



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 9, 2016

Mr. William M. Buechler
Counsel for Port Aransas Independent School District
Buechler & Associates, P.C.
3660 Stoneridge Road, Suite D-101
Austin, Texas 78746

OR2016-17857

Dear Mr. Buechler:

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# 622063.

The Port Aransas Independent School District (the "district"), which you represent, received a request for information in a specified folder pertaining to a named individual. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code.¹ 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 has informed this office the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code, does not permit state and local educational authorities to disclose to this office, without parental or an adult student's consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act.² 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

¹Although you also raise section 552.102 of the Government Code, you have not provided any arguments to support this exception. Therefore, we assume you have withdrawn your claim this section applies to the submitted information. See Gov't Code §§ 552.301, .302.

²A copy of this letter may be found on the Office of the Attorney General's website at <https://www.texasattorneygeneral.gov/files/og/20060725usdoe.pdf>.

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 unredacted education records for our review. Because our office is prohibited from reviewing these education records to determine whether appropriate redactions under FERPA have been made, we will not address the applicability of FERPA to any of the submitted records. *See* 20 U.S.C. § 1232g(a)(1)(A). Such determinations under FERPA must be made by the educational authority in possession of the education records. However, we will consider your arguments against disclosure of the submitted information.

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 a completed evaluation that is subject to section 552.022(a)(1). The district must release the completed evaluation pursuant to section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or is 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), which we have marked, 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 we have marked.

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.

You claim the completed evaluation of the named individual is confidential under section 21.355. We note the information at issue pertains to an individual who is a school nurse for the district. You contend, however, a nurse qualifies as a teacher for purposes of section 21.355 of the Education Code. You rely on a definition of the word “teacher” found in section 21.201 of the Education Code. Section 21.201 provides in part:

In this subchapter:

(1) “Teacher” means a superintendent, principal, supervisor, classroom teacher, counselor, or other full-time professional employee who is required to hold a certificate issued under Subchapter B or a nurse.[]

Educ. Code § 21.201(1). We note, by its express language, the definition of “teacher” in section 21.201(1) applies only “[i]n this subchapter[.]” Section 21.201 is found in subchapter E of chapter 21 of the Education Code, “Term Contracts.” Section 21.355, which provides for the confidentiality of an evaluation of a teacher or administrator, is found in subchapter H, “Appraisals and Incentives.” Thus, section 21.201 does not define the word “teacher” for the purposes of section 21.355. Consequently, we find section 21.355 of the Education Code is not applicable to a nurse, unless the nurse in question would otherwise qualify as a teacher under section 21.355. *See id.* § 21.355; ORD 643 at 4. You do not indicate the nurse in question would otherwise qualify as a teacher for the purposes of section 21.355. We therefore conclude the completed evaluation subject to section 552.022(a)(1) of the Government Code, which we have marked, is not confidential under section 21.355 of the Education Code, and thus is not excepted from disclosure under section 552.101 of the Government Code. *See also* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality provision must be express, and confidentiality requirement will not be implied from statutory structure), 649 at 3 (1996) (language of confidentiality provision controls scope of its protection), 478 at 2 (1987) (statutory confidentiality requires express language making certain information confidential or stating that information shall not be released to public). As no other exceptions to disclosure of the information at issue have been raised, the district must release the marked information subject to section 552.022(a)(1) of the Government 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.

...

(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 claiming section 552.103 has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information, and (2) the information at issue is related to that litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

You state, and provide documentation showing, prior to the district's receipt of the instant request, a lawsuit styled *Ramsden v. Port Aransas Indep. Sch. Dist.*, Civil Action No. 2:16-cv-00122, was filed and is currently pending against the district in the United States District Court for the Southern District of Texas, Corpus Christi Division. Therefore, we agree litigation was pending on the date the district received the present request for information. You also state the remaining information pertains to the substance of the lawsuit claims. Based on your representations and our review, we find the information at issue is related to the pending litigation. Therefore, we agree section 552.103(a) is applicable to the remaining information.

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 pending litigation is not excepted from disclosure under section 552.103(a). We note the opposing party to the litigation has seen some of the information at issue. Therefore, the district may not withhold this information,

which we have marked, under section 552.103(a). Nevertheless, we agree the district may withhold the remaining information under section 552.103 of the Government Code. We also note the applicability of section 552.103(a) ends once the litigation has concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Upon review, we find you have not demonstrated any of the remaining information is highly intimate or embarrassing and not of legitimate public concern. Thus, none of the remaining information may be withheld under section 552.101 in conjunction with common-law privacy.

In summary, the district must release the marked information subject to section 552.022(a)(1) of the Government Code. With the exception of the information we have marked for release, 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, 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,

A handwritten signature in black ink, appearing to read 'Gerald A. Arismendez', with a stylized flourish at the end.

Gerald A. Arismendez
Assistant Attorney General
Open Records Division

GAA/dls

Ref: ID# 622063

Enc. Submitted documents

c: Requestor
(w/o enclosures)