School District (the "district"), which you represent, received a request for information pertaining to a named employee and all e-mail exchanges of two individuals regarding either of two other named individuals.¹ You state the district is releasing some of the requested information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, and 552.107 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the United States Department of Education Family Policy Compliance Office has informed this office the Family Educational Rights and Privacy Act ("FERPA"),

¹We note the district sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request).

²Although you raise section 552.101 of the Government Code in conjunction with Rule 503 of the Texas Rules of Evidence, 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). The proper exception to raise when asserting the attorney-client privilege for information not subject to section 552.022 of the Government Code is section 552.107 of the Government Code. *See* ORD 676.

section 1232g of title 20 of the United States Code, 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.³ Consequently, state and local educational authorities that receive a request for education records from a member of the public under the Act must not submit education records to this office in unredacted form, that is, in a form in which “personally identifiable information” is disclosed. *See* 34 C.F.R. § 99.3 (defining “personally identifiable information”). You have submitted unredacted education records for our review. Because this office is prohibited from reviewing an education record for the purpose of determining whether appropriate redactions have been made under FERPA, we will not address the applicability of FERPA to the submitted information. Such determinations under FERPA must be made by the educational authority in possession of the education records.⁴ However, we will consider your exceptions to disclosure of the remaining information under the Act.

We next 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; [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). The submitted information contains completed evaluations that are subject to subsection 552.022(a)(1). The district must release the completed evaluations pursuant to subsection 552.022(a)(1) unless they are excepted from disclosure

³A copy of this letter may be found on the attorney general's website, <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

⁴If in the future the district does obtain parental consent to submit unredacted education records and seeks a ruling from this office on the proper redaction of those education records in compliance with FERPA, we will rule accordingly.

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 they are made confidential under the Act or other law. *See id.* § 552.022(a)(3). You seek to withhold the information subject to subsections 552.022(a)(1) and 552.022(a)(3) 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). Thus, the information subject to subsections 552.022(a)(1) and 552.022(a)(3) may not be withheld under section 552.103 of the Government Code. However, as sections 552.101 and 552.117 of the Government Code can make information confidential under the Act, we will address the applicability of these sections to the information subject to subsections 552.022(a)(1) and 552.022(a)(3).⁵

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 provides, in relevant part, “[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 (1996). In Open Records Decision No. 643, we determined for purposes of section 21.355, the word “teacher” 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 and who is in the process of teaching, as that term is commonly defined, at the time of the evaluation. *See id.* at 4.

You represent, and provide documentation showing, the employee whose information is at issue held a teaching certificate under subchapter B of chapter 21 of the Education Code at the time of the evaluations. Upon review, we agree some of the information, which we have marked, consists of teacher evaluations for purposes of section 21.355. Accordingly, the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. We note some of the remaining information in Exhibit 6 consists of self-evaluation forms that were completed by the individual at issue. Thus, we find you have failed to demonstrate how any of the remaining information in Exhibit 6 consists of documents evaluating the performance of a teacher for purposes of section 21.355 of the Education Code. Therefore, the district

⁵The 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).

may not withhold any of the remaining information in Exhibit 6 under section 552.101 in conjunction with section 21.355 of the Education Code.

Section 552.117(a)(1) excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee of a governmental body who timely requests confidentiality for the information under section 552.024 of the Government Code. *See Gov't Code §§ 552.117(a)(1), .024.* Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See Open Records Decision No. 530 at 5 (1989).* Information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee who did not timely request confidentiality under section 552.024. Accordingly, if the district employee whose information is at issue timely elected to keep her information confidential pursuant to section 552.024, the district must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The district may not withhold this information under section 552.117 if the employee did not timely elect to keep her information confidential. As you raise no further exceptions, the remaining information subject to section 552.022 must be released.

Next, we address your argument under section 552.103 of the Government Code for the information not subject to section 552.022. 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 has the burden of providing relevant facts and documents to show that 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).

You state, and provide documentation showing, a lawsuit was filed against a district employee in her individual and official capacity, prior to the district's receipt of the present request for information. You further state the remaining information is related to the pending litigation. Accordingly, upon review of your arguments and the information at issue, we find litigation was pending against the district when the district received this request for information and the information at issue relates to the pending litigation. Therefore, the district may withhold the remaining information pursuant to section 552.103 of the Government Code.⁶

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

In summary, the district must withhold the information we have marked in Exhibit 6 under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. If the district employee whose information is at issue timely elected to keep her information confidential pursuant to section 552.024, the district must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The district must release the remaining information subject to subsections 552.022(a)(1) and 552.022(a)(3), which we have marked. The district may withhold the remaining information under section 552.103 of the Government Code.

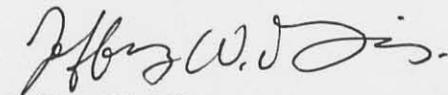
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

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,

⁶As our ruling is dispositive, we do not address your remaining arguments against disclosure.

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,



Jeffrey W. Giles
Assistant Attorney General
Open Records Division

JWG/dls

Ref: ID# 479048

Enc. Submitted documents

c: Requestor
(w/o enclosures)