



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 17, 2015

Ms. Ramona Soto
Attorney
Office of Legal Services
Fort Worth Independent School District
100 North University Drive, Suite SW 172
Fort Worth, Texas 76107

OR2015-17007

Dear Ms. Solo:

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# 575557.

The Fort Worth Independent School District (the "district") received a request for information pertaining to the termination of a former employee. You state some of the submitted information has been redacted pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.¹ You claim the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

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:

¹The 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. The DOE has determined FERPA determinations must be made by the educational authority in possession of the education records. We have posted a copy of the letter from the DOE to this office on the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

(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 [and]

...

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

Gov't Code § 552.022(a)(1),(3). Some of the submitted information consists of completed evaluations subject to section 552.022(a)(1) and contracts subject to section 552.022(a)(3). The district must release the information at issue pursuant to subsections 552.022(a)(1) and 552.022(a)(3) unless it is excepted from disclosure under section 552.108 of the Government Code or expressly made confidential under the Act or other law. Although you raise section 552.103 of the Government Code for the information subject to section 552.022, 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); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, none of the information subject to section 552.022, which we have marked, may be withheld under section 552.103. However, we note some of the information subject to section 552.022(a)(1) may be subject to section 552.101 of the Government Code.² As section 552.101 of the Government Code makes information confidential under the Act, we will consider the applicability of this exception to the information subject to section 552.022(a)(1) of the Government Code. 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 information protected by other statutes, including section 21.355 of the Education Code. Section 21.355 provides, in part, “[a] document evaluating the performance of a teacher or administrator 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 that for

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body. *See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987)*.

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 engaged in the process of teaching, as that term is commonly defined, at the time of the evaluation. *See id.* at 4.

Upon review, we find the submitted information includes evaluations of a teacher. Therefore, provided the teacher was required to hold and did hold the appropriate certificate and was teaching at the time of the submitted teaching evaluations, the information we have marked is generally confidential under section 21.355.

However, we note section 21.352(c) of the Education Code specifically provides, “[e]ach teacher is entitled to receive a written copy of the evaluation on its completion.” Educ. Code § 21.352(c); *see id.* § 21.352(a) (prescribing appraisal process and performance criteria each school district shall use). The requestor is the authorized representative of the teacher whose evaluations are at issue. Therefore, if the evaluations we marked are of the type contemplated by section 21.352, then this requestor has a right of access to them under section 21.352(c) and the district may not withhold them under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. However, provided the teacher was required to hold and did hold the appropriate certificate and was teaching at the time of the submitted teaching evaluations, if the marked evaluations are not of the type contemplated by section 21.352, the requestor does not have a right of access under section 21.352(c), and the district must withhold them under section 552.101 in conjunction with section 21.355 of the Education Code.

Section 552.103 of the Government Code provides 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). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception 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).

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* Open Records Decision No. 588(1991).

Section 21.256 of the Education Code provides that hearings requested under section 21.253 of the Education Code “shall be conducted in the same manner as a trial without a jury in a district court of [Texas].” Educ. Code § 21.256(e). Section 21.256 also specifically affords a teacher the right to be represented by a representative of the teacher’s choice; the right to hear the evidence on which the charges are based; the right to cross-examine each adverse witness; and the right to present evidence. *See id.* § 21.256(c). Section 21.256(d) provides that the Texas Rules of Evidence apply at the hearing. *See id.* § 21.256(d). We also note, in a chapter 21 hearing, the hearing examiner may issue subpoenas for the attendance of witnesses and the production of documents; an appeal of the proceedings to the commissioner of education is based only on the record of the local hearing; and in a judicial appeal of the commissioner’s decision, the court must review the evidence pursuant to the substantial evidence rule. *Id.* §§ 21.255(a) (subpoena power of examiner), .301(c) (appeal based solely on local record), .307(e) (substantial evidence rule for judicial review). Therefore, we determine a hearing under chapter 21 of the Education Code constitutes litigation for purposes of section 552.103.

You state, and provide documentation representing, the former employee filed a petition for review with the Texas Commissioner of Education, styled *Tiesha Beaty v. Fort Worth ISD*, challenging the district’s decision to terminate her employment. You also state this petition was filed prior to the district’s receipt of the instant request. Upon review of your arguments, we agree litigation to which the district is a party was pending on the date the district received the present request. Further, we find the information not subject to section 552.022 is related to the pending litigation. Thus, we conclude the district may withhold the information not subject to section 552.022 under section 552.103 of the Government Code.

We note once information has been obtained by all parties to the pending 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 the opposing party in the pending litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability

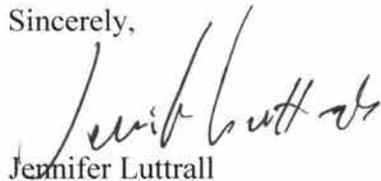
of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, provided the teacher was required to hold and did hold the appropriate certificate and was teaching at the time of the submitted teaching evaluations, if the marked evaluations are not of the type contemplated by section 21.352 of the Education Code, the requestor does not have a right of access under section 21.352(c) of the Education Code, and the district must withhold them 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 of the Government Code under section 552.103 of the Government Code. 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,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/akg

Ref: ID# 575557

Enc. Submitted documents

c: Requestor
(w/o enclosures)