



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

June 18, 2015

Ms. Holly G. McIntush  
Counsel for the Abilene Independent School District  
Thompson & Horton, L.L.P.  
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Austin, Texas 78701

OR2015-12076

Dear Ms. McIntush:

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# 568082.

The Abilene Independent School District (the "district"), which you represent, received a request for twenty-one categories of information pertaining to several named district employees, specified incidents and investigations, training documentation, and specified policies.<sup>1</sup> You state the district has redacted information subject to section 552.117 of the Government Code as permitted by section 552.024(c) of the Government Code.<sup>2</sup> We

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<sup>1</sup>You state the district sought and received clarification 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) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

<sup>2</sup>Section 552.117 of the Government Code excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body. *See* Gov't Code § 552.117(a)(1). Section 552.024 of the Government Code authorizes a governmental body to withhold information subject to section 552.117 without requesting a decision from this office if the current or former employee or official chooses not to allow public access to the information. *See id.* § 552.024(c); *see also id.* § 552.024(a-1) (a school district may not require an employee or former employee of the district to choose whether to allow public access to the

understand the district will withhold social security numbers pursuant to section 552.147(b) of the Government Code.<sup>3</sup> You state the district has released some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.114, and 552.135 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g, 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>4</sup> Consequently, state and local educational authorities that receive a request for education records from a member of the public under the Act must not submit education records to this office in unredacted form, that is, in a form in which "personally identifiable information" is disclosed. *See* 34 C.F.R. § 99.3 (defining "personally identifiable information"). You have submitted redacted education records for our review. We further note that the requestor may be the attorney for a student to whom some of the submitted information pertains. Because our office is prohibited from reviewing these education records to determine the applicability of FERPA, we will not address the applicability of FERPA to any of the submitted records, other than to note that an attorney has a right of access under FERPA to her client's education records and this right of access prevails over claims under sections 552.101, 552.103, and 552.135 of the Government Code. *See* 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.3; Open Records Decision No. 431 (1985) (information subject to right of access under FERPA may not be withheld pursuant to statutory predecessor to Gov't Code § 552.103); *see also Equal Employment Opportunity Comm'n v. City of Orange Tex.*, 905 F. Supp. 381, 382 (E.D. Tex. 1995) (holding FERPA prevails over inconsistent provision of state law). Such determinations under FERPA must be made by the educational authority in possession of the education records. Likewise, we do not address your argument under section 552.114 of the Government Code. *See* Gov't Code §§ 552.026 (incorporating FERPA into the Act), 552.114 (excepting from disclosure "student records"); Open Records Decision No. 539 (1990) (determining the same analysis applies under section 552.114 of the Government Code and FERPA). We will consider the district's claimed exceptions to the extent the student's attorney does not have a right of access to the submitted information under FERPA.

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employee's or former employee's social security number).

<sup>3</sup>Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office. *See id.* § 552.147(b).

<sup>4</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>.

Next, 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:

(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 section 552.022(a)(1). The district must release the completed evaluations pursuant to section 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 section 552.022(a)(1) under section 552.103 of the Government Code. However, section 552.103 is discretionary in nature 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). Therefore, the information subject to section 552.022 (a)(1) may not be withheld under section 552.103 of the Government Code. However, as section 552.101 of the Government Code applies to confidential information, we will consider your argument under section 552.101 for the information at issue. We will also consider your argument under section 552.103 of the Government Code against disclosure of the information not subject to section 552.022(a)(1) of the Government Code.

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 section encompasses information protected by other statutes. Section 21.355 of the Education Code provides, in relevant part, “[a] document evaluating the performance of a teacher or administrator is confidential.” Educ. Code § 21.355(a). The Third Court of Appeals 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.” *Abbott v. North East Indep. Sch. Dist.*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.). 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 administrator. *See* Open Records Decision No. 643 (1996). In Open Records Decision No. 643, we determined for 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 and who is in the process of teaching, as that term is commonly defined, at the time of the evaluation. *See*

*id.* at 4. Further, in Open Records Decision No. 643, we determined an “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 as an administrator, as that term is commonly defined, at the time of the evaluation. *Id.*

You argue the information you have marked, including the information subject to section 552.022(a)(1) of the Government Code, consists of confidential evaluations of district teachers and administrators by the district. You indicate the teachers and administrators at issue were certified as teachers or administrators by the State Board of Educator Certification and were acting as teachers or administrators at the time the evaluations were prepared. Upon review, we find the district has demonstrated the applicability of section 21.355 to some of the information at issue, which we have marked. Accordingly, the district must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. However, the remaining information you marked consists of hand-written interview notes that do not evaluate any employee for purposes of section 21.355. Thus, we find you have failed to demonstrate how the remaining information at issue consists of documents evaluating the performance of a teacher or administrator for purposes of section 21.355 of the Education Code. Accordingly, the district may not withhold the remaining information under section 552.101 of the Government Code on that basis.

Section 552.103 of the Government Code provides in relevant part as follows:

(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 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 from disclosure under section 552.103(a).

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 establish litigation is reasonably anticipated, a governmental body must provide this office “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *Id.* In Open Records Decision No. 638 (1996), this office stated a governmental body has met its burden of showing litigation is reasonably anticipated by representing it received a notice-of-claim letter that is in compliance with the Texas Tort Claims Act (“TTCA”), chapter 101 of the Civil Practices and Remedies Code. If that representation is not made, the receipt of the claim letter is a factor we will consider in determining, from the totality of the circumstances presented, whether the governmental body has established litigation is reasonably anticipated. *See* ORD 638 at 4.

The district argues the remaining information is related to reasonably anticipated civil litigation and thus is protected by section 552.103 of the Government Code. The district informs us the instant request for information states the requestor is an attorney representing a district student and is investigating certain “inappropriate, unethical and illegal actions” of a named former district employee against the requestor’s client. The requestor further states she is investigating the district’s handling of the former employee’s actions, and asks that the district “consider this letter a grievance under [district] policy[.]” In addition, you state in correspondence with the parents of the requestor’s client, the district was told by a parent “all future communications should go through their attorney.” Finally, you note in connection with a related police investigation, the chief of police of the Abilene Police Department has stated his belief that the administration of the district did not respond appropriately after learning of alleged inappropriate conduct. You do not affirmatively represent to this office the correspondence from the requestor is in compliance with the TTCA. Therefore, we will only consider the claim as a factor in determining whether the district reasonably anticipated litigation when it received the request for information. Based on your representations, our review of the submitted documents, and the totality of circumstances, we find the district has demonstrated it reasonably anticipated litigation when it received the request for information. We also find the information at issue is related to the anticipated litigation for purposes of section 552.103(a). Therefore, the district may withhold the remaining information under section 552.103(a) of the Government Code.<sup>5</sup>

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<sup>5</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of the submitted information.

However, once the information has been obtained by all parties to the anticipated litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note the applicability of section 552.103(a) ends when the litigation has concluded or is no longer anticipated. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

In summary, the district must withhold the information 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,



Claire V. Morris Sloan  
Assistant Attorney General  
Open Records Division

CVMS/som

Ref: ID# 568082

Enc. Submitted documents

c: Requestor  
(w/o enclosures)