



February 22, 2001

Ms. Lynn Rossi Scott
Bracewell & Patterson L.L.P.
Attorneys at Law
500 N. Akard Street, Suite 400
Dallas, Texas 75201-3387

OR2001-0655

Dear Ms. Scott:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 144427.

The Hurst-Eules Independent School District (the "district"), which you represent, received a request for fifteen categories of information related to three named district employees. You object to the release of information responsive to the following three request categories:

start and end dates of leave taken under the Family Medical Leave Act for [a named employee];

specific date of background check by the school district, means by which information was obtained, and findings resulting from [district] Paraprofessional Application question 7 under Personal Information concerning felony or misdemeanor arrest; and

workplace accommodations due to physical and/or mental health status made for each assistant during the current school year (2000-2001).

You assert that the information responsive to these items is excepted from disclosure under sections 552.101 and 552.102 of the Government Code.¹ You also indicate that student identifying information has been redacted from the responsive information as required by the Family Educational Rights and Privacy Act of 1974 ("FERPA").² We assume that the remaining responsive information has been released. We have considered the exceptions you claim and reviewed the submitted information.

¹Because the standard applied under section 552.102 is the same standard applied under section 552.101 in conjunction with the common law right of privacy, we address your argument under section 552.101 only.

²An educational agency or institution may withhold from public disclosure information that is protected by FERPA without the necessity of requesting an attorney general decision as to that information. Open Records Decision No. 634 (1995).

We first note that the submitted materials include a document which was filed with a court. Section 552.022 of the Government Code provides several categories of information that are not excepted from required disclosure unless they “are expressly confidential under other law.” In pertinent part this section reads:

- (a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

...

- (17) information that is also contained in a public court record

The document that we have marked as subject to section 552.022(a)(17) of the Government Code is not made confidential by law and must therefore be released.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses information protected by other statutes, including the Family and Medical Leave Act, 29 U.S.C. § 2654 (the “FMLA”).

Section 825.500 of chapter V of title 29 of the Code of Federal Regulations identifies the record-keeping requirements for employers that are subject to the FMLA. Subsection (g) of section 825.500 states that

[r]ecords and documents relating to medical certifications, recertifications or medical histories of employees or employees' family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files, and if ADA is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements . . . , except that:

- (1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;
- (2) First aid and safety personnel may be informed (when appropriate) if the employee’s physical or medical condition might require emergency treatment; and
- (3) Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

29 C.F.R. § 825.500(g). You relate that the information that you have marked as subject to the FMLA is maintained as information related to medical certifications, recertifications or medical histories, created for purposes of FMLA. Based on your representations and our review of this information, we conclude that none of the release provisions of FMLA apply to this information. Therefore, the information marked as subject to FMLA must be withheld under section 552.101 of the Government Code in conjunction with the FMLA.

Section 552.101 also encompasses information made confidential by the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 (the "ADA"). The ADA provides that information about the medical conditions and medical histories of applicants or employees must be 1) collected and maintained on separate forms, 2) kept in separate medical files, and 3) treated as a confidential medical record. In addition, information obtained in the course of a "fitness for duty examination," conducted to determine whether an employee is still able to perform the essential functions of his job, is to be treated as a confidential medical record. 29 C.F.R. § 1630.14(c). *See also* Open Records Decision No. 641 (1996). The Equal Employment Opportunity Commission (the "EEOC") has determined that medical information for the purposes of the ADA includes "specific information about an individual's disability and related functional limitations, as well as general statements that an individual has a disability or that an ADA reasonable accommodation has been provided for a particular individual." *See* Letter from Ellen J. Vargyas, Legal Counsel, EEOC, to Barry Kearney, Associate General Counsel, National Labor Relations Board, 3 (Oct. 1, 1997).

Federal regulations define "disability" for purposes of the ADA as "(1) a physical or mental impairment that substantially limits one or more of the major life activities of the individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment." 29 C.F.R. § 1630.2(g). The regulations further provide that

physical or mental impairment means: (1) [a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or (2) [a]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

29 C.F.R. § 1630.2(h). From our review of the information which you have designated as subject to the ADA, we conclude that this information is "about the medical conditions and medical histories of applicants or employees," and must be withheld under section 552.101 of the Government Code in conjunction with the ADA.

The submitted information includes criminal history record information (CHRI), which is also made confidential by statute. Title 28, Part 20 of the Code of Federal Regulations governs the release of criminal history record information ("CHRI") which states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal

regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety (the "DPS") maintains, except that the DPS may disseminate such records as provided in chapter 411, subchapter F of the Government Code. *See also* Gov't Code § 411.087 (entities authorized to obtain information from DPS are authorized to obtain similar information from any other criminal justice agency; restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release the information except to another criminal justice agency for a criminal justice purpose, *id.* § 411.089(b)(1). Other entities specified in Chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release the information except as provided by Chapter 411. *See generally id.* §§ 411.090-.127. Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. *See* Open Records Decision No. 565 (1990). Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. We have marked the information that must be withheld under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code.

Social security numbers may be withheld in some circumstances under section 552.101 of the Government Code. A social security number or "related record" may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that any of the social security numbers in the records here are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure on the basis of that federal provision. We caution, however, that section 552.353 of the Open Records Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained pursuant to any provision of law, enacted on or after October 1, 1990.

Section 552.101 of the Government Code also excepts information from disclosure under the common law right of privacy. Information is protected by the common law right of privacy if it (1) contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) it is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). However, the scope of public employee privacy is narrow. Open Records Decision No. 423 at 2 (1984). Because the work behavior of a public employee and the conditions for his or her continued employment are matters of legitimate

public interest, the common law right of privacy does not protect facts about a public employee's misconduct on the job or complaints made about the employee's performance. Open Records Decision Nos. 438 (1986). Similarly, information about a public employee's qualifications, disciplinary action and background is not protected by common law privacy. Open Records Decision No. 444 (1986). From our review of the submitted materials, we conclude that none of the information that you contend is protected by common law privacy is so protected.

The submitted materials also include information that is not excepted from disclosure by section 552.101 but that may be subject to section 552.117 of the Government Code. This section excepts from required public disclosure the home addresses, home telephone numbers, social security numbers, or personal family members information of public employees who request that this information be kept confidential under section 552.024. However, whether a particular piece of information is public must be determined at the time the request for it is made. Open Records Decision No. 530 at 5 (1989). Therefore, section 552.117 information must be withheld if a current or former employee or official requested that this information be kept confidential under section 552.024 before the request for information was received, but you may not withhold section 552.117 information of a current or former employee who made the request for non-disclosure under section 552.024 after the request for information was made. We have marked the information that is subject to section 552.117.

The submitted documents include information excepted under section 552.130 of the Government Code. This section governs the release and use of information obtained from motor vehicle records, and provides in relevant part as follows:

- (a) Information is excepted from [required public disclosure] if the information relates to:
 - (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]
 - (2) a motor vehicle title or registration issued by an agency of this state[.]

Texas driver's license numbers, VIN numbers, and Texas license plate numbers must be withheld pursuant to section 552.130. We have marked the Texas drivers' license information in the submitted materials. This information must be withheld under section 552.130 of the Government Code.

In conclusion, information made confidential by the ADA, FMLA, or chapter 411 of the Government Code, must be withheld under section 552.101 of the Government Code. Social security numbers must be withheld under section 552.101 if they were obtained or maintained pursuant to any provision of law enacted on or after October 1, 1990. The information which you have determined identifies particular students must be withheld, as required by FERPA. Information subject to section 552.117 must be withheld if the

employee elected non-disclosure under section 552.024 before the request for information was received. Texas drivers' license information must be withheld under section 552.130 of the Government Code. The remaining information, including information filed with a court, must be released. We have marked the submitted information accordingly.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

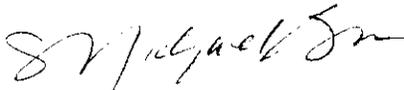
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael Jay Burns
Assistant Attorney General
Open Records Division

MJB/er

Ref: ID# 144427

Encl: Submitted documents

cc: Ms. Gwen Allison
c/o Lynn Rossi Scott
Bracewell & Patterson L.L.P.
Attorneys at Law
500 N. Akard Street, Suite 400
Dallas, Texas 75201-3387
(w/o enclosures)

Ms. Lory Hawkes
c/o Lynn Rossi Scott
Bracewell & Patterson L.L.P.
Attorneys at Law
500 N. Akard Street, Suite 400
Dallas, Texas 75201-3387
(w/o enclosures)