



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 20, 2015

Ms. Ylise Y. Janssen
Senior School Law Attorney
Office of the Chief of Staff & Legal Services
Austin Independent School District
1111 West Sixth Street
Austin, Texas 78703

OR2015-17322

Dear Ms. Janssen:

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# 576314.

The Austin Independent School District (the "district") received a request for the human resource and campus files pertaining to the requestor. You claim the submitted information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note a portion of the submitted information, which we have marked, is not responsive to the instant request because it was created after the district received the request. This ruling does not address the public availability of any information that is not responsive to the request, and the district is not required to release such information in response to this request.

We also note some of the submitted information may have been the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2013-22005 (2013). In that ruling, we determined the district may withhold certain information under section 552.107(1) of the Government Code; however, the district may not withhold the non-privileged portions of the e-mails we marked if they were maintained by the district separate and apart from the otherwise privileged e-mail strings in which they

appeared; (2) if the non-privileged e-mails were maintained separate and apart, then the district must withhold the e-mail address we marked under section 552.137 of the Government Code, unless the owner of the e-mail address affirmatively consented to its release; and (3) release the remaining non-privileged e-mails. You now seek to withhold the submitted information under sections 552.103 and 552.107 of the Government Code, some of which may have been previously released pursuant to Open Records Letter No. 2013-22005. Section 552.007 of the Government Code, however, provides if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential under law. *See* Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, the district may not now withhold any previously released information unless its release is expressly prohibited by law or the information is confidential under law. We note sections 552.103 and 552.107 do not prohibit the release of information or make information confidential. *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 section 552.103); Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). Thus, to the extent any of the submitted information was previously released pursuant to Open Records Letter No. 2013-22005, the district may not now withhold it under section 552.103 or section 552.107. We will consider your arguments for the submitted information to the extent it was not released in accordance with the prior ruling.

Additionally, we note the district has redacted some of the submitted information. Pursuant to section 552.301 of the Government Code, a governmental body that seeks to withhold requested information must submit to this office a copy of the information, labeled to indicate which exceptions apply to which parts of the copy, unless the governmental body has received a previous determination for the information at issue or has statutory authorization to withhold the information without requesting a decision under the Act. *See* Gov't Code § 552.301(a), (e)(1)(D). The district does not assert, nor does our review of our records indicate, the district is authorized to withhold this portion of the information without first seeking a ruling from this office. *See id.* § 552.301(a); Open Records Decision No. 673 (2000) (previous determinations). Therefore, this type of information must be submitted in a manner that enables this office to determine whether it falls within the scope of an exception to disclosure. However, because we can discern the nature of the redacted information, being deprived of the information does not inhibit our ability to make a ruling. Nonetheless, in the future, the district must not redact information from the information it submits to this office unless it is authorized to do so by statute or the information is the subject of a previous determination under section 552.301 of the Government Code. Failure to comply with section 552.301 may result in the information being presumed public under section 552.302 of the Government Code. *See* Gov't Code § 552.302.

Next, we note portions of the submitted information are 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; [and]

...

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

Id. § 552.022(a)(1), (3). The submitted information includes completed evaluations and contracts relating to the receipt or expenditure of funds by the district which are subject to section 552.022. 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.¹ *See id.* § 552.022(a)(1). The district must release the contracts pursuant to section 552.022(a)(3) unless the information is 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*, 4 S.W.3d at 475-76; Open Records Decision No. 665 at 2 n.5, 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, none of the information subject to section 552.022 may be withheld under section 552.103 of the Government Code. However, because section 552.101 of the Government Code protects information made confidential under law, we will address the applicability of this exception to the information at issue.² Additionally, we will address your arguments for the information not subject to section 552.022.

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

¹We note the district does not raise section 552.108 for the information subject to section 552.022(a)(1).

²The 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).

(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 demonstrate 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 found a pending complaint with the Equal Employment Opportunity Commission (the "EEOC") indicates litigation is reasonably anticipated. See Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982).

You contend the district reasonably anticipated litigation because the requestor filed an EEOC complaint against the district. We note the requestor's EEOC complaint was filed after the date the district received the current request. Therefore, we find the district failed to demonstrate any party had taken concrete steps toward filing litigation on the date it received the present request for information. Accordingly, the district may not withhold the information not subject to section 552.022 under section 552.103 of the Government Code.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege

in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “to facilitate the rendition of professional legal services” to the client governmental body. Tex. R. Evid. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. Tex. R. Evid. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state the information in Exhibit D consists of communications between the district’s attorneys and employees. You state these communications were made for the purpose of facilitating the rendition of professional legal services. You further indicate these communications were intended to be, and have remained, confidential. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to Exhibit D. Accordingly, the district may withhold Exhibit D under section 552.107(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. Section 552.101 of the Government Code encompasses section 1324a of title 8 of the United States Code. Section 1324a governs I-9 forms and their related documents. This section provides an I-9 form and “any information contained in or appended to such form may not be used for purposes other than for enforcement of this

chapter” and for enforcement of other federal statutes governing crime and criminal investigations. *See* 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). Release of the submitted I-9 forms in this instance would be “for purposes other than enforcement” of the referenced federal statutes. Accordingly, we conclude the submitted I-9 forms are confidential in their entirety pursuant to section 1324a of title 8 of the United States Code; the district must withhold this information, which we have marked, under section 552.101 of the Government Code in conjunction with federal law.

Section 552.101 of the Government Code also encompasses section 21.355 of the Education Code, which 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 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 information subject to section 552.022(a)(1) consists of evaluations of a teacher for section 21.355 purposes. *See* Educ. Code § 21.355(a). Therefore, provided the teacher held the appropriate certificate and was teaching at the time of the evaluations at issue, the information subject to section 552.022(a)(1) is generally confidential under section 21.355.

However, we note section 21.352(c) of the Education Code specifically provides that “[e]ach teacher is entitled to receive a written copy of the evaluation promptly on its completion.” *Id.* § 21.352(c); *see id.* § 21.352(a) (prescribing appraisal process and performance criteria each school district shall use). In this instance, the requestor is the employee whose evaluations are at issue. Therefore, to the extent the evaluations we marked under section 552.022(a)(1) are the type contemplated in section 21.352, this requestor has a right of access to her own evaluations under section 21.352(c). However, if this requestor does not have a right of access under section 21.352(c), then provided the teacher was required to hold and did hold the appropriate certificate and was teaching at the time of the evaluations, the evaluations we marked under section 552.022(a)(1) must be withheld under section 552.101 in conjunction with section 21.355 of the Education Code. However, if the teacher did not hold the appropriate certificate or was not teaching at the time of the evaluations at issue, then the information subject to section 552.022(a)(1) is not confidential under section 21.355 and may not be withheld under section 552.101.

Section 552.101 of the Government Code also encompasses section 21.048 of the Education Code. Section 21.048 addresses teacher certification examinations. Section 21.048(c-1) provides the following:

(c-1) The results of an examination administered under this section are confidential and are not subject to disclosure under Chapter 552, Government Code, unless:

(1) the disclosure is regarding notification to a parent of the assignment of an uncertified teacher to a classroom as required by Section 21.057; or

(2) the educator has failed the examination more than five times.

Educ. Code § 21.048(c-1). Upon review, we find portions of the submitted information, which we have marked, reflect the results of an examination administered under section 21.048 of the Education Code. You do not inform us subsections 21.048(c-1)(1) and (2) are applicable in this instance. Accordingly, the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 21.048(c-1) of the Education Code.

The remaining information contains e-mail addresses that may be subject to section 552.137 of the Government Code. 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). Gov’t Code § 552.137(a)-(c). Accordingly, the district must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the addresses affirmatively consent to their release or they are subject to subsection (c).

In summary, to the extent the requested information was not the subject of Open Records Letter No. 2013-22005, (1) the district may withhold Exhibit D under section 552.107(1) of the Government Code; (2) the district must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code; (3) if this requestor does not have a right of access under section 21.352(c), then provided the teacher was required to hold and did hold the appropriate certificate and was teaching at the time of the evaluations, the evaluations we marked must be withheld under section 552.101 in conjunction with section 21.355 of the Education Code; (4) the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 21.048(c-1) of the Education Code; and (5) the district must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the addresses

affirmatively consent to their release or subsection (c) applies. The remaining information must be released.³

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,



Cole Hutchison
Assistant Attorney General
Open Records Division

CH/som

Ref: ID# 576314

Enc. Submitted documents

c: Requestor
(w/o enclosures)

³We note the information being released contains the requestor's client's e-mail address, and other personal information to which the requestor has a right of access under sections 552.023 and 552.137(b) of the Government Code. See Gov't Code §§ 552.023, .137(b); *see also* Open Records Decision No. 481 at 4 (1987).