



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 4, 2016

Ms. Julie Chen Allen
General Counsel
Spring Independent School District
16717 Ella Boulevard
Houston, Texas 77090-4213

OR2016-02720

Dear Ms. Allen:

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# 596723 (PIR No. 224).

The Spring Independent School District (the "district") received a request for all information relating to a named former employee of the district. The district states it has released some of the requested information. The district states it is withholding information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g.¹ The district claims the submitted information is excepted from disclosure under sections 552.101,

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 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. The DOE has determined FERPA determinations must be made by the educational authority in possession of the educational records. We have posted a copy of the letter from the DOE on the Attorney General's website at <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

552.111, and 552.116 of the Government Code.² We have considered the exceptions the district claims and reviewed the submitted information.

Section 552.116 of the Government Code provides as follows:

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, a school district, or a joint board operating under Section 22.074, Transportation Code, including any audit relating to the criminal history background check of a public school employee, is excepted from the requirements of Section 552.021. If information in an audit working paper is also maintained in another record, that other record is not excepted from the requirements of Section 552.021 by this section.

(b) In this section:

(1) "Audit" means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, a resolution or other action of a board of trustees of a school district, including an audit by the district relating to the criminal history background check of a public school employee, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.

(2) "Audit working paper" includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116. The district asserts the submitted information constitutes audit working papers of the Texas Education Agency ("TEA") maintained by the district as an auditee of the TEA. As the auditee, the district cannot assert section 552.116 in order to protect its own interest in withholding the information. We note this office has received no arguments from the TEA seeking to withhold the information at issue under section 552.116.

²We note in a letter dated December 7, 2015, the district states it wishes to withdraw its request for an open records decision for the information submitted as Item 2 because the district has released this information to the requestor.

Accordingly, we conclude the district may not withhold the submitted information based on an audit being performed by the TEA. Thus, the district may not withhold any of the information at issue under section 552.116 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 protected by section 21.355 of the Education Code, which provides, in relevant part, “[a] document evaluating the performance of a teacher or administrator is confidential.” Educ. Code § 21.355(a). 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.” *Abbott v. North East Indep. Sch. Dist.*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.). 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 an “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 as an administrator, as that term is commonly defined, at the time of the evaluation. *Id.*

The district states the information submitted as Item 3 consists of a confidential evaluation of a district administrator. We understand the administrator at issue was acting in his capacity as an administrator when the evaluative document was created. However, the district does not inform us the individual in question held the requisite certificate under chapter 21 of the Education Code at the time of the evaluation as an administrator. *See* ORD 643 at 4. Accordingly, we must rule conditionally. The district must withhold the information submitted as Item 3 under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code to the extent the individual at issue held the appropriate certificate under chapter 21 at the time the information at issue was created. However, to the extent the individual at issue did not hold the requisite certificate under chapter 21 of the Education Code at the time the information at issue was created, the information at issue is not confidential under section 21.355 of the Education Code and may not be withheld under section 552.101 on that basis.

Section 552.111 of the Government Code excepts from disclosure “[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]” Gov’t Code § 552.111. This exception encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, writ ref’d n.r.e.); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, we determined section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995). Further, section 552.111 does not protect facts and written observations of facts and events severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152, 157 (Tex. App.—Austin 2001, no pet.); *see* ORD 615 at 5. But, if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, section 552.111 protects the factual information. *See* Open Records Decision No. 313 at 3 (1982).

The district states the information it has marked consists of advice, opinions, and recommendations relating to the district's policymaking. Upon review, we find the district may withhold some of the information at issue, which we have marked, under section 552.111. However, some of the remaining information at issue consists of either general administrative information that does not relate to policymaking or information that is purely factual in nature. Thus, we find the district has failed to demonstrate the remaining information at issue is excepted under section 552.111. Accordingly, the district may not withhold the remaining information at issue under section 552.111 of the Government Code.

In summary, the district must withhold the information submitted as Item 3 under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code to the extent the individual at issue held the appropriate certificate under chapter 21 at the time the information at issue was created. The district may withhold the information we have marked under section 552.111 of the Government Code. The district must release the remaining information submitted as Item 4.

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 'D. Wheelus', with a long horizontal flourish extending to the right.

David L. Wheelus
Assistant Attorney General
Open Records Division

DLW/bhf

Ref: ID# 596723

Enc. Submitted documents

c: Requestor
(w/o enclosures)