



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 12, 2009

Mr. Robert Vina  
Walsh, Anderson, Brown, Aldridge, and Gallegos, P.C.  
6521 North 10<sup>th</sup> Street, Suite C  
McAllen, Texas 78504

OR2009-06396

Dear Mr. Vina:

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# 342835 (PIR# 4920).

The Brownsville Independent School District (the "district"), which you represent, received a request for all reports conducted by outside consultants concerning special education services for a specified time period and internal auditor reports. You state the district is redacting some of the responsive information pursuant to the federal Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.<sup>1</sup> You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.111 of the Government Code and privileged under rules 192.3 and 192.7 of the Texas Rules of Civil Procedure.<sup>2</sup> We have considered your arguments and reviewed the submitted information.

Initially, you inform this office pages BISD 0001 through BISD 0041 were previously ruled on in Open Records Letter No. 2008-00179 (2008). In that ruling, we ruled the district must

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<sup>1</sup>We note our office is prohibited from reviewing education records to determine whether appropriate redactions under FERPA have been made; therefore, we will not address the applicability of FERPA to any of the submitted information.

<sup>2</sup>Although you raise section 552.101 in conjunction with rule 192.3 of the Texas Rules of Civil Procedure, this office has concluded section 552.101 of the Government Code does not encompass discovery privileges. *See* Open Records Decision No. 647 at 2 (1996).

release the information at issue because the district failed to comply with the requirements of section 552.301 of the Government Code. You now seek to withhold the submitted information in its entirety, including the information that was previously addressed by this office. Section 552.007 of the Government Code provides that if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential by law. *See id.* § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, the district may not now withhold the previously released information unless its release is expressly prohibited by law or the information is confidential by law. You seek to withhold the entirety of the submitted information, including the information that was previously released under Open Records Letter No. 2008-00179, under sections 552.101, 552.103, and 552.111 of the Government Code and rules 192.3 and 192.7 of the Texas Rules of Civil Procedure. Rules 192.3 and 192.7 do not prohibit the release of information or make information confidential. *See* TEX. R. EVID. 511; *Jordan v. Court of Appeals*, 701 S.W.2d 644, 649 (Tex. 1985); *Arkla, Inc. v. Harris*, 846 S.W.2d 623, 630 (Tex. Civ. App.—Houston [14th Dist.] 1993, orig. proceeding); *Aetna Cas. & Surety Co. v. Blackmon*, 810 S.W.2d 438, 440 (Tex. Civ. App.—Corpus Christi 1991, writ denied). Further, sections 552.103 and 552.111 also do not prohibit the release of information or make information confidential. *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); *see also* Open Records Decision Nos. 470 at 7 (1987) (statutory predecessor to section 552.111 may be waived), 663 at 5 (1999) (governmental body may waive section 552.111), 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, because the district has released pages BISD 0001 through BISD 0041 to members of the public in response to Open Records Letter No. 2008-00179, the district may not now withhold such information under the discovery privileges or the claimed exceptions that do not prohibit the release of information or make information confidential. You also claim section 552.101 for the information previously ruled upon by this office. Section 552.101 makes information confidential by law. Accordingly, we will consider your argument under section 552.101 for the previously ruled upon information. Additionally, we will consider your claimed exceptions for the submitted information that was not subject to the prior ruling.

Next, we must address the district's obligations under the Act. Pursuant to section 552.301(b) of the Government Code, a governmental body must ask for the attorney general's decision and state the exceptions that apply within ten business days after receiving the request. *See* Gov't Code § 552.301(b). Additionally, under section 552.301(e), a governmental body receiving an open records request for information that it wishes to withhold pursuant to one of the exceptions to public disclosure is required to submit to this office within fifteen business days of receiving the request (1) general written comments

stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See* Gov't Code § 552.301(e). You state the district received the request on February 2, 2009. You further state, and provide documentation showing, you provided the requestor with a cost estimate on February 13, 2009 that is in compliance with section 552.2615 of the Government Code. *See id.* § 552.2615 (providing that governmental body shall provide requestor with estimate of charges if charges exceed \$40). The requestor complied with section 552.2615 by accepting the charges. *See id.* § 552.2615(b). Section 552.2615 of the Government Code provides that the submission of an estimate of charges to the requestor does not toll the governmental body's deadlines to ask for an attorney general decision under section 552.301. *See id.* § 552.2615(g) (providing that "[t]he time deadlines imposed by this section do not affect the application of a time deadline imposed on a governmental body under Subchapter G"); *see also* Open Records Decision No. 663 at 2-5 (1999) (addressing circumstances under which governmental body's communications to clarify or narrow request for information will toll section 552.301(b) deadlines). Section 552.263(a) provides in relevant part that a governmental body "may require a deposit or bond for payment of anticipated costs . . . if [the governmental body] has provided the requestor with the required written itemized statement detailing the estimated charge for providing the copy and if the charge" is estimated to exceed \$100. Gov't Code § 552.263(a). Section 552.263(e) states a request for information is considered received by a governmental body on the date it receives the request deposit or bond for payment of anticipated costs. *See* Gov't Code § 552.263(e). You do not inform us, and the cost estimate does not reflect, the district requested a deposit for the estimated amount pursuant to section 552.263. Accordingly, the ten business day deadline began on February 2, 2009. Thus, the district was required to request a decision from this office by February 16, 2009. Consequently, we find the district failed to comply with the requirements of section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption that the information is public. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). A compelling reason exists when third-party interests are at stake, or when information is confidential by law. Open Records Decision No. 150 (1977). Although you claim sections 552.103 and 552.111, these exceptions are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See Dallas Area Rapid Transit*, 4 S.W.3d at 475-76 (governmental body may waive section 552.103); *see also* ORD Nos. 677 at 10 (section 552.111 is not compelling

reason to withhold information under section 552.302), 522 (discretionary exceptions in general). Rules 192.3 and 192.7 are privileges against discovery and are also subject to waiver. *See* TEX. R. EVID. 511; *Jordan*, 701 S.W.2d at 649; *Arkla*, 846 S.W.2d at 630; *Aetna*, 810 S.W.2d at 440. Therefore, the district may not withhold the information not previously ruled upon under section 552.103 or section 552.111 of the Government Code or rules 192.3 or 192.7 of the Rules of Civil Procedure. However, because your claim under section 552.101 of the Government Code can provide a compelling reason for non-disclosure, we will address this exception.

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 protected by other statutes. Section 21.355 of the Education Code provides that “a document evaluating the performance of a teacher or administrator is confidential.” Educ. Code § 21.355. This office has 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 Open Records Decision No. 643, we determined that a “teacher” for purposes of section 21.355 means a person who (1) 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 (2) is engaged in the process of teaching, as that term is commonly defined, at the time of the evaluation. *See id.* at 4. In addition, the court has concluded a written reprimand constitutes an evaluation for purposes of section 21.355 because “it reflects the principal’s judgment regarding [a teacher’s] actions, gives corrective direction, and provides for further review.” *North East Indep. Sch. Dist. v. Abbott*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.).

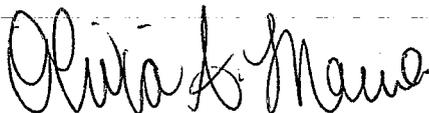
You state the submitted information evaluates the performance of educators who can be discerned from the positions being evaluated. We note, however, the submitted information consists of evaluations of district programs in their entireties, not of a teacher for the purposes of section 21.355, and internal audit information. Therefore, we find you have failed to show how the submitted information evaluates the performance of a teacher for the purposes of section 21.355. Thus, the district may not withhold the submitted information under section 552.101 on that basis. As you raise no other arguments against disclosure, the submitted information must be released.

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

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General’s Open Government Hotline, toll free,

at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Olivia A. Maceo  
Assistant Attorney General  
Open Records Division

OM/eeg

Ref: ID# 342835

Enc. Submitted documents

c: Requestor  
(w/o enclosures)