



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 26, 2014

Mr. Darin Darby
Counsel for South San Antonio Independent School District
Escamilla & Poneck, L.L.P.
P.O. Box 200
San Antonio, Texas 78291-0200

OR2014-05022

Dear Mr. Darby:

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# 517852.

The South San Antonio Independent School District (the "district"), which you represent, received a request for the following: (1) the name, title, professional experience, number of contract days, and annual salary of professional employees employed by the district during specified school years, excluding teachers; (2) documents used to determine the requestor's client's placement on the salary schedule during specified school years; and (3) the requestor's client's job description, employment contracts, formal evaluations, and written reprimands for specified school years. You state the district will withhold student-identifying information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.¹ You indicate the district

¹The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office FERPA does not permit state and local educational authorities to disclose to this office, without parental or student 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 FERPA determinations must be made by the educational authority in possession of the education records. A copy of this letter may be found on the Office of the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

does not have information responsive to a portion of the request.² You claim the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we note some of 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;

(2) the name, sex, ethnicity, salary, title, and dates of employment of each employee and officer of 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[.]

Gov't Code § 552.022(a)(1)-(3), (15). The submitted information includes a completed report and completed evaluations subject to subsection 552.022(a)(1). The district must release the completed report and completed evaluations 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 the name, title, salary, and dates of employment of district employees subject to subsection 552.022(a)(2) and executed contracts subject to subsection 552.022(a)(3). Additionally, the submitted information contains a job description. We note the district posts job description on its website when advertising job openings. Accordingly, we find the district considers job descriptions to be open to the public under the district's policies, and therefore the submitted job description is subject

²The Act does not require a governmental body to release information that did not exist when it received a request or to create responsive information. *See Economic 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), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

to subsection 552.022(a)(15), The information subject to subsections 552.022(a)(2), 552.022(a)(3), and 552.022(a)(15) must be released unless it is made confidential under the Act or other law. *See id.* § 552.022(a)(2)-(3), (15). Although the district claims section 552.103 of the Government Code for this information, that section 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 district may not withhold the information subject to section 552.022 under section 552.103. However, because section 552.101 of the Government Code can make information confidential, we will consider the applicability of that section to the information subject to section 552.022 of the Government Code.³ We will also address your argument under section 552.103 of the Government Code 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. This section encompasses information protected by other statutes, such as section 21.355 of the Education Code, which provides in part that “[a] document evaluating the performance of a teacher or administrator is confidential.” *See* 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 for purposes of section 21.355, an “administrator” 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. *See* ORD 643 at 4. Upon review, we find the information we have marked constitutes evaluations of an administrator. Therefore, provided the administrator was required to hold and did hold the appropriate certificate and was performing the functions of an administrator at the time of the evaluations at issue, the marked evaluations are confidential under section 21.355 of the Education Code and must be withheld under section 552.101 of the Government Code. In that instance, we note that, while the requestor represents the individual whose evaluations are at issue, the Education Code does not contain an access provision for administrator evaluations. If the individual at issue did not hold the appropriate certificate or was not performing the functions of an administrator at the time of the evaluations at issue, the marked evaluations are not confidential under section 21.355 and may not be withheld under section 552.101 on that basis.

³The 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).

We note some of the materials at issue may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; see Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. As the district raises no further exceptions for the remaining information subject to section 552.022, it must be released. However, any information subject to copyright may only be released in accordance with copyright law.

We next address your arguments under section 552.103 for the remaining information. Section 552.103 of the Government Code provides, in relevant 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). The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. See Open Records Decision No. 551 at 4-5 (1990). A governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception applies in a particular situation. The test for meeting this burden is a showing (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the requested information is related to that litigation. See *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); ORD 551 at 4. The governmental body must meet both parts of this test for information to be excepted under section 552.103(a). See ORD 551 at 4.

To establish litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *See* 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 letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. *See* Open Records Decision No. 555 (1990); *see also* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, or when an individual threatened to sue on several occasions and hired an attorney. *See* Open Records Decision Nos. 346 (1982), 288 (1981). 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 litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983).

You contend the district reasonably anticipated litigation prior to its receipt of the request for information because a district employee heard that an individual made an alleged threat of litigation against the district, and the district subsequently received the present request for information from an attorney representing the individual. You further state the requestor's client confirmed her threats by filing a grievance against the district pursuant to district policies. However, we note the requestor's client did not file her grievance until after the district received the present request for information. Further, you have not demonstrated the requestor's client had taken any concrete steps towards filing litigation prior to the district's receipt of the request for information. Accordingly, we find you have failed to establish the district reasonably anticipated litigation when it received the request for information. Therefore, the district may not withhold any of the remaining information under section 552.103 of the Government Code.

In summary, provided the administrator was required to hold and did hold the appropriate certificate and was performing the functions of an administrator at the time of the evaluations at issue, 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. The district must release the remaining information; however, any information subject to copyright may only be released in accordance with copyright law.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read "Kristi L. Wilkins". The signature is fluid and cursive, with the first letters of each word being capitalized and prominent.

Kristi L. Wilkins
Assistant Attorney General
Open Records Division

KLW/tch

Ref: ID# 517852

Enc. Submitted documents

c: Requestor
(w/o enclosures)