



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 10, 2017

Mr. Gary Allmon Grimes
Counsel for the Mesquite Independent School District
Schuerenberg & Grimes
120 West Main Street, Suite 201
Mesquite, Texas 75149

OR2017-23101

Dear Mr. Grimes:

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# 679080.

The Mesquite Independent School District (the "district"), which you represent, received a request for all employment documents related to a named former district employee. You state the district will redact social security numbers under section 552.147(b) of the Government Code.¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.115, 552.117, and 552.130 of the Government Code.² In addition, you state, and provide documentation demonstrating, you notified the named former employee of the request for information. *See* Gov't Code § 552.304 (permitting interested third party to submit to attorney general reasons why requested information should or should not be released). We have also received comments from the Kirbyville Consolidated

¹Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office. *See* Gov't Code § 552.147(b).

²Although you also raise section 552.024 of the Government Code, we note this section is not an exception to disclosure. Rather, this section permits a current or former official or employee of a governmental body to choose whether to allow public access to certain information relating to the current or former official or employee that is held by the employing governmental body. *See* Gov't Code § 552.024.

Independent School District (“KCISD”). *See id.* We have considered the submitted arguments and reviewed the submitted information.

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:

(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];

...

(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[.]

Id. § 552.022(a)(1), (3), (15). We note portions of the submitted information consist of completed evaluations subject to section 552.022(a)(1). Additionally, some of the submitted information consists of 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 job descriptions 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 section 552.022(a)(3) and, to the extent the district considers the job descriptions 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)(3), (15). KCISD raises section 552.103 for the information at issue. However, section 552.103 does 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 also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Accordingly, the district may not withhold the information subject to sections 552.022(a)(1) and 552.022(a)(3) of the Government Code under section 552.103 of the Government Code.

Further, if the district considers the job descriptions as open to the public, then they are subject to section 552.022(a)(15) and the district may not withhold that information under section 552.103 of the Government Code. However, as sections 552.101, 552.102, 552.117, and 552.136 of the Government Code make information confidential under the Act, we will consider the applicability of these exceptions to the submitted information.³ Further, we will consider KCISD's assertion of section 552.103 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). 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 under section 552.103(a). See ORD 551 at 4.

KCISD states a lawsuit styled *Kirbyville Consolidated Independent School District v. Reeves*, Cause No. 09-17-00231-CV, was pending in the Ninth Court of Appeals and a lawsuit styled *In re Reeves* was pending in the 136th Judicial District Court in Jefferson County, Texas prior to the district's receipt of this request for information. We note the district is not a

³The 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).

party to the pending lawsuits and, therefore, does not have a litigation interest in the matter for purposes of section 552.103. *See* Gov't Code § 552.103(a); Open Records Decision No. 575 at 2 (1990) (statutory predecessor to section 552.103 only applies when governmental body is party to litigation). In such a situation we require an affirmative representation from the governmental body with the litigation interest that it wants the information at issue withheld from disclosure under section 552.103. KCISD affirms it objects to the release of the information at issue because of the pending litigation. KCISD states the information at issue is related to the pending litigation. Upon review, we agree the information at issue is related to litigation that was pending on the date the district received the present request for information. Therefore, we conclude, with the exception of the information subject to section 552.022 of the Government Code, the district may withhold the submitted information under section 552.103 of the Government Code on behalf of KCISD.⁴

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. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing parties in the pending 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).

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 and is not subject to disclosure under [the Act].” 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)). 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, and “administrator” means a person who is required to and does in fact hold an administrator’s certificate required under subchapter B

⁴As our ruling is dispositive, we need not consider the remaining arguments against disclosure of this information.

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. *See id.* at 4.

The district argues some of the information subject to section 552.022 consists of confidential evaluations of the named former employee by the district. The district indicates the named former employee was certified as a teacher or administrator by the State Board of Educator Certification and was acting as a teacher or administrator at the time the evaluations were prepared. Upon review, we find 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.⁵

Section 552.102(a) of the Government Code excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Gov’t Code § 552.102(a). We understand you to assert the privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101 of the Government Code. Section 552.101 of the Government Code also encompasses common-law privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). In *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref’d n.r.e.), the court of appeals ruled the privacy test under section 552.102(a) is the same as the *Industrial Foundation* privacy test. However, the Texas Supreme Court has expressly disagreed with *Hubert’s* interpretation of section 552.102(a) and held the privacy standard under section 552.102(a) differs from the *Industrial Foundation* test under section 552.101. *See Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). The supreme court also considered the applicability of section 552.102(a) and held it excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *See id.* at 348. Upon review, we find no portion of the remaining information is subject to section 552.102(a) of the Government Code, and the district may not withhold any of the remaining information on that basis.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee or official of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code, except as provided by section 552.024(a-1). *See* 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, the

⁵As our ruling is dispositive, we need not consider the remaining arguments against disclosure of this information.

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. Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may be withheld under section 552.117(a)(1) only on behalf of a current or former employee or official who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee or official who did not timely request under section 552.024 the information be kept confidential. You state, and the submitted information demonstrates, the employee at issue timely elected confidentiality under section 552.024. Therefore, the district must withhold the information we have marked under section 552.117(a)(1) of the Government Code. However, we find section 552.117(a)(1) is not applicable to the any portion of the remaining information, and the district may not withhold it on that ground.

Section 552.136 of the Government Code provides, "notwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining "access device"). Accordingly, the district must withhold the routing and bank account numbers we have marked under section 552.136 of the Government Code.

In summary, with the exception of the information subject to section 552.022 of the Government Code, the district may withhold the submitted information under section 552.103 of the Government Code on behalf of KCISD. The district must withhold: (1) the information we have marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code; (2) the information we have marked under section 552.117(a)(1) of the Government Code; and (3) the routing and bank account numbers we have marked under section 552.136 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,

A handwritten signature in black ink, appearing to read "Tim Neal". The signature is fluid and cursive, with the first name "Tim" being more prominent than the last name "Neal".

Tim Neal
Assistant Attorney General
Open Records Division

TN/tdw

Ref: ID# 679080

Enc. Submitted documents

c: Requestor
(w/o enclosures)

2 Third Parties
(w/o enclosures)