ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 21, 2014

Ms. Rebecca Bailey Weimer
Counsel for the Corpus Christi Independent School District
Thompson & Horton, L.L.P.
3200 Southwest Freeway, Suite 2000
Houston, Texas 77027

OR2014-14745

Dear Ms. Weimer:

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# 533489.

The Corpus Christi Independent School District (the "district"), which you represent, received a request for information pertaining to a specific incident involving the requestor and her daughter, including apology letters to both the requestor and her daughter. You state the requested apology letters do not exist.[1] You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.108, 552.117, 552.1175, and 552.135 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.[2]

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[1]The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

[2]We 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.

Initially, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

> (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:
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> > (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 includes completed evaluations that are subject to subsection 552.022(a)(1). The district must release the completed evaluations pursuant to subsection 552.022(a)(1) unless they are excepted from disclosure under section 552.108 of the Government Code or are made confidential under the Act or other law. *See id.* You seek to withhold the information subject to subsection 552.022(a)(1) under section 552.103 of the Government Code. However, section 552.103 is a discretionary exception that 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 § 552.130); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the evaluations may not be withheld under section 552.103 of the Government Code. However, as section 552.101 of the Government Code can make information confidential under the Act, we will consider your argument under this exception to the information at issue. We will also consider your argument under section 552.103 for the information that is not subject to section 552.022.

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 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 that opinion, this office also concluded a teacher is someone who is required to hold and does hold a certificate required under chapter 21 of the Education Code and is teaching at the time of his or her evaluation. *Id.* 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." *See Abbott v. North East Indep. Sch. Dist.*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.).

You assert the submitted information subject to section 552.022 of the Government Code consists of evaluations of a teacher. We understand the teacher was required to hold and did

hold the appropriate certificate and was acting as a teacher at the time of the evaluations at issue. Therefore, these evaluations, which we marked, must be withheld under section 552.101 in conjunction with section 21.355 of the Education Code.

Section 552.103 of the Government Code provides in relevant part:

> (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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> . . .
>
> (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 section 552.103(a) applies 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 requested information is related to that litigation. *See 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). *See* ORD 551 at 4. We note contested cases conducted under the Administrative Procedure Act (the "APA"), chapter 2001 of the Government Code, are considered litigation for purposes of section 552.103. *See* Open Records Decision No. 588 at 7 (1991).

This office has long held that "litigation," for purposes of section 552.103, includes "contested cases" conducted in a quasi-judicial forum. *See* Open Records Decision Nos. 474 (1987), 368 (1983), 336 (1982), 301 (1982). In determining whether an administrative proceeding is conducted in a quasi-judicial forum, some of the factors this office considers are whether the administrative proceeding provides for discovery, evidence to be heard, factual questions to be resolved, the making of a record, and whether the proceeding is an adjudicative forum of first jurisdiction with appellate review of the resulting decision without a re-adjudication of fact questions. *See* ORD 588.

You state the information not subject to section 552.022 relates to a grievance filed by the requestor. You explain grievances filed with the district are "litigation" in that the district follows administrative procedures. You also explain the district's policy includes a three-level process whereby various administrators hear the grievances at Level I and II, and the district's board of trustees hears the grievance if the grievant appeals to Level III. You state during the hearings, the grievant is allowed to be represented by counsel, present favorable evidence in opposition to the district's position, and present witnesses to testify on their behalf. You further inform us, the grievant must complete the grievance process before she can appeal to the Commissioner of Education, and eventually into district court. Based on your representations and our review, we find the district's administrative procedure for disputes, as described above, is conducted in a quasi-judicial forum. Thus, we find the district's grievance procedures constitute litigation for section 552.103 purposes. You indicate, and the submitted information reveals, the grievance was filed prior to the district's receipt of the request. Having reviewed your arguments and the information at issue, we find the district was a party to pending litigation on the date the district received the request. Further, we find the district has demonstrated the information not subject to section 552.022 of the Government Code is related to the pending litigation.

We note basic information is generally not excepted from public disclosure under section 552.103. Open Records Decision No. 597 (1991). We further note 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 pending or anticipated litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. We note the opposing party has seen or had access to portions of the information at issue. Therefore, this information, which we marked for release, is not protected by section 552.103 of the Government Code and may not be withheld on that basis. 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). Therefore, with the exception of basic information and the information we have marked for release, the district may withhold the information not subject to section 552.022 under section 552.103 of the Government Code.[3]

Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). Upon review, we find the district must withhold the e-mail addresses we

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

marked under section 552.137 of the Government Code, unless their owners affirmatively consent to their public disclosure.

In summary, the evaluations, which we marked, must be withheld under section 552.101 in conjunction with section 21.355 of the Education Code. With the exception of basic information and the information we have marked for release, the district may withhold the information not subject to section 552.022 under section 552.103 of the Government Code. The district must withhold the e-mail addresses we marked under section 552.137 of the Government Code, unless their owners affirmatively consent to their public disclosure. The remaining 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.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,

Rahat Huq
Assistant Attorney General
Open Records Division

RSH/dls

Ref: ID# 533489

Enc. Submitted documents

c: Requestor
(w/o enclosures)