



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

September 22, 2017

Mr. Lucas Henry  
Counsel for Frisco Independent School District  
Abernathy Roeder Boyd Hullett  
1700 Redbud Boulevard, Suite 300  
McKinney, Texas 75069

OR2017-21795

Dear Mr. Henry:

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# 676787 (File No. MD3-0237).

The Frisco Independent School District (the "district"), which you represent, received a request for information pertaining to named employees, and documents pertaining to specified training.<sup>1</sup> You state you have released some information. We understand you have redacted student-identifying information from the submitted documents pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the

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<sup>1</sup>We note the district sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed). You inform us the district sent the requestor a cost estimate of charges pursuant to section 552.2615 of the Government Code, and the requestor accepted the cost estimate. *See* Gov't Code § 552.2615. The estimate of charges required the requestor to provide a deposit for payment of anticipated costs under section 552.263 of the Government Code. *See id.* § 552.263(a). You inform us the district received full payment on June 29, 2017. *See id.* § 552.263(e) (if governmental body requires deposit or bond for anticipated costs pursuant to section 552.263, request for information is considered to have been received on date governmental body receives bond or deposit).

United States Code.<sup>2</sup> You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.107, 552.117, 552.137, and 552.147 of the Government Code, and privileged under Texas Rule of Evidence 503 and rule 192.5 of the Texas Rules of Civil Procedure. We have considered your arguments and reviewed the submitted representative sample of information.<sup>3</sup> Additionally, the district provides documentation showing it has notified individuals of their rights to submit comments to this office why some of the submitted information should not be released.<sup>4</sup> *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note some of the submitted information may have been the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2017-17003 (2017). In that ruling, we determined the district (1) may withhold the information not subject to section 552.022 under section 552.103 of the Government Code; (2) may withhold the information we marked within the submitted attorney fee bills pursuant to rule 503 of the Texas Rules of Evidence; and (3) must release the remaining information subject to section 552.022 of the Government Code. There is no indication the law, facts, and circumstances on which the prior ruling was based have changed. Accordingly, to the extent the requested information is identical to the information previously requested and ruled upon, we conclude the district may continue to rely on Open Records Letter No. 2017-17003 as a previous determination and withhold or release the identical information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes information is or is not excepted from disclosure). However, to the extent the information in the current request is not encompassed by the prior ruling, we will address your arguments for the information not subject to the previous ruling.

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<sup>2</sup>The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office FERPA does not permit state and local educational authorities to disclose to this office, without parental or student 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 FERPA determinations must be made by the educational authority in possession of the education records. A copy of this letter may be found on the Office of the Attorney General's website: <https://www.texasattorneygeneral.gov/files/og/20060725usdoe.pdf>

<sup>3</sup>We 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.

<sup>4</sup>As of the date of this letter, this office has not received comments from any third party explaining why any of the submitted information should not be released.

Next, we note some of the submitted information is subject to section 552.022(a) of the Government Code, which reads, in part, as follows:

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; [and]

...

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

Gov't Code § 552.022(a)(1), (3). The submitted documents contain completed evaluations that are subject to section 552.022(a)(1) and employment contracts that are subject to section 552.022(a)(3). Section 552.103 of the Government Code is discretionary 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 section 552.103); Open Records Decision No. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the district may not withhold the information subject to section 552.022 under section 552.103. As no other exceptions to disclosure are raised for the contracts, which we marked, they must be released pursuant to section 552.022(a)(3) of the Government Code. However, section 552.101 of the Government Code makes information confidential under the Act. Accordingly, we will consider the applicability of section 552.101 to the information subject to section 552.022(a)(1). Additionally, we will consider your arguments for the remaining information not subject to section 552.022.

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.” Act of May 16, 2017, 85th Leg., R.S., S.B 7 § 14 (to be codified as an amendment to Educ. Code § 21.355(a)). Additionally, the Third Court of Appeals has concluded 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.” *Abbott v. N. E. 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. *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. We also have determined that for purposes of section 21.355, “administrator” 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 of an administrator, as that term is commonly defined, at the time of the evaluation. *Id.* We further determined that “teacher interns, teacher trainees, librarians, educational aids and counselors cannot be teachers or administrators for purposes of section 21.355.” *See* Open Records Decision No. 684 at 5 (2009).

You contend Exhibit E contains evaluations of teachers and administrators that are confidential under section 21.355 of the Education Code. You state, and provide documentation showing, the individuals at issue held the appropriate certificates at the time of the creation of the evaluations and were functioning as teachers or administrators at the time of the evaluations. Based on your representations and our review, we conclude the district must withhold the submitted evaluations of teachers and administrators under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. However, we note the remaining evaluations at issue pertain to employees’ performances as counselors. Thus, we find you have not shown any of the counselor evaluations evaluate the performance of a teacher or administrator for the purposes of section 21.355. Therefore, the district may not withhold these evaluations, which we marked, under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.

The district asserts the information not subject to section 552.022 is excepted from disclosure under section 552.103 of the Government Code, which 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 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 that (1) litigation is 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). The governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a).

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 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.” *Id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, an attorney for a potential opposing party making a demand for payment and asserting an intent to sue if such payments are not made. Open Records Decision Nos. 555 at 3 (1990), 346 (1982). In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party threatened to sue on several occasions and hired an attorney. *See* Open Records Decision No. 288 at 2 (1981). However, an individual publicly threatening to bring suit against a governmental body, but who does not actually take objective steps toward filing suit, is not concrete evidence that litigation is reasonably anticipated. *See* Open Records Decision No. 331 at 1-2 (1982).

You state, and provide documentation showing, prior to the district's receipt of the instant requests for information, the district received a letter notifying it of the intent of the requestor's client to seek reimbursement for specified costs from the district, pursuant to section 1412(a)(10)(C) of title 20 United States Code. Based on your representations and our review of the information at issue, we determine the district has established it reasonably anticipated litigation prior to the date it received the requests for information. We further find the information at issue is related to the anticipated litigation for purposes of section 552.103. Accordingly, we conclude the district may withhold the remaining information under section 552.103 of the Government Code.<sup>5</sup>

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

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<sup>5</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

information. 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 once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, to the extent the requested information is identical to the information previously requested and ruled upon, we conclude the district may continue to rely on Open Records Letter No. 2017-17003 as a previous determination and withhold or release the identical information in accordance with that ruling. The district must withhold the completed evaluations of teachers and administrators under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. The district must release the information we marked pursuant to section 552.022 of the Government Code. The district may withhold the remaining information under section 552.103(a) 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,



D. Michelle Case  
Attorney  
Open Records Division

DMC/eb

Ref: ID# 676787

Enc. Submitted documents

c: Requestor  
(w/o enclosures)