



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 15, 2004

Mr. Therold I. Farmer
Walsh, Anderson, Brown, Schulze & Aldridge, P.C.
6300 La Calma
Suite 200
Austin, Texas 78752

OR2004-4871

Dear Mr. Farmer:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 203376.

The Magnolia Independent School District (the "district"), which you represent, received a request from the State Board for Educator Certification ("SBEC") for specified categories of employment information concerning a named former district employee, including (1) reports, notes, statements, or memoranda that reflect a chronology of the conduct reported or the district's investigation of the incident; (2) the employee's application for employment and any documents submitted in support of the application; (3) any information that evidences administrative reprimands or other disciplinary measures; (4) any documentation relating to the employee's employment; (5) the employee's teacher service record; and (6) any other document that may be relevant to SBEC's investigation of the employee.¹ You have submitted responsive information that you claim is excepted from disclosure under sections 552.101 and 552.102 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted.

¹ The district represents that it has redacted student identifying information from the responsive information in accordance with Open Records Decision No. 634 (1995) (an educational agency or institution may withhold from public disclosure information that is protected by the Family Educational Rights and Privacy Act and excepted from required public disclosure by sections 552.026 and 552.101 of the Government Code without the necessity of requesting an attorney general decision as to those exceptions).

Initially, you ask whether the district may release the requested information to SBEC as an interagency transfer. Although a governmental body may treat a request by another governmental body such as SBEC as a request for information under chapter 552 of the Government Code, a governmental body that receives such a request is not required to do so. *See* Attorney General Opinion JM-119 at 2 (1983). A transfer of information between governmental bodies is not necessarily a release to the public for purposes of chapter 552. *See id.* For example, an official or employee of a governmental body who, in an official capacity, requests information held by another governmental body does not act as a member of the public in doing so. Thus, an official or employee of one governmental body may review records of another governmental body without implicating the prohibition of selective disclosure under chapter 552 of the Government Code. *See* Attorney General Opinion JM-119 at 2 (1983); *see also* Open Records Decision No. 468 at 4 (1987).² Here, however, SBEC requests the information pursuant to the Public Information Act; therefore, it appears that SBEC chooses not to treat the request for information as an interagency transfer. Accordingly, we will address your claimed exceptions to disclosure.

You claim that the information submitted as Document Group #1 is confidential under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. Section 552.101 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. Section 21.355 of the Education Code provides, "A document evaluating the performance of a teacher or administrator is confidential." This office interpreted this section to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. Open Records Decision No. 643 (1996). In that opinion, this office also concluded that a teacher is someone who is required to hold and does hold a certificate or permit required under chapter 21 of the Education Code and is teaching at the time of his or her evaluation. *Id.* Similarly, an administrator is someone who is required to hold and does hold a certificate required under chapter 21 of the Education Code and is administering at the time of his or her evaluation. *Id.* Based on the reasoning set out in Open Records Decision No. 643, we conclude that those documents entitled "Professional Development and Appraisal System" are confidential under section 21.355 of the Education Code. Therefore, pursuant to section 552.101 of the Government Code, the district must withhold these documents. We note, however, that section 21.355 is inapplicable to the September, 2000 memorandum; thus, this document cannot be withheld pursuant to section 552.101.

² An interagency transfer of requested information is prohibited, however, if a confidentiality statute enumerates the specific entities to which confidential information may be disclosed, and the enumerated entities do not include the requesting governmental body. *See* Open Records Decision Nos. 655 at 8-9 (1997), 516 at 4-5 (1989), 490 at 2 (1988); *see also* Attorney General Opinions DM-353 at 4 n. 6 (1995), JM-590 (1986).

You contend that the information submitted in Document Group #2 may constitute criminal history record information ("CHRI"), which is excepted from disclosure under section 552.101 of the Government Code. CHRI generated by the National Crime Information Center ("NCIC") or by the Texas Crime Information Center ("TCIC") is confidential. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that 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.*

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 CHRI 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 the Department of Public Safety ("DPS") or another criminal justice agency; however, those entities may not release CHRI 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. The information submitted for our review does not constitute CHRI obtained from DPS or any other criminal justice agency; therefore, this information cannot be withheld under section 552.101 in conjunction with chapter 411 of the Government Code.

You assert that even if the information is not protected under chapter 411, it may be CHRI that is protected under common law privacy. Section 552.101 also encompasses common law privacy. For information to be protected from public disclosure by the common law right of privacy under section 552.101, the information must meet the criteria set out in *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person and (2) the information is not of legitimate concern to the public. 540 S.W.2d at 685. Where an individual's criminal history information has been compiled by a governmental entity, the information takes on a character that implicates the individual's right to privacy. *See United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989). In this instance, however, the requestor does not seek a compilation of an individual's CHRI, but instead requests information about a specific incident. Furthermore, the information the district seeks to withhold does not constitute CHRI. *See generally* Gov't Code § 411.082(2) (defining CHRI as "information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments,

informations, and other formal criminal charges and their dispositions." Therefore, Document Group #2 may not be withheld as CHRI.

You further claim that the college transcript submitted in Document Group #4 is excepted from disclosure under section 552.102(b). Section 552.102(b) excepts from public disclosure "a transcript from an institution of higher education maintained in the personnel file of a professional public school employee." Gov't Code § 552.102(b). This section further provides, however, that "the degree obtained or the curriculum on a transcript in the personnel file of the employee" are not excepted from disclosure. Thus, except for the information that reveals the degree obtained and the courses taken, the district must withhold the transcript submitted under section 552.102(b).

The information submitted in Document Groups #2 and 3 contains social security numbers and other information that may be excepted under section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) excepts from disclosure the home address, home telephone number, and social security number of a current or former employee of a governmental body, as well as information that reveals whether the employee has family members, if the current or former employee timely requested that this information be kept confidential under section 552.024.³ See Open Records Decision Nos. 622 (1994), 455 (1987). This information may not be withheld, however, in the case of a current or former employee who made the request for confidentiality under section 552.024 after the request for information was made. Whether a particular piece of information is public must be determined at the time the request for it is made. See Open Records Decision No. 530 at 5 (1989). Therefore, to the extent that the employee in question made a timely election under section 552.024, you must withhold this information under section 552.117.

If the employee did not timely elect, his social security number may also be withheld in some circumstances 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.* You state that section 21.053 of the Education Code, which was re-enacted in 1995, requires the district to maintain the certificate of each employed teacher. You also state these teaching certificates contain the teacher's certificate number, which is identical to the teacher's social security number. Thus, you assert that section 21.053 is a law that requires the district to obtain and maintain a teacher's social security number. We note, however, that the district has

³ The former home addresses and telephone information of an employee of a governmental body who timely requests confidentiality under section 552.024 are also excepted from disclosure under section 552.117. See Open Records Decision No. 622 (1994).

submitted numerous documents, which are not teaching certificates, that contain the teacher's social security number. It is, therefore, clear to this office that the district obtains and maintains a teaching certificate for purposes other than the requirements of section 21.053. Consequently, we conclude that the social security number at issue is not confidential under section 405(c)(2)(C)(viii)(I) and it may not be excepted from public disclosure under section 552.101 on the basis of that federal provision.

Lastly, you claim an exception to disclosure under section 552.102 for information submitted in Document Group #5 that potentially implicates a privacy interest. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101. See *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). The information submitted in Document Group #5 consists of information pertaining to the workplace conduct of public employees. Since there is a legitimate public interest in the workplace conduct of public employees and the conditions for their continued employment, this information cannot be withheld under section 552.101 and common law privacy. See Open Records Decision No. 438 (1986); see also Open Records Decision Nos. 484 (1987) (public interest in knowing how police departments resolve complaints against police officer ordinarily outweighs the officer's privacy interest), 444 (1986) (concluding that public has obvious interest in having access to information concerning performances of governmental employees, particularly employees who hold positions as sensitive as those held by members of law enforcement), 423 at 2 (1984) (scope of public employee privacy is narrow), 405 at 2-3 (1983) (public has interest in workplace conduct of public employee), 329 at 2 (1982) (information relating to complaints against public employees and discipline resulting therefrom not protected under statutory predecessor to section 552.101), 208 at 2 (1978) (information relating to complaint against public employee and disposition of the complaint is not protected under either the constitutional or common law right of privacy). Upon review of the information submitted, we conclude that no privacy interest is implicated, and this record must be released in its entirety.

In summary, the district must withhold all formal teacher performance evaluations under section 552.101. Except for the information that reveals the degree obtained and the courses taken, the district must withhold the transcript submitted under section 552.102(b). The district must withhold the home address and phone number, social security number and family member information if the employee timely elected to keep this information confidential under section 552.117. The district must release all remaining information.

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).

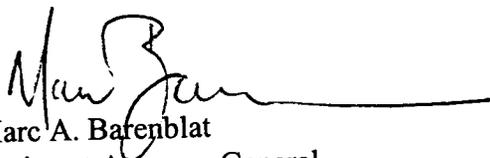
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code

§ 552.325. 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,

A handwritten signature in black ink, appearing to read "Marc A. Barenblat", with a long horizontal line extending to the right.

Marc A. Barenblat
Assistant Attorney General
Open Records Division

MAB/jh

Ref: ID# 203376
Enc: Submitted documents

c: Mr. Scott Byram
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(w/o enclosures)