ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 13, 2009

Ms. LeAnne Lundy
Feldman Rogers
5718 Westheimer Road, Suite 1200
Houston, Texas 77057

OR2009-00529

Dear Ms. Lundy:

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# 332129.

The Somerville Independent School District (the "district"), which you represent, received a request for (1) all incident reports, investigation reports, and disciplinary action related to the district or its employees for the past five years; (2) all information regarding lawsuits or settlements involving the district for the past ten years; (3) the complete employment files for three named individuals; (4) all correspondence regarding complaints or employee misconduct; (5) all materials pertaining to educational training for employees; and (6) all information regarding insurance policies for the past five years.[1] You state the district has redacted student-identifying information within the responsive information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.[2] You claim the submitted information is excepted from disclosure under

[1] You state the district sought and received clarification from the requestor regarding the request. *See* Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used).

[2] We note the 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 student 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 education records. We have posted a copy of the letter from the DOE to this office on the Attorney General's website: http:// www.oag.state.tx.us/open/20060725usdoe.pdf.

sections 552.101, 552.102, 552.103, 552.107, 552.117, 552.130, 552.136 of the Government Code, and privileged under Texas Rule of Evidence 503. We have considered your arguments and reviewed the submitted information.

Initially, we note some of the submitted information is subject to section 552.022 of the Government Code, which provides in relevant part:

> the following categories of information are public information and not excepted from required disclosure under [the Act] 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[.]

Gov't Code § 552.022(a)(1). The submitted information contains completed evaluations, which must be released under section 552.022(a)(1), unless the information is excepted from disclosure under section 552.108 or expressly confidential under other law. You claim the evaluations are excepted under section 552.103 of the Government Code. Section 552.103, however, is a discretionary exception to public disclosure that protects a governmental body's interests and may be waived. *See id.* § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 665 at 2 n.5 (discretionary exceptions generally). As such, section 552.103 is not other law that makes information confidential for the purposes of section 552.022. Therefore, the district may not withhold the submitted evaluations under section 552.103 of the Government Code. You also claim the completed evaluations are confidential under section 552.101 of the Government Code. Because section 552.101 is other law for purposes of section 552.022, we will consider your claim under this exception for the evaluations.

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 section encompasses information protected by other statutes, such as section 21.355 of the Education Code, which 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 further determined that "teacher interns, teacher trainees, librarians, educational

aids and counselors cannot be teachers or administrators for purposes of section 21.355." *See id.* at 5.

You claim the completed teacher evaluations submitted as pages 226-280 and 293-305 constitute evaluations of an individual who held a teaching certificate and was employed as a teacher at the times of the evaluations. Based on your representations and our review, we agree the teacher evaluations at pages 226-280 and 293-305 are confidential under section 21.355 of the Education Code and must be withheld from disclosure under section 552.101 of the Government Code.

You also assert the completed bus driver evaluations submitted as pages 214-225, 285-292, and 530-545, teacher aide evaluations submitted as pages 371-406, 528-529, and 546-567, and cafeteria worker evaluations submitted as pages 568-573 are confidential under section 21.355. Although you inform us some of the bus driver evaluations pertain to an individual who holds a teaching certificate, these evaluations pertain to his performance as a bus driver and not as a teacher engaged in the process of teaching. You inform us the cafeteria worker, teacher aides, and other bus driver hold teacher aide certificates. You do not, however, inform us these individuals held the requisite teaching certificates at the times of their evaluations. Furthermore, as previously noted, this office does not consider teacher aides to be teachers for purposes of section 21.355. *See id.* Thus, you have failed to demonstrate how the bus driver, cafeteria worker, and teacher aide evaluations pertain to teachers engaged in the process of teaching. Consequently, the district may not withhold the bus driver, teacher aide, and cafeteria worker evaluations at pages 214-225, 285-292, 371-406, and 528-573 under section 552.101 of the Government in conjunction with section 21.355 of the Education Code. As you have claimed no other exceptions to disclosure for these documents, they must be released.

You claim the remaining information not subject to section 552.022 is excepted from disclosure under section 552.103 of the Government Code, which provides:

> (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.
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> . . .
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> (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). A governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To demonstrate litigation is reasonably anticipated, the governmental body must furnish concrete evidence litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Concrete evidence to support a claim litigation is reasonably anticipated may include, for example, a potential opposing party hiring an attorney who makes a demand for disputed payments and threatens to sue if the payments are not made promptly. *See* Open Records Decision No. 346 (1982); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). Furthermore, this office has concluded litigation was reasonably anticipated when the potential opposing party threatened to sue on several occasions and hired an attorney. *See* Open Records Decision No. 288 (1981).

You state the requestor's client threatened to sue the district several times and hired more than one attorney prior to the district's receipt of this request. You also state, and provide documentation showing, that prior to the district's receipt of this request, the requestor's client's former attorney made a demand for personal injury payments and threatened litigation if the payments were not made. Based on your representations and our review, we determine the district reasonably anticipated litigation on the date it received the request. Further, you explain the information at issue relates to the requestor's client's claims against the district. Thus, we agree the information at issue relates to the reasonably anticipated litigation. Therefore, the district may withhold the remaining information not subject to section 552.022 under section 552.103 of the Government Code.[3]

We note, however, once information has been obtained by all parties to the anticipated 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 potential 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).

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[3] As our ruling for this information is dispositive, we need not address your remaining arguments against disclosure.

In summary, the district must withhold the completed teacher evaluations at pages 226-280 and 293-305 under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. The district may withhold the remaining information not subject to section 552.022 under section 552.103 of the Government Code. The remaining 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). If the governmental body does not file suit over 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).

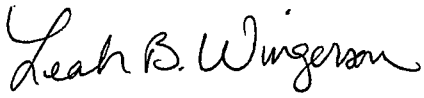
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can challenge that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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,



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/cc

Ref: ID# 332129

Enc. Submitted documents

cc: Requestor
(w/o enclosures)