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ATTORNEY GENERAL OF TEXAS

July 31, 2017

Ms. Katie Payne
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P.O. Box 460606
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OR2017-17100

Dear Ms. Payne:

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# 668782.

The La Feria Independent School District (the "district"), which you represent, received a request for all information pertaining to a named individual and specified information related to district administrators and principals. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, we note some of the submitted information is subject to section 552.022 of the Government Code, which provides in pertinent 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:

¹We 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.

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108 [of the Government Code];

(2) the name, sex, ethnicity, salary, title, and dates of employment of each employee and officer of a governmental body;

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

...

(15) information regarded as open to the public under an agency's policies[.]

Gov't Code § 552.022(a)(1)-(3), (15). We note portions of the submitted information consist of documents relating to a completed investigation, as well as a completed evaluation, which are subject to section 552.022(a)(1). Additionally, some of the submitted information consists of the names and salaries of employees of a governmental body subject to section 552.022(a)(2). Further, the submitted information includes information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body, and, thus, is subject to section 552.022(a)(3). Lastly, you have also submitted a job description subject to section 552.022(a)(15). The district must release the information subject to section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or expressly made confidential under the Act or other law. *See id.* § 552.022(a)(1). The district may withhold information subject to sections 552.022(a)(2), 552.022(a)(3) and, to the extent the district considers the job description open to the public, the information subject to section 552.022(a)(15), only to the extent this information is confidential under the Act or other law. *See id.* § 552.022(a)(2)-(3), (15).

You raise section 552.103 of the Government Code for the entirety of the submitted information, as well as section 552.107(1) for the information subject to sections 552.022(a)(1) and 552.022(a)(3). However, these sections do not make information confidential under the Act. *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); *see* Open Records Decision No. 676 at 6 (2002) (attorney-client privilege under section 552.107(1) may be waived); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Accordingly, the district may not withhold the information at issue under section 552.103 or section 552.107(1) of the Government Code. Consequently, as no other exceptions to disclosure are raised for the information at issue, the district must release the names and salaries of the district employees pursuant to

section 552.022(a)(2) of the Government Code. Further, if the district considers the job description as open to the public, then it is subject to section 552.022(a)(15) and the district may not withhold that information under section 552.103 of the Government Code. In this instance, as you raise no other exceptions to disclosure for this information, the district must release the information we have marked under section 552.022(a)(15) of the Government Code. However, the Texas Supreme Court has held the Texas Rules of Evidence are “other law” that make information expressly confidential for purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Thus, we will address your claim of the attorney-client privilege under rule 503 of the Texas Rules of Evidence for the information subject to sections 552.022(a)(1) and 552.022(a)(3). Moreover, we will address the applicability of sections 552.101 and 552.117 of the Government Code, which make information confidential under the Act, for the information at issue.² We will also consider your assertion of sections 552.103 and 552.107 for the information not subject to section 552.022 of the Government Code.

Section 552.103 of the Government Code provides, in 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). A governmental body that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate that (1) litigation is pending or reasonably anticipated on the date the governmental body receives the request for information, and (2) the information at issue is related to the pending or anticipated litigation. *See 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

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).

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). *See* ORD 551 at 4.

This office has long held that for the purposes of section 552.103, “litigation” includes “contested cases” conducted in a quasi-judicial forum. *See* Open Records Decision Nos. 474 (1987), 368 (1983), 336 (1982), 301 (1982). In determining whether an administrative proceeding is conducted in a quasi-judicial forum, some of the factors this office considers are whether the administrative proceeding provides for discovery, evidence to be heard, factual questions to be resolved, the making of a record, and whether the proceeding is an adjudicative forum of first jurisdiction with appellate review of the resulting decision without a re-adjudication of fact questions. *See* Open Records Decision No. 588 (1991).

You inform us, prior to the district’s receipt of the instant request for information, the requestor filed a grievance with the district on behalf of his client. You explain grievances filed with the district are “litigation” because the district follows administrative procedures in handling such disputes. You state the district’s grievance process is a multi-level hearing process “in front of various administrators and ultimately in front of the [d]istrict’s [b]oard of [t]rustees” Additionally, you inform us “[d]uring these hearings, the grievant is allowed to be represented by counsel and present evidence[.]” You state the grievant must complete the district’s grievance process in order to appeal to a court of competent jurisdiction. Based on your representations and our review, we find you have demonstrated the district’s administrative procedure for disputes is conducted in a quasi-judicial forum and, thus, constitutes litigation for purposes of section 552.103. Therefore, we determine the district was involved in pending litigation at the time it received the instant request. You state the information at issue directly relates to the subject of this pending litigation. Based on your representations and our review, we find the information at issue is related to the pending litigation. Therefore, we conclude the district may withhold the remaining information not subject to sections 552.022(a)(1), 552.022(a)(3), and 552.022(a)(15), to the extent the district considers the job description open to the public, under section 552.103 of the Government Code.

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 pending 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).

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 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). Additionally, the Third Court of Appeals has concluded that a written reprimand constitutes an evaluation for purposes of section 21.355 as it “reflects the principal’s judgment regarding [a teacher’s] actions, gives corrective direction, and provides for further review.” *N. E. Indep. Sch. Dist. v. Abbott*, 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. *See* Open Records Decision No. 643 at 3 (1996). We also determined a “teacher” for purposes of section 21.355 means a person who (1) is required to and does in fact hold a teaching certificate under subchapter B of chapter 21 of the Education Code or a school district teaching permit under section 21.055, and (2) is engaged in the process of teaching, as that term is commonly defined, at the time of the evaluation. *See id.* at 4. Further, in Open Records Decision No. 643, we determined an “administrator” for purposes of section 21.355 means a person who is required to, and does in fact, hold an administrator’s certificate under subchapter B of chapter 21 of the Education Code, and is performing the functions as an administrator, as that term is commonly defined, at the time of the evaluation. *Id.*

You contend the information at issue consists of confidential evaluations of teachers or administrators by the district. You assert some of the information at issue evaluates the performance of a teacher who holds the appropriate certificate for the purposes of section 21.355. Additionally, we note some of the remaining information pertains to an employee of the district who was serving as a principal when the documents were created. The information at issue reveals the administrator at issue held an administrator’s certificate under chapter 21 of the Education Code at the time of the evaluation and was performing the functions of an administrator at the time of the respective evaluations. *See* ORD 643 at 4. Accordingly, the district must withhold the information you have marked and we have marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education 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 at 6-7. 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).

You assert some of the remaining information subject to section 552.022 consists of privileged attorney-client communications. You inform us the information at issue was communicated between and among attorneys and attorney representatives for the district and district employees for the purpose of the rendition of legal services to the district. Upon review, we find you have demonstrated the applicability of the attorney-client privilege to the communications at issue. Therefore, the district may generally withhold the information we have marked under rule 503 of the Texas Rules of Evidence. However, we note the information at issue includes an attachment to a privileged facsimile communication which was seen by a non-privileged party. Furthermore, if this facsimile attachment is removed from the privileged facsimile communication to which it is attached and stands alone, it is responsive to the request for information. Therefore, if the non-privileged attachment subject to section 552.022(a)(3), which we have marked, is maintained by the district separate and apart from the otherwise privileged facsimile communication to which it is attached, then the district may not withhold the attachment under Texas Rule of Evidence 503. In this instance, as you raise no other exceptions to disclosure, the district must release the information

marked under section 552.022(a)(3) of the Government Code. Conversely, if the non-privileged attachment subject to section 552.022(a)(3) of the Government Code, which we have marked, does not exist separate and apart from the privileged facsimile communication to which it is attached, the district may withhold it under Texas Rule of Evidence 503.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code, except as provided by section 552.024(a-1). Gov't Code §§ 552.117(a)(1), .024. Section 552.024(a-1) of the Government Code provides, "A school district may not require an employee or former employee of the district to choose whether to allow public access to the employee's or former employee's social security number." *Id.* § 552.024(a-1). Thus, a school district may only withhold under section 552.117 the home address and telephone number, emergency contact information, and family member information of a current or former employee or official of the district who requests this information be kept confidential under section 552.024. Accordingly, if the individual whose information is at issue timely requested confidentiality pursuant to section 552.024 of the Government Code, the district must withhold the information we have marked under section 552.117(a)(1) of the Government Code.

In summary, the district must release the information we have marked under section 552.022(a)(15) of the Government Code to the extent the district considers the job description open to the public. The district must release the names and salaries of the district employees pursuant to section 552.022(a)(2) of the Government Code. The district may withhold the remaining information not subject to sections 552.022(a)(1), 552.022(a)(3), and section 552.022(a)(15), to the extent the district considers the job description open to the public, under section 552.103 of the Government Code. The district must withhold the information you have marked and we have marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. The district may generally withhold the information we have marked under rule 503 of the Texas Rules of Evidence. However, if the non-privileged attachment subject to section 552.022(a)(3), which we have marked, is maintained by the district separate and apart from the otherwise privileged facsimile communication to which it is attached, then the district may not withhold the attachment under Texas Rule of Evidence 503, and must release this information.³ If the individual whose information is at issue timely requested confidentiality pursuant to section 552.024 of the Government Code, the district must withhold the information we have

³In this instance, we note the requestor has a right of access to some of the information being released. See Gov't Code § 552.023(a) (person or person's authorized representative has special right of access, beyond right of general public, to information held by governmental body that relates to person and is protected from public disclosure by laws intended to protect person's privacy interests); ORD 481 at 4 (privacy theories not implicated when individual asks governmental body to provide him with information concerning himself).

marked under section 552.117(a)(1) of the Government Code. The district must release the remaining information.

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/eb

Ref: ID# 668782

Enc. Submitted documents

c: Requestor
(w/o enclosures)