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ATTORNEY GENERAL OF TEXAS

December 19, 2016

Ms. Rebecca Bailey Weimer
Counsel for the Pasadena Independent School District
Thompson & Horton LLP
Phoenix Tower, Suite 200
3200 Southwest Freeway
Houston, Texas 77027-7528

OR2016-27910

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# 638532.

The Pasadena Independent School District (the "district"), which you represent, received a request for the complete investigative file for a specified incident, including any complaints or violations regarding a named former teacher of the district. The district claims the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.117, 552.135, 552.137, and 552.152. The district also informs us it has notified the Harris County District Attorney's Office (the "district attorney's office") of its right to submit comments to this office as to why the information should not be released. *See* Gov't Code § 552.304 (interested party may submit written comments regarding availability of requested information). We have considered the exceptions the district claims and reviewed the submitted information.

Initially, we note the United States Department of Education Family Policy Compliance Office has informed this office FERPA 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.¹ 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”). Some of the submitted information consists of redacted education records. 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.

We understand some of the remaining information was created and is maintained by the district’s police department (the “department”) for a law enforcement purpose. FERPA is not applicable to records that were created by a law enforcement unit of an educational agency or institution for a law enforcement purpose and that are maintained by the law enforcement unit. *See id.* § 1232g(a)(4)(B)(ii); 34 C.F.R. §§ 99.3, .8. Accordingly, this information is not encompassed by FERPA and none of it may be withheld on that basis. Because we are able to discern the nature of the redacted information, we are not prevented from determining whether that information falls within the scope of the district’s claimed exceptions to disclosure. Accordingly, we will address the district’s arguments with respect to the information at issue, including the redacted information. Nevertheless, we caution the district that a failure to provide this office with requested information generally deprives us of the ability to determine whether information may be withheld and leaves this office with no alternative other than ordering the redacted information to be released. *See* Gov’t Code § 552.301(e)(1)(D) (governmental body must provide this office with copy of specific information requested or representative sample if information is voluminous).

Next, you inform us the information you indicated was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2016-03576 (2016). In Open Records Letter No. 2016-03576, we determined (1) with the exception of basic information, the district may withhold the information not subject to section 552.022 of the Government Code under section 552.108(a)(1) of the Government Code; (2) the district must withhold certain information under section 552.101 of the Government Code in conjunction with section 261.201(1)(1) of the Family Code; and (3) the district must release the remaining information. We have no indication there has been any change in the law, facts, or circumstances on which the previous ruling was based. Accordingly, we conclude the district must continue to rely on Open Records Letter No. 2016-03576 as a previous determination and withhold or release the information at issue in accordance with that ruling. *See* Open Records Decision No. 673 at 6-7 (2001) (discussing criteria for first

¹A copy of this letter may be found on the Office of the Attorney General’s website at <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

type of previous determination). We will address your arguments against disclosure of the remaining information, which is not subject to this prior ruling.

Section 552.108(a) of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). A governmental body claiming section 552.108(a)(1) must explain how and why release of the requested information would interfere with the detection, investigation, or prosecution of crime. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977).

You state the district attorney’s office has advised the submitted information relates to a pending prosecution, and release of that information would interfere with the prosecution of the case. Based upon this representation, we conclude the release of the Exhibit C would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975) (court delineates law enforcement interests that are present in active cases), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Thus, section 552.108(a)(1) is applicable to the information at issue. Therefore, you may withhold Exhibit C under section 552.108(a)(1) of the Government Code.²

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. Section 21.355(a) provides, “[a] document evaluating the performance of a teacher or administrator is confidential.” 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). In *Open Records Decision No. 643*, we determined a “teacher” for purposes of section 21.355 means a person who is required to, and does in fact, hold a teacher’s certificate under subchapter B of chapter 21 of the Education Code, and is in the process of teaching, as that term is commonly defined, at the time of the evaluation. *Id.*

The district contends the remaining information constitutes confidential evaluations of a teacher. The district informs us the teacher held the appropriate certificate for the purpose of section 21.355 and was acting as a teacher at the time of the evaluations. Upon review,

²As our ruling is dispositive, we need not address the district’s remaining arguments against disclosure for this information.

we conclude the remaining information is confidential under section 21.355 of the Education Code, and the district must withhold it under section 552.101 of the Government Code.³

In summary, the district must continue to rely on Open Records Letter No. 2016-03576 as a previous determination and withhold or release the information you have indicated in accordance with that ruling. The district may withhold Exhibit C under section 552.108(a)(1) of the Government Code. The district must withhold the remaining information under section 552.101 of the Government Code in conjunction with section 21.355 of the Education 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,



Kaelan A. Henze
Assistant Attorney General
Open Records Division

KAH/bhf

Ref: ID# 638532

Enc. Submitted documents

c: Requestor
(w/o enclosures)

³As our ruling is dispositive, we need not address the district's remaining arguments against disclosure for this information.