



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 3, 2014

Dr. Carol Simpson
Counsel for Paducah Independent School District
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5300 Democracy Drive, Suite 200
Plano, Texas 75024

OR2014-05546

Dear Dr. Simpson:

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# 518611.

The Paducah Independent School District (the "district"), which you represent, received a request for (1) the minutes and agendas for all school board meetings pertaining to the employment of a specified individual; (2) the personnel file of the specified individual; (3) information pertaining to the use of the Paducah High School gymnasium and locker room for a specified period of time; (4) communications pertaining to allegations against the specified individual; (5) Texas Rangers reports pertaining to the allegations; (6) information pertaining to the district's liability insurance policy; and (7) faculty and staff directories for Paducah High School and the district for a specified period of time.¹ You state the district will redact student identifying information pursuant to the Family Educational Rights and

¹You state the district sought and received clarification of a portion of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (if governmental entity, acting in good faith, requests clarification of unclear or overbroad request, ten-day period to request attorney general ruling is measured from date request is clarified).

Privacy Act (“FERPA”), section 1232g of title 20 of the United States Code.² Additionally, you state the district will withhold certain information pursuant to Open Records Decision No. 684 (2009), as well as social security numbers under section 552.147 of the Government Code.³ You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.⁴

Initially, we note portions of the information at issue are subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part, the following:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or 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 [of the Government Code];

...

²The 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. A copy of this letter may be found on the Office of the Attorney General’s website at <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

³Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain categories of information without the necessity of requesting an attorney general decision, including certified agendas of closed meetings under section 552.101 in conjunction with section 551.104 of the Government Code, as well as certain drivers’ license information under section 552.130(a) of the Government Code. We note, however, the Texas Legislature amended section 552.130 effective September 1, 2011, to allow a governmental body to redact the information described in section 552.130(a) without the necessity of seeking a decision from the attorney general. *See* Gov’t Code § 552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See id.* § 552.130(d), (e). Thus, the statutory amendment to section 552.130 superceded Open Records Decision No. 684 on September 1, 2011. Therefore, a governmental body may only redact information subject to section 552.130(a) in accordance with section 552.130(c), not Open Records Decision No. 684.

⁴We assume the “representative sample” of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;

...

(15) information regarded as open to the public under an agency's policies[.]

Gov't Code § 552.022(a)(1), (3), (15). The submitted information contains completed evaluations subject to section 552.022(a)(1) and an employment contract subject to section 552.022(a)(3), which we have marked. We have also marked a job description that may be subject to section 552.022(a)(15), if the district considers the job description open to the public under its policies. Although you raise section 552.103 for this information, this section is a discretionary exception to disclosure and does not make information confidential under the Act. *See 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); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Thus, the district may not withhold the information subject to section 552.022(a)(1) or section 552.022(a)(3) under section 552.103 of the Government Code. Additionally, as you only claim section 552.103 of the Government Code for the job description subject to section 552.022(a)(15), the district must release this information if it is considered to be open to the public under the district's policies. Because section 552.101 of the Government Code makes information confidential under the Act, we will consider its applicability to the information subject to section 552.022.⁵ We will also consider your arguments for the information not subject to section 552.022.

Section 552.101 of the Government Code excepts "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 that "[a] document evaluating the performance of a teacher or administrator is confidential." 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 that for purposes of section 21.355, "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 id.* at 4. We

⁵The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

have also determined that “administrator,” for purposes of 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.* Additionally, the Third Court of Appeals has concluded that a written reprimand constitutes an evaluation for purposes of section 21.355, as 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 indicate the information subject to section 552.022(a)(1) evaluates the performance of an individual who is a certified teacher and administrator. You inform us the individual whose information is at issue was acting as a teacher and/or administrator when the evaluative documents were created. Based on your representations and our review, we find the evaluations at issue constitute evaluations of a teacher or administrator for purposes of section 21.355. Accordingly, the district must withhold the evaluations we have marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.

We now address your claim under section 552.103 of the Government Code for the information not subject to section 552.022. Section 552.103 of the Government Code provides, in relevant part, the following:

(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.

...

(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). The purpose of section 552.103 is to protect the litigation interests of governmental bodies that are parties to the litigation at issue. *See id.* § 552.103(a); Open Records Decision No. 638 at 2 (1996) (section 552.103 only protects the litigation interests of the governmental body claiming the exception). A governmental body has the burden of providing relevant facts and documents to show section 552.103(a) 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, 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

To establish litigation is reasonably anticipated, a governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body’s receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. *See* Open Records Decision No. 555 (1990); *see also* Open Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact a potential opposing party has hired an attorney who makes a request for information does not establish litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983).

You state, and provide documentation showing, prior to the district’s receipt of the request for information, the requestor sent a letter to the district identifying himself as the attorney of a student in relation to “pending legal issues” involving a former district employee. Further, you inform us, and provide documentation showing, the requestor filed an action in court against the district seeking pre-suit discovery prior to the district’s receipt of the instant request. Based on your representations and our review, we find the district reasonably anticipated litigation at the time it received the request for information. Additionally, we agree the information at issue is related to the anticipated litigation. Therefore, the district may withhold this information under section 552.103 of the Government Code.⁶

We note, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to all parties to 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 been concluded or is no longer anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

⁶As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

In summary, the district must withhold the evaluations we have marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. The district may withhold the information not subject to section 552.022 under section 552.103 of the Government Code. The district must release the remaining information, including the job description subject to section 552.022(a)(15), if it is considered to be open to the public under the district's policies.

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, 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,



Miriam A. Khalifa
Assistant Attorney General
Open Records Division

MAK/akg

Ref: ID# 518611

Enc. Submitted documents

c: Requestor
(w/o enclosures)