March 10, 2017

Mr. W. Montgomery Meitler
Senior Counsel
Office of Legal Services
Texas Education Agency
1701 North Congress Avenue
Austin, Texas 78701-1494

Dear Mr. Meitler:

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# 648545 (TEA PIR# 28663).

The Texas Education Agency (the “agency”) received a request for information regarding two named educators. You state you have released some information. You state you do not have some information. You also state the agency will withhold information pursuant to sections 552.130(c) and 552.147(b) of the Government Code and the dates of birth of public citizens pursuant to Open Records Letter No. 2016-04398 (2016). Further, you state the agency will redact information pursuant to the Family Educational Rights and Privacy Act.

The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. See Econ. Opportunities Dev. Corp. v. Bustamante, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism’d); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

Section 552.130(c) of the Government Code allows a governmental body to redact the information described in section 552.130(a) without the necessity of seeking a decision from the attorney general. See Gov’t Code § 552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). See id. § 552.130(d), (e). Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person’s social security number without the necessity of requesting a decision from this office. See id. § 552.147(b). Open Records Decision No. 2016-04398 allows the agency to withhold the dates of birth of public citizens under section 552.101 of the Government Code in conjunction with common-law privacy without seeking a ruling from this office.
("FERPA"), section 1232g of title 20 of the United States Code.³ You claim portions of the submitted information are excepted from disclosure under sections 552.101, 552.102, and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.⁴

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 21.048 of the Education Code, which addresses teacher certification examinations. Section 21.048(c-1) provides the following:

The results of an examination administered under this section are confidential and are not subject to disclosure under [the Act], unless the disclosure is regarding notification to a parent of the assignment of an uncertified teacher to a classroom as required by section 21.057.

Educ. Code § 21.048(c-1). Upon review, we find the information you marked consists of or reveals teacher certification examination results administered under section 21.048 of the Education Code. You state the information at issue does not constitute notification to a parent of the assignment of an uncertified teacher to a classroom. Therefore, the agency must withhold the information you marked under section 552.101 of the Government Code in conjunction with section 21.048(c-1) of the Education Code.

Section 552.101 also 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." Id. § 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 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. Upon review, we agree the information you marked consists of evaluations of teachers for purposes of section 21.355. You inform us the teachers at issue were certified

³The 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 that 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: https://www.texasattorneygeneral.gov/files/og/20060725usdoe.pdf.

⁴We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.
as a teachers under chapter 21 of the Education Code and were performing the functions of educators at the time the evaluations were prepared. Accordingly, the agency must withhold the information you marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.

Section 552.102(b) of the Government Code excepts from disclosure “a transcript from an institution of higher education maintained in the personnel file of a professional public school employee[.]” Gov’t Code § 552.102(b). However, this section further provides that “the degree obtained or the curriculum on a transcript in the personnel file of the employee” is not excepted from disclosure. Id. You state the submitted transcripts are maintained in an educator’s personnel file at Plano Independent School District, and the agency has possession of these transcripts via a special right of access in chapter 249 of title 19 of the Texas Administrative Code. See 19 T.A.C. § 249.14 (agency may obtain and investigate information concerning alleged improper conduct by an educator). In Texas Education Agency v. Abbott, the district court held that transcripts obtained by the agency from a school district during its investigation of an educator are considered to be maintained in the personnel files of employees of the district and are thus subject to section 552.102(b). Tex. Educ. Agency v. Abbott, No. 07-002656 (250th Dist. Ct., Travis County, Tex., Sept. 2, 2008). Thus, with the exception of the educator’s name, courses taken, and degree obtained, the agency must withhold the transcripts you have marked under section 552.102(b) of the Government Code.

Section 552.103 of the Government Code provides, in relevant part, the following:

(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 claiming section 552.103 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 is pending or reasonably anticipated on the date the governmental body received the request, 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.
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." Open Records Decision No. 452 at 4 (1986). In the context of anticipated litigation in which the governmental body is the prospective plaintiff, the concrete evidence must at least reflect that litigation is "realistically contemplated." See Open Records Decision No. 518 at 5 (1989); see also Attorney General Opinion MW-575 (1982) (finding that investigatory file may be withheld from disclosure if governmental body attorney determines that it should be withheld pursuant to section 552.103 and that litigation is "reasonably likely to result"). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. See ORD 452 at 4.

You state the remaining information is related to an open investigation into allegations that educators engaged in inappropriate conduct. You also state the alleged misconduct may require the agency to file a petition for sanctions against the educators pursuant to provisions of the Education Code and title 19 of the Texas Administrative Code. See Educ. Code §§ 21.031(a) (agency shall regulate and oversee standards of conduct of public school educators), .041(b) (agency shall propose rules providing for disciplinary proceedings); 19 T.A.C. §§ 247.2, 249.15(c). You explain that if the educators file answers to the petitions, the matters will be referred to the State Office of Administrative Hearings for contested case proceedings. See 19 T.A.C. § 249.18. You state such proceedings are governed by the Administrative Procedure Act (the "APA"), chapter 2001 of the Government Code. See Educ. Code § 21.041(b)(7); 19 T.A.C. § 249.4(a)(1); Open Records Decision No. 588 (1991) (contested case under APA constitutes litigation for purposes of statutory predecessor to section 552.103). Based on your representations and our review, we find the agency reasonably anticipated litigation when it received the instant request. Further, you explain the information at issue was compiled for the purpose of investigating the educators' alleged misconduct. Upon review, we agree the information relates to the anticipated litigation. Therefore, we conclude the agency may withhold the information it marked under section 552.103 of the Government Code.

We note, however, once information has been obtained by all parties to the anticipated 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 anticipated 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 when the litigation has concluded. See Attorney General Opinion MW-575 at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2.
In summary, the agency must withhold the information you marked under section 552.101 of the Government Code in conjunction with section 21.048(c-1) of the Education Code. The agency must withhold the information you marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. With the exception of the employee’s name, courses taken, and degrees obtained, which must be released, the agency must withhold the submitted college transcripts pursuant to section 552.102(b) of the Government Code. The agency may withhold the information you marked under section 552.103 of the Government Code. The remaining information must be released.

Finally, you ask this office to issue a previous determination permitting the agency to withhold the results of teacher certification examinations under section 552.101 of the Government Code in conjunction with section 21.048(c-1) of the Education Code without seeking a ruling from this office. See Gov’t Code § 552.301(a) (allowing governmental body to withhold information subject to previous determination); Open Records Decision No. 673 (2001). After due consideration, we have decided to grant your request on this matter. Therefore, this letter ruling authorizes the agency to withhold the results of examinations administered under section 21.048 of the Education Code under section 552.101 of the Government Code in conjunction with section 21.048(c-1) of the Education Code. We note section 21.048(c-1) permits disclosure when the disclosure is regarding notification to a parent of the assignment of an uncertified teacher to a classroom as required by section 21.057. Educ. Code § 21.048(c-1). So long as the elements of law, fact, and circumstances do not change so as to no longer support the findings set forth above, the agency need not ask for a decision from this office again with respect to this type of information. See ORD 673 at 7-8 (listing elements of second type of previous determination under Gov’t Code § 552.301(a)).

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,

D. Michelle Case
Assistant Attorney General
Open Records Division

DMC/eb
Ref: ID# 648545

Enc. Submitted documents

c: Requestor
  (w/o enclosures)