



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 7, 2014

Ms. Leticia D. McGowan
School Attorney
Dallas Independent School District
3700 Ross Avenue
Dallas, Texas 75204

OR2014-17901

Dear Ms. McGowan:

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# 538553 (DISD ORR# 13167).

The Dallas Independent School District (the "district") received a request for (1) any and all copies of notes, correspondence, or other documents regarding the recommendation for contract non-renewal of a specified employee; (2) all performance records for the 2013-2014 school year for the employee; and (3) copies of the entire campus file and district personnel file for the employee. 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 the request is for information related to a specified individual. However, a portion of the submitted information pertains to a different district employee, and is therefore not responsive. This ruling does not address the public availability of non-responsive information, and the district is not required to release non-responsive information in response to this request.

We note the United States Department of Education Family Policy Compliance Office has informed this office the Family Educational Rights and Privacy Act ("FERPA"), 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 or an adult student's

consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act.¹ 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 our office is prohibited from reviewing these education records to determine whether appropriate redactions under FERPA have been made, we will not address the applicability of FERPA to any of the submitted records. *See* 20 U.S.C. § 1232g(a)(1)(A). Such determinations under FERPA must be made by the educational authority in possession of the education records.

We must address the district’s obligations under the Act. Section 552.301 of the Government Code describes the procedural obligations placed on a governmental body that receives a written request for information it wishes to withhold. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. *See* Gov’t Code § 552.301(b). In this instance, although you state the district received the request for information on July 7, 2014, the request itself shows it was e-mailed to the district’s public information coordinator on June 27, 2014. You inform us, starting June 9, 2014, the district’s offices were closed on Fridays. Thus, we consider the district to have received the request on the next business day, which was June 30, 2014. The district does not inform us it was closed for business on any of the remaining days at issue. Accordingly, the district’s ten-business-day deadline was July 16, 2014. However, the district requested a ruling from our office in an envelope meter-marked July 22, 2014. *See id.* § 552.308(a) (deadline under the Act is met if document bears post office mark indicating time within the deadline period). Consequently, we find the district failed to comply with section 552.301 of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body’s failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the information is public and must be released, unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 630 (1994). Normally, a compelling reason exists when third-party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). You assert the requested information is excepted from disclosure under

¹A copy of this letter may be found on the Office of the Attorney General’s website at <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

section 552.103 of the Government Code. Section 552.103 is a discretionary exception to disclosure and may be waived. *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 section 552.103); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Thus, in failing to comply with section 552.301 the district has waived its claim under section 552.103, and may not withhold any responsive information on this basis. However, we note the submitted documents include information subject to section 552.101 of the Government Code, which can provide a compelling reason to overcome the presumption of openness.² Therefore, we will address the applicability of this exception to the submitted information.

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 of the Government Code encompasses section 21.355 of the Education Code, which provides, in part, “[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, 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 engaged in the process of teaching, as that term is commonly defined, at the time of the evaluation. *See* ORD 643 at 4.

Upon review, the submitted information includes evaluations of a teacher. We understand the teacher at issue held the proper teaching certificate and was acting as a teacher at the time the evaluations were prepared. Therefore, the teacher evaluations we marked are generally confidential under section 21.355.

However, we note section 21.352(c) of the Education Code specifically provides, “[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 authorized representative of the teacher whose evaluations are at issue. Therefore, if the evaluations we marked are of the type contemplated by section 21.352, then this requestor has a right of access to them under section 21.352(c) and the district may not withhold them under section 552.101 of the Government Code in conjunction with section 21.355 of the Government Code. However, if the marked evaluations are not of the type contemplated by section 21.352, the requestor does not have a right of access under section 21.352(c), and the district must withhold them under section 552.101 in conjunction with section 21.355 of the Education Code. As no

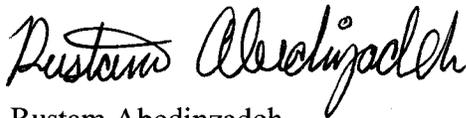
²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

further exceptions to disclosure are raised, the remaining responsive information must be released.³

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,



Rustam Abedinzadeh
Assistant Attorney General
Open Records Division

RA/dls

Ref: ID# 538553

Enc. Submitted documents

c: Requestor
(w/o enclosures)

³We note the requestor has a special right of access to some of the information being released. Gov't Code § 552.023(a) (person or person's authorized representative has special right of access to information held by governmental body that relates to person and that is protected from public disclosure by laws intended to protect person's privacy interests); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individuals request information concerning themselves). Thus, the district must again seek a decision from this office if it receives another request for the same information from another requestor.