



June 6, 2002

Mr. William M. Buechler
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OR2002-3075

Dear Mr. Buechler:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 164039.

The Tulo-so-Midway Independent School District (the "district"), which you represent, received one request for copies of all documents pertaining to a former district teacher and a second request for copies of all documents pertaining to the former teacher's conduct or performance as a teacher with the district. You claim that the submitted information is excepted from disclosure pursuant to sections 552.026, 552.101, 552.103, and 552.114 of the Government Code, as well as pursuant to the Family Educational Rights and Privacy Act ("FERPA"). We have considered the exceptions you claim and have reviewed the submitted representative sample documents.¹

Initially, we note that two of the documents in Exhibit E that we have marked are subject to section 552.022 of the Government Code. Section 552.022 makes certain information public, unless it is expressly confidential under other law. *See* Gov't Code § 552.022(a). One category of public information under section 552.022 is "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by [s]ection 552.108[.]" Gov't Code § 552.022(a)(1). Thus, the two marked evaluations in Exhibit E must be released to the requestors, unless they are confidential under "other law" or are excepted from disclosure pursuant to section 552.108 of the Government Code.

¹ We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach and, therefore, does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Although the district claims that these evaluations are excepted from disclosure pursuant to section 552.103 of the Government Code, we note that this exception to disclosure is a discretionary exception under the Public Information Act and, as such, does not constitute "other law" that makes the evaluations confidential.² Accordingly, we do not address your section 552.103 claim with respect to the marked evaluations in Exhibit E.

However, we also note that the marked evaluations in Exhibit E are subject to section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.³ Section 21.355 provides that, "[any] 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. *See* Open Records Decision No. 643 (1996). In that opinion, this office also concluded that a teacher is someone who is required to hold and does hold a certificate or permit required under chapter 21 of the Education Code and is teaching at the time of his or her evaluation. *See id.* at 4.

We note that with regard to the appraisal of teachers, section 21.352(a) of the Education Code provides:

- (a) In appraising teachers, each school district shall use:
 - (1) the appraisal process and performance criteria developed by the [Commissioner of Education]; or
 - (2) an appraisal process and performance criteria:
 - (A) developed by the district- and campus-level committees established under Section 11.251;
 - (B) containing the items described by Sections 21.351(a)(1) and (2); and
 - (C) adopted by the board of trustees.

² Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential), 473 (1987) (governmental body may waive section 552.111), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

³ Section 552.101 excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. Section 552.101 encompasses information protected by other statutes.

Educ. Code § 21.352. We further note that section 21.352(c) specifically provides that “[e]ach teacher is entitled to receive a written copy of the evaluation on its completion.” It is well established that statutes governing access to a specific subset of information held by a governmental body prevail over the generally applicable Public Information Act (the “Act”). *See, e.g.*, Open Records Decision No. 478 at 2-3 (1987) (Act does not govern special rights of access granted under other statutes). After reviewing the marked evaluations in Exhibit E, we presume that they were developed pursuant to section 21.352 of the Education Code. Based on that presumption, we conclude that the district must withhold the evaluations from the first requestor pursuant to section 552.101 in conjunction with section 21.355 of the Education Code. However, assuming that the second requestor in this instance received permission from the former district teacher to receive copies of his evaluations, we also conclude that the district must release these evaluations to the second requestor. *See* Educ. Code § 21.352(c). If the former district teacher did not provide the second requestor with this permission, then we conclude that the district must withhold the marked evaluations in Exhibit E from the second requestor pursuant to section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.

You claim that Exhibit C is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. Section 261.201 provides in part:

- (a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:
 - (1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and
 - (2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). You state that Exhibit C constitutes documents that were forwarded to the State Board for Education Certification (“SBEC”) as part of an ongoing investigation that is being conducted by SBEC arising out of an alleged incident of suspected child abuse. However, we note that neither the district nor SBEC are agencies authorized to conduct chapter 261 investigations. *See* Fam. Code § 261.103 (listing agencies authorized to conduct child abuse investigations). Furthermore, you do not indicate that Exhibit C is maintained by the district’s law enforcement unit or was forwarded to another agency charged with conducting an investigation under chapter 261. Thus, if Exhibit C is

maintained or was forwarded to an appropriate investigating entity under chapter 261, we conclude that it is confidential in its entirety under section 261.201 of the Family Code and, thus, is excepted from disclosure pursuant to section 552.101. *See* Open Records Decision No. 440 at 2 (1986) (predecessor statute). However, if Exhibit C is not maintained or was not forwarded to an appropriate investigating entity under chapter 261, we conclude that no portion of Exhibit C is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. In that event, we address your additional arguments against disclosure of these records.

You also claim that Exhibits C and D, as well as the remaining information in Exhibit E, is excepted from disclosure pursuant to section 552.103 of the Government Code. Section 552.103 provides in pertinent 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 district maintains 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 is pending or reasonably anticipated on the date that the governmental body receives the request for information, and (2) the information at issue is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *see also 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). The district must meet both prongs of this test for information to be excepted under section 552.103(a). We note that contested cases conducted under the Administrative Procedure Act (the "APA"), chapter 2001 of the Government Code, are considered litigation under section 552.103. *See* Open Records Decision No. 588 at 7 (1991).

You state that Exhibits C, D, and E pertain to a contested case which is currently pending before the Texas Education Agency. Based on our review of your representations and the

information at issue, we conclude that the district has demonstrated that litigation is pending and that the information at issue is related to that litigation for purposes of section 552.103. Accordingly, we conclude that the district may withhold from disclosure the documents in Exhibits C and E, that we have marked, pursuant to section 552.103 of the Government Code.⁴

However, we note that once information has been obtained by all parties to the 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 anticipated litigation is not excepted from disclosure under section 552.103(a) and may not be withheld from disclosure on that basis. We note that two of the documents in Exhibit C, the entirety of Exhibit D, and the remaining document in Exhibit E, all of which we have marked, have been seen by the opposing party in this matter. Accordingly, we conclude that the district may not withhold these particular documents from disclosure under section 552.103 of the Government Code. Consequently, the district must release to the requestors the marked document in Exhibit E that has been seen by the opposing party in this matter.

However, you also claim that the two documents in Exhibit C that are not excepted from disclosure under section 552.103 are excepted from disclosure pursuant to section 552.114 of the Government Code. Section 552.114 excepts from disclosure student records at an educational institution funded completely or in part by state revenue. This office generally applies the same analysis under section 552.114 and the Family Educational Rights and Privacy Act ("FERPA"). *See* Open Records Decision No. 539 (1990). FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information, other than directory information, contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1). "Education records" means those records that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. *See id.* § 1232g(a)(4)(A). Information must be withheld from disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." *See* Open Records Decision Nos. 332 (1982), 206 (1978). Based on our review of your arguments and these two documents in Exhibit C, we conclude that no portion of either of these documents constitutes personally identifiable information contained in a student's education records. Accordingly, we conclude that the district may not withhold any portion of these two documents in Exhibit C from disclosure under section 552.114 of the Government Code in conjunction with FERPA.

⁴ We note, however, that the applicability of section 552.103(a) ends once the litigation has been concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

However, you also claim that these two documents in Exhibit C are excepted from disclosure pursuant to section 552.101 in conjunction with the common-law right to privacy. Section 552.101 also encompasses information protected from disclosure by the common-law right to privacy. Information is protected from disclosure under the common-law right to privacy if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied), the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. *See Ellen*, 840 S.W.2d at 525. The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *See id.* The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the public's interest was sufficiently served by the disclosure of such documents. *See id.* In concluding, the *Ellen* court held that "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.* Based on our review of your arguments and these two documents in Exhibit C, we conclude that no portion of these documents constitutes identifying information of victims or witnesses of alleged sexual harassment. Accordingly, we conclude that the district may not withhold any portion of these two documents in Exhibit C from disclosure pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy. Consequently, the district must release these two marked documents in Exhibit C to the requestors.

We note, however, that Exhibit D contains some information that may be excepted from disclosure pursuant to section 552.117(1) of the Government Code. Section 552.117(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. *See Gov't Code* § 552.117(1). However, information subject to section 552.117(1) may not be withheld from disclosure if the current or former employee made the request for confidentiality under section 552.024 after the request for information at issue was received by the governmental body. Whether a particular piece of information is public must be determined at the time the request for it is made. *See Open Records Decision No. 530 at 5* (1989). Accordingly, we conclude that the district must withhold the information that we have marked in Exhibit D from the first requestor pursuant to section 552.117(1) of the Government Code, if the former employee at issue requested that this information be kept confidential under section 552.024 prior to the district's receipt of the present requests. However, the district may not withhold this particular information from the second requestor in any event pursuant to section 552.023 of the Government Code. *See Gov't Code* § 552.023 (providing that individual has limited special right of access to information when only basis for excepting information from

disclosure involves protection of same individual's privacy interest); *see also* Open Records Decision No. 481 (1987).

In summary, the district must withhold the marked evaluations in Exhibit E from the first requestor pursuant to section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. Assuming that the second requestor in this instance received permission from the former district teacher to receive copies of his evaluations, the district must release these evaluations to the second requestor pursuant to section 21.352(c) of the Education Code. However, if the former district teacher did not provide the second requestor with this permission, the district must withhold the marked evaluations in Exhibit E from the second requestor pursuant to section 552.101 in conjunction with section 21.355 of the Education Code. The district must withhold Exhibit C from disclosure in its entirety pursuant to section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code, if Exhibit C is maintained or was forwarded to an appropriate investigating entity under chapter 261. However, if Exhibit C is not maintained or was not forwarded to an appropriate investigating entity under chapter 261, the district may withhold from disclosure the documents in Exhibits C and E, that we have marked, pursuant to section 552.103 of the Government Code. The district must withhold the information that we have marked in Exhibit D from the first requestor pursuant to section 552.117(1) of the Government Code, if the former employee at issue requested that this information be kept confidential under section 552.024 prior to the district's receipt of the present requests. The district must release the remaining information to the requestors.

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 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

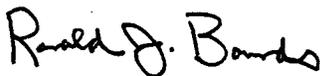
governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The 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); *Texas Department of Public 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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/sdk

Ref: ID# 164039

Enc. Marked documents

cc: Ms. Nancy Vera
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(w/o enclosures)