



November 1, 2001

Mr. Oscar Trevino
Attorney for Kenedy I.S.D.
Walsh, Anderson, Brown, Schulze & Aldridge
P.O. Box 2156
Austin, Texas 78768

OR2001-5030

Dear Mr. Trevino:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 154214.

The Kenedy Independent School District (the "school district"), which you represent, received a request for (1) updates made to the school district's policy manual since July 23, 2001, (2) a copy of the school district superintendent's application for employment, (3) fees paid to the school district board of trustees' attorneys for the 2000-2001 school year, (4) projected school district enrollment for the 2001-2002 school year, and (5) any information relating to a "performance improvement plan" for the school district's superintendent. You claim that the information responsive to the fifth category of the request is excepted from disclosure under section 552.101 of the Government Code. You indicate that the school district will release the remainder of the responsive information. We have also received comments from the requestor. See Gov't Code § 552.304. We have considered all of the submitted arguments and reviewed the submitted information.

In response to the request for information relating to a "performance improvement plan" for the school district's superintendent, you have submitted two versions of an intervention plan. You submitted the first version in your initial correspondence with this office, indicating that while the plan had not been approved by the school district's board at the time the school district received the instant request for information, the board subsequently voted to approve the submitted plan. One week later you submitted to this office a newer version of the intervention plan that incorporated some handwritten notes on the originally submitted plan. You state that this newer version of the plan is the final version of the plan approved by the board and should replace the version originally submitted to this office as the responsive information. We note that the Public Information Act does not apply to information that did not exist at the time a request for information was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dismissed);

Open Records Decision No. 452 at 3 (1986). It appears that the second version of the intervention plan did not exist at the time the school district received the instant request for information. Therefore, we do not reach the issue of whether this version of the intervention plan must be released to the instant requestor under the Act. Furthermore, it is unclear whether the version of the intervention plan first submitted to this office existed at the time the school district received the request for information. Although you indicate that the board had not approved of the plan at the time the school district received the request for information, you have not indicated whether the school district possessed or had a right of access to the document at the time of the request.¹ If the school district did not possess or have a right of access to the first submitted version of the plan at the time it received the instant request for information, the Act does not require the release of the information in this instance and we do not reach the issue of whether the plan is excepted from disclosure. See Gov't Code § 552.002; *Bustamante*, 562 S.W.2d 266; ORD 452 at 3. However, to the extent the first submitted version plan did exist at the time of the request and the school district possessed it or had a right of access to it, we will address your argument under section 552.101 of the Government Code.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Section 21.355 of the Education Code provides, "A document evaluating the performance of a teacher or administrator is confidential." This office interpreted this section to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. Open Records Decision No. 643 (1996). In that opinion, this office also concluded that an administrator is someone who is required to hold and does hold a certificate required under chapter 21 of the Education Code and is administering at the time of his or her evaluation. *Id.* Based on the reasoning set out in Open Records Decision No. 643, we conclude that the intervention plan submitted to this office evaluates the performance of a certified administrator and is therefore confidential under section 21.355 of the Education Code. Therefore, pursuant to section 552.101 of the Government Code, the school district must withhold this document.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the

¹Formal approval of information by a governmental body's governing board is not required in order for information to be considered "public information" under the Public Information Act. Rather, information is considered "public information" as long as it "is collected assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it." Gov't Code § 552.002.

governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

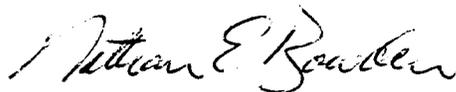
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Nathan E. Bowden
Assistant Attorney General
Open Records Division

NEB/sdk

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Enc: Submitted documents

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