



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 13, 2003

Ms. Mia M. Martin
General Counsel
Richardson Independent School District
400 South Greenville Avenue
Richardson, Texas 75081-4198

OR2003-7530A

Dear Ms. Martin:

You asked whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. This office assigned your request ID# 189719 and issued Open Records Letter No. 2003-7530 (2003). We have since determined that an error was made in the decisional process and that Open Records Letter No. 2003-7530 (2003) is incorrect. Therefore, Open Records Letter No. 2003-7530 (2003) is hereby withdrawn. This decision is substituted for the previous decision and serves as the correct ruling.

The Richardson Independent School District (the "district") received two sets of requests for personnel information relating to seven named individuals. You indicate that you have released some of the requested information, but argue that the remainder of the requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.117 and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.¹

We first note that some of the requested information is subject to section 552.022 of the Government Code. Section 552.022 provides that:

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.

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under 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;

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(1), (3). In this instance, the requested information includes completed evaluations and a contract. The district must release the completed evaluations and contract under section 552.022 unless they are excepted from disclosure under section 552.108 or expressly confidential under other law. You do not claim that the evaluations or contract are excepted under section 552.108. Therefore, you may withhold this information only if the information is confidential under other law. Although you argue that the information at issue is excepted under section 552.103 of the Government Code, section 552.103 is a discretionary exception and is not "other law" for the purposes of section 552.022. See *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103). Thus, the district may not withhold any of the evaluations or the contract under section 552.103. However, sections 552.101 and 552.102 constitute "other law" under section 552.022; therefore, we will consider whether sections 552.101 and 552.102 apply to this information.

Section 552.101 excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses information that other statutes make confidential. You contend that the evaluations are confidential under section 21.355 of the Education Code. Section 21.355 provides that "[a] document evaluating the performance of a teacher or administrator is confidential." Educ. Code § 21.355. 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). In that decision, we determined that the word "teacher," for purposes of section 21.355, is a person who is required to and does in fact hold a teaching certificate under subchapter B of chapter 21 of the Education Code or a school district teaching permit under section 21.055 and who is engaged in the process of teaching, as that term is commonly defined, at the time of the evaluation. See Open Records Decision No. 643 at 4. We also concluded that the word "administrator" in 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 of an administrator, as that term is commonly defined, at the time of the evaluation. *See id.*

The requested information includes evaluations of certified teachers and administrators of the district. We conclude that the evaluations of these individuals are excepted from disclosure under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. *See Open Records Decision No. 643 at 4.* Section 21.355 does not, however, protect the evaluations of individuals who were not certified under Chapter 21 of the Education Code as teachers or administrators at the time of their evaluations. *See id.*

You argue that sections 552.101 and 552.102 except the noneducator evaluations and contract from disclosure. For information to be protected from public disclosure by the common law right of privacy under section 552.101, the information must meet certain criteria. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure 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. *Id.* at 685. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101. *See Indus. Found.*, 540 S.W.2d at 683-85. Accordingly, we will consider your section 552.101 and section 552.102 claims together.

Having reviewed the noneducator evaluations and contract, we conclude that none of the information they contain is protected by common law privacy. *See Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute his private affairs), 455 (1987) (public employee's job performance or abilities generally not protected by privacy), 444 at 4 (1986) (public will frequently have legitimate interest in personnel file information relating to public employees, and thus even highly intimate or embarrassing information generally will be open to public), 405 at 2-3 (1983) (public has interest in manner in which public employee performs his job), 400 at 5 (1983) (information protected only if release would lead to clearly unwarranted invasion of employee's privacy); see also Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow).* Consequently, none of the remaining evaluations or the contract may be withheld under section 552.101 or section 552.102 of the Government Code in conjunction with common law privacy.

Some of the noneducator evaluations and the contract contain social security numbers. Section 552.117 of the Government Code excepts from disclosure social security numbers for employees of a governmental body who request that this information be kept confidential under section 552.024. *See* Gov't Code § 552.117(a)(1).² Whether a social security number is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, pursuant to section 552.117(a)(1), the district must withhold the social security numbers of employees who elected, prior to the district's receipt of the request for information, to keep such information confidential. The district may not withhold such information under section 552.117 for anyone who did not make a timely election. If no timely election was made under section 552.117, we note that the individuals' social security numbers may still be excepted from disclosure. Under section 552.101 in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if a governmental body obtains or maintains a social security number pursuant to any provision of law enacted on or after October 1, 1990, the number is confidential. *See* Open Records Decision No. 622 at 2-4 (1994). You inform this office that some of the social security numbers were obtained pursuant to title 38, section 120.1(a)(1) of the Texas Administrative Code. However, we have been unable to locate any such provision. We caution you that chapter 552 of the Government Code imposes criminal penalties for the release of confidential information. *See* Gov't Code §§ 552.007, .352. Therefore, before releasing a social security number, the district should ensure that it was not obtained and is not maintained pursuant to any provision of law enacted on or after October 1, 1990. With the exception of social security numbers, the noneducator evaluations and contract must be released.

With regard to the information not subject to section 552.022, we address your claim under section 552.103. Section 552.103 provides in 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

² In Senate Bill 1388, which became effective on June 20, 2003, the Seventy-eighth Legislature amended section 552.117 of the Government Code by adding "(a)" to the relevant language of this provision. *See* Act of May 30, 2003, 78th Leg., R.S., ch. 947, 2003 Tex. Sess. Law Serv. 2822 (Vernon) (to be codified as an amendment to Gov't Code § 552.117).

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 governmental body has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information; and (2) that the information at issue is related to that litigation. *See University of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See id.* To demonstrate that litigation is reasonably anticipated, the district must furnish concrete evidence that litigation is realistically contemplated and is more than mere conjecture. *See* Open Records Decision No. 518 at 5 (1989). Concrete evidence to support a claim that 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.³ Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). Conversely, this office has determined that 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).

Whether litigation is reasonably anticipated must be determined on case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). You explain that the requested information relates to grievances the requestor has filed against district employees. You summarize the facts that led to the filing of the grievances and describe the district's written and oral exchanges with the requestor regarding the grievances. We find that the totality of the circumstances demonstrates the district reasonably anticipated litigation relating to the grievances on the date the district received the request for information.

We now examine whether the requested information is related to the anticipated litigation. "Ordinarily, the words 'related to' mean 'pertaining to,' 'associated with' or 'connected with.'" *University of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 483 (Tex. App.—Austin 1997, no pet.). After a review of your arguments and the submitted

³ In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

information, we find that the requested information is related to the anticipated litigation. Therefore, the district may withhold all documents other than the evaluations and contract under section 552.103 of the Government Code. We have marked the materials excepted under section 552.103.

Generally, however, 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. 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 it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the district must withhold the certified educator evaluations under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. With the exception of certain social security numbers, the evaluations of noneducator personnel and the contract must be released under section 552.022. The district may withhold all remaining documents under section 552.103 of the Government Code.⁴

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

⁴ Because we are able to make this determination, we need not address your additional arguments under sections 552.101, 552.102, 552.117 and 552.130 of the Government Code.

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 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 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,



Heather R. Rutland
Assistant Attorney General
Open Records Division

HRR/sdk

Ref: ID# 189719A

Enc: Submitted documents

c: Mr. J. Umoren
P.O. Box 270114
Dallas, Texas 75227
(w/o enclosures)