



KEN PAXTON  
ATTORNEY GENERAL OF TEXAS

April 27, 2017

Ms. Leticia D. McGowan  
Assistant General Counsel  
Dallas Independent School District  
3700 Ross Avenue  
Dallas, Texas 75204

OR2017-09020

Dear McGowan:

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# 655064 (ORR# 15966).

The Dallas Independent School District (the "district") received a request for the requestor's personnel file and all records pertaining to a specified investigation by the district's Professional Standards Office. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.107, and 552.111 of the Government Code and privileged under rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure. We have considered the submitted arguments 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.<sup>1</sup> 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

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<sup>1</sup>A 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 redacted and 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 provides, in part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the 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 contains a completed report and completed evaluations that are subject to section 552.022(a)(1). The district must release this information unless it is excepted from disclosure under section 552.108 of the Government Code or made confidential under the Act or other law. *See id.* Although you raise sections 552.103, 552.107, and 552.111 of the Government Code, these sections are discretionary in nature and do 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. 677 at 10 (2002) (attorney work product privilege under Gov’t Code § 552.111 may be waived), 676 at 10-11 (2002) (attorney-client privilege under Gov’t Code § 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 470 at 7 (1987) (statutory predecessor to Gov’t Code § 552.111 subject to waiver). Therefore, the information subject to section 552.022(a)(1) may not be withheld under section 552.103, section 552.107, or section 552.111 of the Government Code. However, we note the Texas Supreme Court has held the Texas Rules of Evidence and the Texas Rules of Civil Procedure are “other law” within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will address your assertion of the attorney-client privilege and the attorney work product privilege under rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure, respectively, for the information subject to section 552.022(a)(1). As sections 552.101 and 552.102 make information confidential, we will also consider the applicability of these exceptions to the submitted information. Further, we will address your arguments under sections 552.103, 552.107, and 552.111 for the information not subject to section 552.022(a)(1).

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.

Upon review, we find the completed evaluations subject to section 552.022 consist of confidential evaluations of a teacher by the district. We understand the teacher at issue was performing the functions of a teacher at the time of the evaluation. However, the district does not inform us the teacher was certified as a teacher under chapter 21 of the Education Code at the time of the evaluations. *See id.* Accordingly, we must rule conditionally. To the extent the teacher at issue was certified under chapter 21 of the Education Code, the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. To the extent the teacher was not certified under chapter 21 of the Education Code, the information we have marked is not confidential under section 21.355 of the Education Code and may not be withheld on that basis under section 552.101 of the Government Code.

Texas Rule of Evidence 503(b)(1) provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client:

(A) between the client or the client’s representative and the client’s lawyer or the lawyer’s representative;

(B) between the client’s lawyer and the lawyer’s representative;

(C) by the client, the client’s representative, the client’s lawyer, or the lawyer’s representative to a lawyer representing another party in a pending action or that lawyer’s

representative, if the communications concern a matter of common interest in the pending action;

(D) between the client's representatives or between the client and the client's representative; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made to further the rendition of professional legal services to the client or reasonably necessary to transmit the communication. *Id.* 503(a)(5).

Accordingly, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. *See* ORD 676. Upon a demonstration of all three factors, the entire communication is confidential under rule 503 provided the client has not waived the privilege or the communication does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 457 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding) (privilege attaches to complete communication, including factual information). We note communications with third parties with whom a governmental entity shares a privity of interest are protected. Open Records Decision Nos. 464 (1987), 429 (1985).

You assert some of the submitted information was communicated between the district's representatives and internal and external legal counsel. You state the communications were made for the purpose of facilitating the rendition of professional legal services to the district. You further state these communications were not intended to be disclosed to third persons. Based on your representations and our review, we find the district has demonstrated the applicability of the attorney-client privilege to the information we have marked. Accordingly, the district may withhold the information we have marked under rule 503 of the Texas Rules of Evidence.<sup>2</sup>

You assert the remaining information is excepted from disclosure under section 552.103 of the Government Code, which provides as follows:

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<sup>2</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

(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 the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing (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). See ORD 551.

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 state, and provide documentation showing, prior to the district's receipt of the instant request for information, the requestor filed a discrimination claim against the district with the EEOC. You assert, and we agree, the information at issue is directly related to the anticipated litigation. Based on your representations and our review of the information at issue, we find the district reasonably anticipated litigation on the date this request was received. Therefore, the district may withhold the remaining information under section 552.103 of the Government Code.<sup>3</sup>

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<sup>3</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

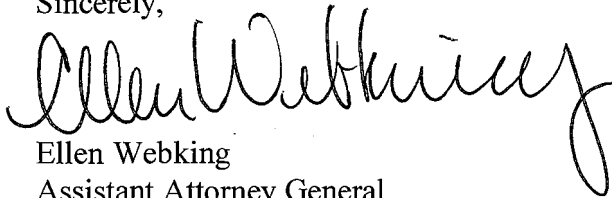
Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to all parties to the anticipated litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

In summary, to the extent the teacher at issue was certified under chapter 21 of the Education Code, the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. The district may withhold the information we have marked under rule 503 of the Texas Rules of Evidence. 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](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,



Ellen Webking  
Assistant Attorney General  
Open Records Division

EW/bw

Ref: ID# 655064

Enc. Submitted documents

c: Requestor  
(w/o enclosures)