



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 20, 2013

Mr. Chris Cooper  
Director of Information Services  
Sherman Independent School District  
2701 Loy Lake Road  
Sherman, Texas 75090

OR2013-22262

Dear Mr. Cooper:

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# 509110.

The Sherman Independent School District (the "district") received a request for the personnel file related to a named teacher. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of the submitted information consists of records created after the date the district received the request for information. The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. 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), 563 at 8 (1990), 555 at 1–2 (1990). Accordingly, this information, which we marked, is not responsive to the request. This ruling does not address the public availability of information that is not responsive to a request, and the district is not required to release non-responsive information.

Next, you state some of the information is subject to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g. The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that FERPA does not permit state and local educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable information contained in education records for

the purpose of our review in the open records ruling process under the Act.<sup>1</sup> Accordingly, we will not address the applicability of FERPA to the information at issue, except to note records contained in an employee's personnel file are generally not education records subject to FERPA. *See id.* (defining "education records"). Regardless, we will address the applicability of the claimed exceptions to the submitted information.

Next, we note some of the submitted information consists of completed evaluations. Section 552.022(a)(1) of the Government Code provides for the required disclosure of "a completed . . . evaluation . . . made of, for, or by a governmental body," unless it is excepted by section 552.108 of the Government Code or made confidential under the Act or other law. Gov't Code § 552.022(a)(1). Section 552.103 is a discretionary exception to disclosure and does not make information confidential. *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); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Accordingly, the district may not withhold the completed evaluations under section 552.103 of the Government Code. However, you also claim section 552.101 of the Government Code for this information, and section 552.101 does make information confidential. Therefore, we will consider your assertion of section 552.101 for that information.

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 section 21.355 of the Education Code, which provides, "[a] document evaluating the performance of a teacher . . . is confidential." *See* Educ. Code § 21.355(a). 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). We have determined for purposes of section 21.355, the term "teacher" means a person who is required to and does in fact hold a teaching certificate or permit under subchapter B of chapter 21 of the Education Code and who is engaged in the process of teaching, as that term is commonly defined, at the time of the evaluation. *See id.* at 4. We understand the individual at issue was a certified teacher and was teaching at the time of the evaluations. Accordingly, the district must withhold the evaluations we marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.

Finally, we turn to the remaining information. Section 552.103 of the Government Code 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

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<sup>1</sup>A copy of this letter may be found on the Office of the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

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 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 is 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, orig. proceeding); *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). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). See ORD 551 at 4. 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 that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* This office has concluded litigation is reasonably anticipated when an individual has threatened to sue on several occasions and hired an attorney. See Open Records Decision No. 288 (1981).

You state, and provide documentation showing, the requestor sent multiple e-mails to the district prior to her request for information. In those communications, the requestor represents to the district that she and her husband are attorneys and she will be making a request for information in order to pursue legal action against the district. She also states possible causes of action for tort, breach of contract, defamation, and libel. You explain the information at issue directly relates to the anticipated litigation because the requestor specifically states she will be seeking employment records to pursue her legal actions. Based on these representations and our review, we conclude the district reasonably anticipated litigation on the date it received the request, and the information at issue relates to the anticipated litigation. Accordingly, the district may withhold the remaining information under section 552.103 of the Government Code.

We note, however, once the information at issue has been obtained by all parties to the anticipated litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to the information. See Open Records Decision Nos. 349 (1982), 320 (1982). Thus, any information obtained from or provided to all other parties in the anticipated litigation is not excepted from disclosure under section 552.103(a) and must be disclosed.

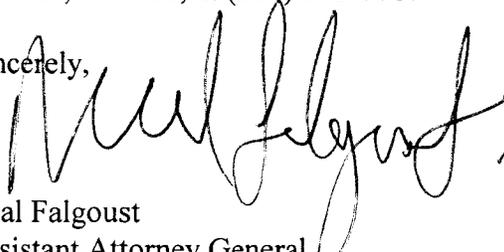
Further, the applicability of section 552.103(a) ends once the litigation has concluded or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

In summary, the district need not release information that is not responsive to the request. The district must withhold the evaluations we marked 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 under section 552.103 of the Government Code.

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.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml), 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Neal Falgoust  
Assistant Attorney General  
Open Records Division

NF/som

Ref: ID# 509110

Enc. Submitted documents

c: Requestor  
(w/o enclosures)