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ATTORNEY GENERAL OF TEXAS

May 6, 2022

Mr. Allen M. Keller
Counsel for Harmony Public Schools
Schulman, Lopez, Hoffer & Adelstein, L.L.P
845 Proton Road
San Antonio, Texas 78258

OR2022-12949

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# 946303.

Harmony Public Schools ("HPS"), which you represent, received a request for seven categories of information pertaining to the requestor's client. We understand some of the submitted information has been redacted pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.¹ You claim the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we note the submitted information contains completed evaluations that are subject to section 552.022(a)(1) of the Government Code, which reads as follows:

Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are

¹ 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 an adult student's 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 educational records. We have posted a copy of the letter from the DOE on the Attorney General's website at <https://www.texasattorneygeneral.gov/sites/default/files/files/divisions/open-government/20060725-USDOE-FERPA.pdf>.

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[.]

Gov't Code § 552.022(a)(1). HPS asserts the information subject to section 552.022, which we marked, is excepted from release under section 552.103 of the Government Code. However, section 552.103 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, HPS may not withhold the information subject to section 552.022 under section 552.103. However, section 552.101 of the Government Code makes information confidential under the Act.² Accordingly, we will consider the applicability of section 552.101 to the information at issue.

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 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.

Upon review, we find the information subject to section 552.022(a)(1) of the Government Code consists of evaluations of a teacher for the purposes of section 21.355. *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. Accordingly, 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

² The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body. *See* Open Records Decision Nos. 481 at 2 (1987), 480 at 5 (1987).

this instance, the requestor's client is the employee whose evaluations are at issue. Therefore, if the submitted evaluations are the type contemplated in section 21.352, this requestor has a right of access to the evaluations under section 21.352(c). Consequently, we must rule conditionally. To the extent the teacher was required to hold and did hold the appropriate certificate at the time of the evaluations at issue and the evaluations are not the type contemplated in section 21.352 of the Education Code, the requestor does not have a right of access to such information and HPS must withhold the evaluations we marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. However, to the extent 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) of the Education Code and they may not be withheld from the requestor under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code; in that instance, the evaluations we marked must be released to this requestor pursuant to section 21.252(c) of the Education Code. Finally, to the extent the teacher was not required to or did not hold the appropriate certificate at the time of the evaluations at issue, the marked evaluations are not confidential under section 21.355 of the Education Code and HPS may not withhold such information under section 552.101 of the Government Code on that basis; in that instance, HPS must release the evaluations we marked pursuant to section 552.022(a)(1) 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.

Id. § 552.103(a), (c). A 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 (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). *See* ORD 551 at 4.

For purposes of section 552.103, "litigation" includes contested cases conducted in a quasi-judicial forum. Open Records Decision Nos. 588 at 2 (1991), 474 at 6 (1987) (disciplinary action before Texas State Board of Pharmacy), 368 at 2 (1983) (administrative hearing before Commissioner of Insurance), 301 at 1-2 (1982). Likewise, "contested cases" conducted under the Texas Administrative Procedure Act, chapter 2001 of the Government Code, constitute "litigation" for purposes of section 552.103. *See, e.g.*, ORD 588 at 7 (State Board of Insurance proceeding), 301 at 2 (hearing before Public Utilities Commission). Factors this office considers in determining whether an administrative proceeding is conducted in a quasi-judicial forum include 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* ORD 588 at 3-4.

You state, and provide documentation showing, prior to the date HPS received the request for information, the requestor filed an employee grievance with HPS on behalf of her client claiming an employee engaged in unprofessional and inappropriate conduct and created a hostile work environment. You inform us employee grievances filed under the grievance process of HPS are "litigation" in that HPS follows administrative procedures in handling such disputes. You provide documentation demonstrating the grievance process of HPS is a multi-level hearing process wherein various administrators and board of directors of HPS hear the grievance and the grievant is allowed to be represented by counsel. Additionally, we understand the grievant must complete the grievance process of HPS in order to exhaust all administrative remedies before filing suit in court. Based on these representations and our review, we find HPS has demonstrated its administrative procedures for grievances are conducted in a quasi-judicial forum and, thus, constitute litigation for purposes of section 552.103. Therefore, we agree litigation was pending when HPS received the request. We also find you have established the information at issue is related to the pending litigation for purposes of section 552.103(a). Therefore, with the exception of the information subject to section 552.022 of the Government Code, HPS may withhold the submitted information under section 552.103 of the Government Code.

Generally, however, once information has been obtained by all parties to the litigation though 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 concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

In summary, with the exception of the information subject to section 552.022 of the Government Code, which we marked, HPS may withhold the submitted information under section 552.103 of the Government Code. With respect to the evaluations subject to section 552.022(a)(1) of the Government Code, which we marked: (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 evaluations at issue and the evaluations are not the type contemplated in section 21.352 of the Education Code, HPS must withhold the marked evaluations 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 evaluations and the evaluations are the type contemplated in section 21.352 of the Education Code, HPS must release the marked evaluations to this requestor pursuant to section 21.252(c) of the Education Code; and (3) to the extent the teacher was not required to or did not hold the appropriate certificate at the time of the evaluations at issue, HPS must release the evaluations we marked pursuant to section 552.022(a)(1) 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 <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,

Pearlie Gault
Attorney
Open Records Division

PG/JM

Ref: ID# 946303

Enc. Submitted documents

c: Requestor
(w/o enclosures)