



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 20, 2009

Mr. S. Anthony Safi
Mounce, Green, Myers, Safi, Paxson & Galatzan
P.O. Box 1977
El Paso, Texas 79950-1977

OR2009-06904

Dear Mr. Safi:

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# 343783.

The El Paso Independent School District (the "district"), which you represent, received a request for correspondence between members of the board of trustees and district administrators during a specified time interval.¹ You claim that some of the requested information is exempted from disclosure under sections 552.101, 552.103, and 552.137 of the Government Code.² We have considered the exceptions you claim and reviewed the information you submitted.

We first note that some of the submitted information was created after the date of the district's receipt of this request for information. The Act does not require a governmental body to release information that did not exist when it received a request or create responsive

¹You inform us that the district sought and received clarification of this request for information. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request).

²Although you also previously raised other exceptions to disclosure, you indicate that the district no longer claims any of those exceptions. Therefore, this decision does not address any of the other exceptions you previously raised. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must submit written comments stating why claimed exception applies to information at issue).

information.³ Thus, the information that did not exist when the district received this request is not responsive to the request. We have marked that information. This decision does not address the public availability of the submitted information that is not responsive to the request, and the district need not release that information in response to this request.

We next note, and you acknowledge, that the district did not comply with its deadlines under section 552.301 of the Government Code in requesting this decision. *See* Gov't Code § 552.301(a)-(b), (e). Pursuant to section 552.302 of the Government Code, the submitted information is therefore presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold any of the information. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ). This statutory presumption can generally be overcome when information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). Section 552.103 of the Government Code, which you claim, is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See* Gov't Code § 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 Gov't Code § 552.103); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Your claim under section 552.103 does not provide a compelling reason for non-disclosure under section 552.302. In failing to comply with section 552.301, the district has waived section 552.103 and may not withhold any of the submitted information under that exception. *See* Open Records Decision No. 663 at 5 (1999) (waiver of discretionary exceptions). The applicability of sections 552.101 and 552.137 of the Government Code, which you also claim, can provide a compelling reason for non-disclosure. Accordingly, we will address your claims under those exceptions.

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 exception encompasses information that other statutes make confidential. You raise section 552.101 in conjunction with 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. In Open Records Decision No. 643 (1996), this office 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. Additionally, we determined that for the 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 concluded that the word

³*See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

“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.* We note that a court has concluded that a written reprimand constitutes an evaluation for the 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 seek to withhold information contained in the school superintendent’s weekly reports and other communications with members of the board of trustees. You contend that the information at issue evaluates the performance of a principal and three teachers who held the appropriate certifications and were functioning as an administrator or teacher, respectively, during the relevant time period. We note that the information at issue appears in the superintendent’s communications with members of the school board on matters that he apparently deemed to be of interest to the board. The information at issue refers to two principals, three teachers, and other district officials by name in the course of discussing administrative, professional, and other matters in which those individuals were involved. We find that you have not demonstrated that the superintendent’s communications of information about those matters to the board constitute evaluations of the principals, teachers, and other officials concerned for the purposes of section 21.355 of the Education Code. We therefore conclude that the district may not withhold any of the responsive information under section 21.355 in conjunction with section 552.101 of the Government Code.

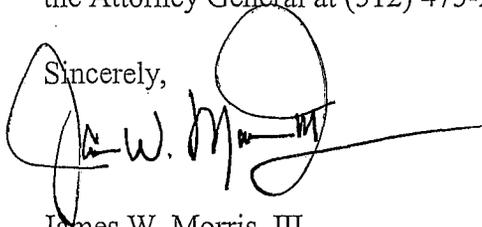
Section 552.137 of the Government Code states that “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act],” unless the owner of the e-mail address has affirmatively consented to its public disclosure. Gov’t Code § 552.137(a)-(b). The types of e-mail addresses listed in section 552.137(c) may not be withheld under this exception. *See id.* § 552.137(c). Likewise, section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. We have marked personal e-mail addresses that the district must withhold under section 552.137 of the Government Code, unless the owner of a particular e-mail address has affirmatively consented to its public disclosure. The rest of the responsive 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,

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,

A handwritten signature in black ink, appearing to read "J.W. Morris, III". The signature is stylized with a large, circular flourish on the left side and a long horizontal line extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/cc

Ref: ID# 343783

Enc: Submitted documents

c: Requestor
(w/o enclosures)