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April 2, 2018

Via Certified Mail RRR
(7017 2400 0000 7843 0746)

Honorable Ken Paxton
Attorney General of Texas
Capital Station
Post Office Box 12548
Austin, Texas 78711-2548
Attention: Open Records Division

Re: Public Information Act Request

Dear Attorney General Paxton:

Pursuant to Section 552.301 of the Public Information Act, KIPP Houston Public Schools (“KIPP”) requests your opinion concerning whether it is required to disclose certain documents responsive to a written request for information.

By letter dated March 26, 2018, on behalf of KIPP, I requested your decision that information sought by Mr. Matt Barnum (“requestor”) was excepted from disclosure. This letter submits additional comments and forwards specific information for your review and confirmation that the information is excepted from disclosure.

1. The Request for Information

By email dated Tuesday, March 6, 2018, Mr. Matt Barnum made a request for information. In his request for information, Mr. Barnum, a reporter at Chalkbeat, requested “[a]ny and all documents pertaining to the dismissal of Mike Feinberg from KIPP. This includes but is not limited to any reports created by WilmerHale, as well as any correspondences pertaining to the dismissal of and accusations against Mr. Feinberg.” The request is attached as Exhibit A.

KIPP’s request for an open records decision was submitted timely, given that KIPP had ten (10) business days from receipt of Mr. Barnum’s request in which to respond. The request was received on Tuesday, March 6, 2018. KIPP was closed for spring break from March 12 through

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March 16, 2018.¹ Therefore, the deadline for KIPP to request an opinion was Tuesday, March 27, 2018, and the deadline for KIPP to submit its briefing and representative sample of documents is Tuesday, April 3, 2018.

KIPP asserts that the entirety of the responsive information contained in Exhibit B and Exhibit C is exempt from public disclosure. KIPP seeks your decision that the responsive information is confidential under sections 552.101 through 552.151 of the Texas Government Code, including, but not necessarily limited to:

- (1) Tex. Gov't Code § 552.101;
- (2) Tex. Gov't Code § 552.107; and
- (3) Tex. R. of Evid. 503.

KIPP is submitting to your office a representative sample of the responsive documents, its written comments stating the reasons why the stated exceptions may apply, and other information as required by Section 552.301.

2. Background information

The open records request was submitted by Mr. Matt Barnum. Mr. Barnum seeks public information from KIPP pertaining to the dismissal of KIPP co-founder and former administrator Mike Feinberg.

KIPP asserts that the documents attached hereto in Exhibits B and C are confidential under Texas Government Code Sections 552.101 and 552.107, and therefore are exempt from disclosure.²

3. The requested information in Exhibit B and Exhibit C is exempt from disclosure under Texas Government Code Section 552.101 as documents evaluating the performance of an administrator.

Section 552.101 of the Public Information Acts exempts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” TEX. GOV'T CODE § 552.101. Section 21.355 of the Texas Education Code states, “A document evaluating the performance of a teacher or administrator is confidential.” TEX. EDUC. CODE § 21.355. Therefore, documents evaluating the performance of a teacher or administrator are confidential and not subject to disclosure under the Public Information Act.

The Attorney General previously has determined that “the definition of ‘administrator’ in Section 21.355 is a person who is required to hold and does in fact hold an administrator’s certificate under subchapter B of chapter 21 [of the Education Code], and who is performing the

¹ KIPP Houston’s academic calendar for the 2017-2018 school year is attached as Exhibit D as evidence that KIPP Houston Public schools was closed for spring break from March 12 through March 16.

² The documents contained in Exhibits B and C are the subject of two other pending requests for information for which KIPP has sought an opinion from the Attorney General, submitted on March 8 and March 16, 2018.



functions of an administrator, as that term is commonly defined, at the time of the evaluation.” ORD-643 (1996). However, Section 21.355(b) provides that the confidentiality provision “applies to a teacher or administrator employed by an open-enrollment charter school regardless of whether the teacher or administrator is certified.”

The Attorney General also has determined that this confidentiality under § 21.355 extends to “any document that evaluates the performance of a teacher or administrator.” ORD-643 (1996). “If the legislature had intended that only the written evaluations resulting from these specific appraisal processes be confidential, then presumably, the legislature would have used language to so indicate.” *Id.* The document itself must “evaluate” the employee. According to the Attorney General, the word evaluate must be given its common and ordinary meaning. *Id.* The common and ordinary meaning of evaluate is “to determine or fix the value of,” or “to determine the significance, worth, or condition of usu[ually] by careful appraisal and study.” *Id.* citing MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 401 (10th ed. 1993) and *Nueces County Water Control Improvement Dist. No. 3 v. Texas Water Rights Comm’n*, 481 S.W.2d 924, 930 (Tex. Civ. App.—Austin 1972, writ ref’d n.r.e.).

The Commissioner of Education determined in *Tave v. Dallas Indep. Sch. Dist.*, Docket No 067-R3-501 (Comm’r Educ. 2001) that a reprimand is a document that evaluates an employee for purposes of § 21.355. Specifically, the Commissioner stated, “A reprimand by its nature evaluates. It points out a deficiency.” *Id.* The Court of Appeals upholding this decision did not dispute that conclusion of law. *Taves v. Alanis*, 109 S.W.3d 890, 893 (Tex. App.—Dallas 2003, no pet.). Additionally, in reviewing the Commissioner of Education’s construction of a different statute, the Texas Supreme Court stated, “Construction of a statute by the administrative agency charged with its enforcement is entitled to serious consideration so long as the construction is reasonable and does not contradict the plain language of the statute.” *Dodd v. Meno*, 870 S.W.2d 4, 7 (Tex. 1994).

The documents contained in Exhibits B and C are documents evaluating the performance of an administrator employed by KIPP at the time the documents were created. KIPP is an open-enrollment charter school; thus documents evaluating the performance of an administrator employed by KIPP are confidential pursuant to Section 21.355(b) regardless of whether the administrator is certified. However, Mr. Feinberg did hold a valid educator’s certificate issued by the State Board for Educator Certification [REDACTED]

[REDACTED]

The documents in Exhibits B and C [REDACTED]

[REDACTED]³ [REDACTED]

³ The documents in Exhibit C contain [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

FERPA defines “education records” as: “those records, files, documents, and other materials which contain information directly related to a student; and are maintained by an educational agency or



[REDACTED]

[REDACTED] Therefore, KIPP seeks to withhold the documents in Exhibits B and C in accordance with Texas Government Code Section 552.101 and Texas Education Code Section 21.355.

4. The information in Exhibit C is protected by Texas Government Code Section 552.107 and Texas Rules of Evidence Rule 503 as attorney-client privileged information.

KIPP believes that the documents in Exhibit C are exempt from public disclosure pursuant to the attorney-client privilege found in Texas Government Code Section 552.107 and Rule 503 of the Texas Rules of Evidence.

Section 552.107 of the Government Code excepts from public disclosure documents protected under the Texas Rules of Evidence, including documents protected from disclosure by the attorney-client privilege. TEX. GOV'T CODE § 552.107. Section 552.107 applies to communications made in confidence in furtherance of an attorney's rendition of professional legal services to the governmental body. ORD No. 676 (2002). The governmental body must show how the documents constitute either client confidences or communications of legal advice or opinion. *Id.*

Further, the Texas Rules of Evidence are "other law" within the meaning of Texas Government Code Section 552.022, which protects information from disclosure even if the information is public information under Section 552.022. The Texas Supreme Court has held that the Texas Rules of Evidence comprise "other law" that may make information "confidential under Section 552.022 of the Act. ORD No. 676 (2002), citing *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Additionally, Texas Government Code Section 552.101 protects from disclosure information made confidential by law. Under Texas Rules of Evidence Section 503, information is privileged and exempt from disclosure if it is a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client between the client or client's representative and the lawyer or lawyer's representative. A communication is confidential if it is not intended to be disclosed to third persons other than those to whom the disclosure is made in

institution or by a person acting for such agency or institution." 20 U.S.C. § 1232g(a)(4)(A). FERPA further states that: "[t]he term does not include: Records created or received by an educational agency or institution after an individual is no longer a student in attendance **and that are not directly related to the individual's attendance as a student.**" 34 C.F.R. § 99.3(b)(5) (emphasis added). Because the documents contain [REDACTED]

[REDACTED]



furtherance of the rendition of legal services to the client or those reasonably necessary for the transmission of the communication. Upon a demonstration of these factors, a document is privileged and confidential under Rule 503 of the Texas Rules of Evidence. See *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

Texas courts have held that where an attorney is retained to conduct an investigation in her capacity as an attorney for the purpose of providing legal services and advice, and the attorney prepares a report as part of that investigation, the entire report is protected by the attorney-client privilege under Rule 503. *Harlandale Indep. Sch. Dist. v. Cornyn*, 25 S.W.3d 328 (Tex. App.—Austin 2000, pet. denied); see also Op. Tex. Att’y Gen. No. OR2018-04957 (2018); Op. Tex. Att’y Gen. No. OR2018-04517 (2018); Op. Tex. Att’y Gen. No. OR2018-04584 (2018); Op. Tex. Att’y Gen. No. OR2018-03670 (2018); Op. Tex. Att’y Gen. No. OR2018-03569 (2018) (all citing *Harlandale Indep. Sch. Dist. v. Cornyn*, 25 S.W.3d 328 (Tex. App.—Austin 2000, pet. denied)).

The documents in Exhibit C are confidential under both Texas Government Code Section 552.107 and Rule 503 of the Texas Rules of Evidence. These documents contain [REDACTED]

[REDACTED]

[REDACTED]

5. Alternatively, some of the requested information so marked in Exhibit C is confidential pursuant to Texas Government Code Section 552.101 and the doctrine of common law privacy.

The doctrine of common law privacy under § 552.101 protects “information that contains highly intimate or embarrassing facts about a person’s private affairs such that its release would be highly objectionable to a reasonable person and the information [is] of no legitimate concern to the public.” OR2001-4769, citing *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). So long as the information meets those conditions, it is not subject to disclosure.

The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders,



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attempted suicide, and injuries to sexual organs. *See id.* at 683. The office of the Attorney General has since concluded that other types of information also are protected from disclosure by the common law right to privacy. *See* ORD No. 659 at 4-5 (1999) (summarizing information attorney general has determined to be private), ORD No. 470 at 4 (1987) (illness from severe emotional job-related stress), ORD No. 455 at 9 (1987) (prescription drugs, illnesses, operations, and physical handicaps), ORD No. 343 at 1-2 (1982) (references in emergency medical records to a drug overdose, acute alcohol intoxication, obstetrical/gynecological illness, convulsions/seizures, or emotional/mental distress).

KIPP asserts that some of the information so marked in Exhibit C is exempt from public disclosure under Texas Government Code 552.101 because [REDACTED]

[REDACTED] Exhibit C contains [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] Therefore, KIPP believes this information is exempt from disclosure under Texas Government Code § 552.101 and the doctrine of common law privacy.

In conclusion, for the reasons stated herein, KIPP seeks your ruling that the attached documents are excepted from disclosure under the Act and may be withheld from disclosure.

Thank you for your consideration.

Very truly yours,

ROGERS, MORRIS & GROVER, L.L.P.

Ellen Spalding
Ellen H. Spalding

Enclosures

cc: Mr. Matt Barnum

(via email pdf – mbarnum@chalkbeat.com, redacted, without enclosures)

Mr. Chuck Fimble

(via e-mail pdf)

