



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 17, 2007

Mr. David M. Kaliski
Kazen, Meurer & Perez, L.L.P.
P.O. Box 6237
Laredo, Texas 78040-6237

OR2007-16619

Dear Mr. Kaliski:

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# 297377.

The Laredo Independent School District (the "district"), which you represent, received a request for a list of campuses that did not "submit abstracts on time for the 2006-2007 scholastic year" and a list of campuses that "did not follow the [district's] PDAS 2006-2007 appraisal calendar and held several summative conferences after May 4, 2007." You state that you have released some of the responsive information to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.102 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, you state that the district does not possess actual lists responsive to the instant request. The Act applies only to information in existence at the time it is requested, and does not require a governmental body to release information that did not exist when a request for information was received, or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-268 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decisions Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983). However, a governmental body must make a good faith effort to relate a request to information that is within the governmental body's possession or control. *See* Open Records Decision No. 561 at 8-9 (1990). As you have identified and submitted

information which is responsive to the request, we will determine whether you must release this information to the requestor.

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 encompasses information made confidential by other statutes, such as 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 Open Records Decision No. 643, we 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 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* ORD 643 at 4. We also determined 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. *Id.* You assert that the submitted information includes evaluations that are confidential under section 21.355; however, you do not state or provide evidence that the employees who were the subjects of these evaluations held teacher’s certificates or permits or administrator’s certificates under subchapter B of chapter 21 of the Education Code and were performing the functions of a teacher or administrator at the time of the evaluations. Thus, we are unable to conclude that section 21.355 is applicable in this instance. If an employee held a teacher’s certificate or permit or an administrator’s certificate and was performing the functions of a teacher or administrator at the time of the evaluation, the information we have marked is confidential under section 21.355, and must be withheld under section 552.101 of the Government Code. To the extent that the employee does not satisfy these criteria, the information we have marked is not confidential under section 21.355 and may not be withheld under section 552.101 of the Government Code. The remaining submitted information does not evaluate the performance of a teacher or administrator as contemplated by section 21.355 of the Education Code. Therefore, the district may not withhold any of the remaining submitted information on that basis.

You also assert that the remaining submitted information is excepted from disclosure under section 552.102 of the Government Code. 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*, 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 v. Texas Industrial Accident Board* for information claimed to be protected under the doctrine of common-law privacy as incorporated by

section 552.101 of the Act. See *Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546, 550 (Tex. App.—Austin 1983, writ ref'd n.r.e.) (citing *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976)). Accordingly, we will consider your common-law privacy claim under both sections 552.101 and 552.102.

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 encompasses the doctrines of common-law and constitutional privacy. Common-law privacy protects information if (1) the information contains highly intimate and embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. 540 S.W.2d 668 at 685. The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683.

Upon review, we find that the information at issue is not intimate or embarrassing. Therefore, none of the remaining information is confidential under the doctrine of common-law privacy, and it may not be withheld under section 552.101 or section 552.102 on that basis.

In summary, if an employee held a teacher’s certificate or permit or an administrator’s certificate and was performing the functions of a teacher or administrator at the time of the evaluation, the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. The remaining submitted information must be released.

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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).

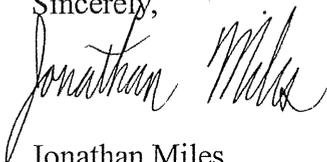
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 challenge 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 Office of the Attorney General 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,



Jonathan Miles
Assistant Attorney General
Open Records Division

JM/jh

Ref: ID# 297377

Enc. Submitted documents

c: Ms. Imelda Murillo
2417 Garfield
Laredo, Texas 78043
(w/o enclosures)