



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 16, 2018

Ms. Andrea L. Mooney
Counsel for the Rice Independent School District
Eichelbaum, Wardell, Hansen, Powell & Mehl, P.C.
5801 Tennyson Parkway, Suite 360
Plano, Texas 75024

OR2018-03773

Dear Ms. Mooney:

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# 696224.

The Rice Independent School District (the "district"), which you represent, received a request for information pertaining to the requestor's client.¹ You state the district redacted some information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g.² You claim the submitted information is excepted from disclosure under

¹You state, and provide documentation showing, the district sought and received clarification of the request for information. *See* Gov't Code § 552.222(b) (stating governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

²The 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 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. 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>.

section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.³

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[.]

Gov't Code § 552.022(a)(1), (3). 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). 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) only to the extent this information is confidential under the Act or other law. *See id.* § 552.022(a)(3). You raise 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) under section 552.103. However, we note some of the information at issue is subject to section 552.101 of the Government Code, which

³We 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.

protects information made confidential under law.⁴ Thus, we will consider the applicability of this section to the information at issue. Further, we will consider your assertion of section 552.103 for the information not subject to section 552.022 of the Government Code.

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].” 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 some of the information subject to section 552.022(a)(1) consists of an evaluation of a teacher for section 21.355 purposes. *See* Educ. Code § 21.355(a). We understand the teacher at issue was performing the functions of a teacher at the time of the evaluation. Therefore, provided the teacher held the appropriate certificate under Chapter 21 of the Education Code at the time of the evaluation at issue, the information we have marked is generally confidential under section 21.355 of the Government Code. However, we note section 21.352(c) of the Education Code specifically provides that “[e]ach teacher is entitled to receive a written copy of the evaluation promptly on its completion.” *Id.* § 21.352(c); *see id.* § 21.352(a) (prescribing appraisal process and performance criteria each school district shall use). In this instance, the requestor’s client is the employee whose evaluation is at issue. Therefore, to the extent the evaluation we have marked under section 21.355 is the type contemplated in section 21.352, this requestor has a right of access to his client’s evaluation under section 21.352(c). We rule conditionally. To the extent the teacher was required to and held the appropriate certificate at the time of the evaluation and the evaluation is the type contemplated in section 21.352, the requestor has a right of access to the evaluation under section 21.352(c) and it may not be withheld from the requestor under section 552.101 in conjunction with section 21.355. In that instant, the evaluation we have marked must be released to this requestor pursuant to section 21.252(c). To the extent the

⁴The 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).

teacher was required to hold and did hold the appropriate certificate at the time of the evaluation at issue but the evaluation is not the type contemplated in section 21.352, the requestor does not have a right of access and the district must withhold the evaluation 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 required to or did not hold the appropriate certificate at the time of the evaluation at issue, then this information is not confidential under section 21.355 and the district may not withhold it under section 552.101 on that basis. In this instance, as you have raised no other exceptions to disclosure for this information, the district must release the information at issue.

Section 552.103 of the Government Code provides, in 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 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 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 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 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 demonstrate litigation is reasonably anticipated, the governmental body must provide this office "concrete evidence showing 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,

the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.⁵ Open Records Decision No. 555 (1990); *see also* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). 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). On the other hand, this office has determined if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982).

You assert the district reasonably anticipated litigation when it received the instant request for information. You inform us the requestor, an attorney, represents a former district employee who has threatened litigation against the district multiple times. Based on your representations and our review, we find the district reasonably anticipated litigation when it received the request for information. We also find the information at issue is related to the anticipated litigation for purposes of section 552.103(a).

We note, however, the opposing party has seen or had access to some of the information at issue. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to that litigation to obtain it through discovery procedures. *See* ORD 551 at 4-5. Thus, once the opposing party has seen or had access to information relating to the anticipated litigation through discovery or otherwise, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Upon review, we find the opposing party has seen the information we have marked. Thus, the district may not withhold this information under section 552.103. As you raise no other exception to disclosure for this information, the district must release the information we have marked for release. Nevertheless, with the exception of the information we have marked for release, the district may withhold the remaining information not subject to section 552.022 of the Government Code under section 552.103 of the Government Code. We note the applicability of section 552.103(a) ends once the litigation has been concluded. *See* Attorney General Opinion MW-575 at 2 (1982); *see also* Open Records Decision No. 350 (1982).

In summary, with respect to the evaluation we have marked under section 21.355 of the Education Code: (1) to the extent the teacher was required to hold and did hold the appropriate certificate under Chapter 21 of the Education Code at the time of the evaluation marked and the evaluation is not the type contemplated in section 21.352 of the Education


⁵In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); and hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982).

Code, the district must withhold the marked evaluation under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code; (2) to the extent the teacher was required to and held the appropriate certificate at the time of the evaluation and the evaluation is the type contemplated in section 21.352 of the Education Code, the district must release the marked evaluation pursuant to section 21.352(c); and (3) to the extent the teacher was not required to or did not hold the appropriate certificate at the time of the evaluation at issue, the district must release the marked evaluation. With the exception of the information we have marked for release, as well as the remaining information subject to sections 552.022(a)(1) and 552.022(a)(3) of the Governments Code, the district may withhold the remaining information under section 552.103 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/sb

Ref: ID# 696224

Enc. Submitted documents

c: Requestor
(w/o enclosures)