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ATTORNEY GENERAL OF TEXAS

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Mr. Allen M. Keller
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845 Proton Road
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OR2019-26291

Dear Mr. Keller:

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# 786705.

IDEA Public Schools ("IDEA"), which you represent, received a request for the personnel file of the requestor's client.¹ You claim the submitted information is excepted from disclosure under sections 552.103 and 552.108 of the Government Code. Additionally, you state, and provide documentation showing, you notified the Hidalgo County District Attorney's Office (the "district attorney's office") of its right to submit comments to this office as to why the submitted information should not be released.² See Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant 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 We note IDEA asked for and received clarification regarding this request. See Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); *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 over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

² As of the date of this letter, we have not received comments from the district attorney's office.

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

...

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

Id. § 552.022(a)(1), (3). The submitted information contains completed evaluations that are subject to section 552.022(a)(1). IDEA must release the information at issue pursuant 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. Additionally, we note the submitted information contains information in an account, voucher, or contract relating to the receipt or expenditure of funds by a governmental body that is subject to section 552.022(a)(3). The information subject to section 552.022(a)(3) must be released unless it is confidential under the Act or other law. *Id.* § 552.022(a)(3). Although you raise sections 552.103 and 552.108 of the Government Code for this information, these sections are discretionary exceptions to disclosure 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. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, IDEA may not withhold the information subject to section 552.022(a)(3), which we marked, under section 552.103 or section 552.108 of the Government Code. As you raise no further exceptions to disclosure, IDEA must release the information we marked pursuant to section 552.022(a)(3) of the Government Code. However, as information subject to section 552.022(a)(1) may be withheld under section 552.108 of the Government Code, we will consider your argument under section 552.108 for the information at issue. Further, we will consider your arguments for the information not subject to section 552.022 of the Government Code.

Section 552.103 of the Government Code provides as follows:

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

You state that the information at issue pertains to a possible criminal prosecution by the district attorney's office. However, we note IDEA has failed to demonstrate it is a party to any pending litigation and, therefore, does not have a litigation interest in a matter for purposes of section 552.103. *See* Gov't Code § 552.103(a); Open Records Decision No. 575 at 2 (1990) (stating that 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 the governmental body wants the information at issue withheld from disclosure under section 552.103. Because IDEA has not provided such a representation, IDEA may not withhold any of the information at issue under section 552.103(a) of the Government Code.

Section 552.108(a)(1) excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov't Code § 552.108(a)(1). A governmental body claiming section 552.108(a)(1) must explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). Section 552.108 may be invoked by the proper custodian of information relating to an investigation or prosecution of criminal conduct. *See* Open Records Decision No. 474 at 4-5 (1987). Where a governmental body has custody of information relating to a pending case of a law enforcement agency, the custodian of records may withhold the information if it provides this office with a demonstration the information relates to a pending criminal case and a representation from the law enforcement agency that it wishes to have the information withheld.

IDEA asserts the information at issue may relate to a criminal investigation or prosecution being conducted by the district attorney's office. However, IDEA has not provided a representation from a law enforcement agency, nor has a law enforcement agency provided a representation to this office, stating it wishes to withhold the information at issue. Therefore, IDEA may not withhold any of the remaining information under section 552.108(a)(1) of the Government Code.

Section 552.101 of the Government Code exempts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.”³ Gov’t Code § 552.101. This section encompasses section 21.355 of the Education Code, which 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 submitted information, which we marked, consists of evaluations 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 evaluations. Therefore, provided the teacher held the appropriate certificate under Chapter 21 of the Education Code at the time of the evaluations at issue, the information we marked is generally confidential under section 21.355 of the Education Code. However, we note section 21.352(c) of the Education Code specifically provides “[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 is an attorney for the employee whose evaluation is at issue. Therefore, if the evaluations we marked under section 21.355 are the type contemplated in section 21.352, this requestor has a right of access to the evaluations under section 21.352(c). Accordingly, we rule conditionally. If the teacher was required to and held the appropriate certificate at the time of the evaluations and the evaluations are the type contemplated in section 21.352, the requestor has a right of access to the evaluations under section 21.352(c) and they may not be withheld from the requestor under section 552.101 in conjunction with section 21.355. In that instance, the evaluations must be released to this requestor pursuant to section 21.252(c). However, if the teacher was required to hold and did hold the appropriate certificate at the time of the evaluations at issue but the evaluations are not the type contemplated in section 21.352, the requestor does not have a right of access and IDEA must withhold the evaluations we marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. Finally, if the teacher was not required to or did not hold the appropriate certificate at the time of the evaluations at issue, then this information is not confidential under section 21.355 and IDEA may not withhold it under section 552.101 on that basis.

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).

We understand you have redacted information pursuant to sections 552.130(c) of the Government Code, section 552.136(c), and 552.147(b) of the Government Code.⁴ Section 552.130 of the Government Code excepts from disclosure information relating to a motor vehicle operator's or driver's license or permit, a motor vehicle title or registration, or a personal identification document issued by an agency of this state or another state or country. Gov't Code § 552.130(a). We note section 552.130 protects personal privacy. As such, the requestor has a right of access to his client's motor vehicle record information. *See id.* § 552.023(a) (“[a] person or a person's authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person's privacy interests”); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when an individual or authorized representative asks governmental body to provide information concerning that individual). Therefore, IDEA may not withhold any of the motor vehicle record information it redacted under section 552.130 of the Government Code.

Section 552.136(b) of the Government Code provides, “[n]otwithstanding 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”). However, as noted above, the requestor has a right of access to his client's information. *See id.* § 552.023(a); ORD 481 at 4. Therefore, IDEA may not withhold any of the information it redacted under section 552.136 of the Government Code.

Section 552.147(a-1) provides, “[t]he social security number of an employee of a school district in the custody of the district is confidential.” Gov't Code § 552.147(a-1). Thus, section 552.147(a-1) makes the social security numbers of school district employees confidential, without such employees being required to first make a confidentiality election under section 552.024 of the Government Code. *Id.* § 552.024(a-1) (school district may not require employee or former employee of district to choose whether to allow public access to employee's or former employee's social security number). Reading sections 552.024(a-1) and 552.147(a-1) together, we conclude section 552.147(a-1) makes confidential the social security numbers of both current and former school district employees. We note the requestor has a right of access to his client's social security number. *See generally id.* § 552.023(a); ORD 481 at 4. Accordingly, IDEA may not withhold any of the information it has redacted under section 552.147 of the Government Code.


⁴ Section 552.130(c) of the Government Code allows a governmental body to redact the information described in section 552.130(a) without the necessity of seeking a decision from the attorney general. *See* Gov't Code § 552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See id.* § 552.130(d), (e). Section 552.136 of the Government Code permits a governmental body to withhold the information described in section 552.136(b) without the necessity of seeking a decision from this office. *See id.* § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(d), (e). Section 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 id.* § 552.147(b).

In summary, IDEA must release the information we marked pursuant to section 552.022(a)(3) of the Government Code. If the teacher was required to hold and did hold the appropriate certificate at the time of the evaluation at issue and if the evaluation is not the type contemplated in section 21.352, then the district must withhold the evaluation we marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. IDEA must release the remaining information, including the information IDEA redacted, to this requestor.⁵

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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,



Jennifer Copeland
Assistant Attorney General
Open Records Division

JC/gw

Ref: ID# 786705.

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁵ Because the requestor has a right of access to certain information that otherwise would be excepted from release under the Act, IDEA must again seek a decision from this office if it receives a request for this information from a different requestor.