



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 1, 2005

Mr. Robert W. Wilson
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OR2005-10768

Dear Mr. Wilson:

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# 237186.

The South San Antonio Independent School District (the "district"), which you represent, received a request for (1) all records related to any and all substitute teachers and teachers' aides that have been terminated or have resigned this current year and the past year, (2) files on active substitute teachers and teachers' aides that have been disciplined, and (3) statements made as to the reason for the disciplinary action and any investigation reports. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.114, 552.117 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Initially, we must address the district's obligations under the Act. Pursuant to section 552.301(b) of the Government Code, a governmental body must ask for the attorney general's decision and state the exceptions that apply within ten business days after receiving a request. See Gov't Code § 552.301(a), (b). Pursuant to section 552.301(e), the governmental body must, within fifteen business days of receiving the request, submit to this office (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or

¹You also raise section 552.024 of the Government Code. Section 552.024 provides the manner in which an individual may choose to keep information confidential for purposes of section 552.117 of the Government Code. Accordingly, section 552.024 is not an exception to disclosure under the Act.

representative samples, labeled to indicate which exceptions apply to which parts of the documents. Gov't Code § 552.301(e)(1)(A)-(D).

You inform us that the district received this request on August 30, 2005. You also have submitted correspondence between the district and the requestor dated September 12, 2005 that indicates that the district subsequently requested a clarification of the initial request. *See* Gov't Code § 552.222 (stating that governmental body may ask requestor to clarify or narrow scope of request, if governmental body determines in good faith that it cannot identify the requested information, or that scope of the request encompasses large amount of information); *see also* Open Records Decision No. 31 (1974) (when presented with broad requests for information rather than for specific records, governmental body may advise requestor of types of information available so that request may be properly narrowed). You state that on "Monday, September 12, 2005, counsel for [the district] sent an e-mail to the requestor acknowledging that requestor had narrowed his request but had also requested additional information not in the initial request" and that the "[r]equestor responded to counsel's e-mail on September 12, 2005." We thus understand that the district considered the requestor's correspondence of September 12 to be a new request for information, triggering the district's ten- and fifteen-day deadlines under section 552.301. We do not agree. Instead, we consider the requestor's communication on September 12 with the district to be a clarification of the original request, rather than a new request for information. Therefore, we find that the requestor did not make a new request for information in the e-mail exchange on September 12, but instead clarified his request of August 30.

When a governmental body requests a clarification under section 552.222, the deadlines of section 552.301(b) and (e) are tolled until the governmental body receives a response to its clarification request. *See* Open Records Decision No. 663 at 5 (1999). However, you did not request a ruling from this office until September 26, 2005. Furthermore, you did not forward the submitted information for our review until October 3, 2005. Consequently, we find that the district failed to comply with the procedural requirements of section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless a compelling reason exists to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). Sections 552.101, 552.102, 552.114 and 552.117 are mandatory exceptions and each constitutes a compelling reason that overcomes the presumption of openness caused by a failure to comply with section 552.301. *See* Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions). Accordingly, we will address each of your arguments.

Section 552.101 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 information protected by other statutes. The Family Educational Rights and Privacy Act of 1974 ("FERPA") provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information, other than directory information, contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1). "Education records" means those records that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. *Id.* § 1232g(a)(4)(A). This office generally applies the same analysis under FERPA and section 552.114 of the Government Code. *See* Open Records Decision No. 539 (1990).

Information must be withheld from required public disclosure under FERPA only to the extent "reasonable and necessary to avoid personally identifying a particular student." *See* Open Records Decision Nos. 332 (1982), 206 (1978). Such information includes information that directly identifies a student as well as information that, if released, would allow the student's identity to be easily traced. *See* Open Records Decision No. 224 (1979). We have marked the submitted information that must be withheld under FERPA.

Next, however, we note that you have redacted portions of the submitted records without seeking a ruling from this office regarding that information. In Open Records Decision No. 634 (1995), this office concluded that an educational agency or institution may withhold from public disclosure information that is protected by FERPA and excepted from required public disclosure by sections 552.026 and 552.101 without the necessity of requesting an attorney general decision as to those exceptions.² Based on the information provided this office, we are unable to determine if the redacted information in the submitted records must be withheld under FERPA, nor do you inform this office that such information is being withheld under FERPA. We conclude, however, that you must withhold the redacted information to the extent such information personally identifies a particular student. However, those portions of the redacted information that do not identify a particular student, or in which the release of the information would not make a student's identity easily traceable, are not made confidential by FERPA and must be released. *See* Gov't Code § 552.302.

Next, we address your claim that the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. §§ 1320d-1320d-8, governs release of portions of the submitted information. At the direction of Congress, the Secretary of Health and Human Services ("HHS") promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. *See* Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of

² Section 552.026 provides that the Act "does not require the release of information contained in education records of an educational agency or institution, except in conformity with" FERPA. Gov't Code § 552.026.

Individually Identifiable Health Information, 45 C.F.R. Pts. 160, 164 (“Privacy Rule”); *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, excepted as provided by parts 160 and 164 of the Code of Federal Regulations. 45 C.F.R. § 164.502(a).

This office has addressed the interplay of the Privacy Rule and the Act. Open Records Decision No. 681 (2004). In that decision, we noted that section 164.512 of title 45 of the Code of Federal Regulations provides that a covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. *See* 45 C.F.R. § 164.512(a)(1). We further noted that the Act “is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public.” *See* Open Records Decision No. 681 at 8 (2004); *see also* Gov’t Code §§ 552.002, .003, .021. We therefore held that the disclosures under the Act come within section 164.512(a). Consequently, the Privacy Rule does not make information confidential for the purpose of section 552.101 of the Government Code. Open Records Decision No. 681 at 9 (2004); *see also* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Because the Privacy Rule does not make confidential information that is subject to disclosure under the Act, the district may not withhold any of the submitted information under section 552.101.

You also argue a portion of the submitted information contains medical records, access to which is governed by the Medical Practice Act (“MPA”), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient’s behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002. However, upon review, we conclude that the submitted information does not include any medical records subject to the MPA. Thus, the district may not withhold any portion of the submitted information under the MPA.

You also claim that portions of the submitted information are excepted from disclosure under section 552.102 of the Government Code. 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(a) 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 of the Act. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Accordingly, we consider your privacy claim under section 552.102(a) together with section 552.101.

In order for information to be protected from public disclosure by the doctrine of common-law privacy under section 552.101, the information must meet the criteria set out in *Industrial Foundation*. 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. *Id.* at 685.

You assert that release of the submitted information is an invasion of personal privacy. However, the submitted documents relate to a district employee's job performance and separation. Since there is a legitimate public interest in how a public employee performs job functions and satisfies employment conditions, the district may not withhold all of submitted information from public disclosure based on the common-law right to privacy. *See generally* Open Records Decision Nos. 470 at 4 (1987) (public has legitimate interest in job performance of public employees), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (1984) (scope of public employee privacy is narrow).

However, this office has found that some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Accordingly, we have marked the medical information in the submitted documents that must be withheld under section 552.101 in conjunction with common-law privacy.

You further claim certain personal information of the employee at issue is excepted from disclosure under section 552.117(a) of the Government Code. This provision excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). We note that section 552.117 also encompasses a personal cell telephone number, provided that the cell phone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (Gov't Code § 552.117 not applicable to cellular mobile phone numbers paid for by governmental body and intended for official use).

Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). The district may only withhold information under section 552.117(a)(1) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. If the employee whose personal information is at issue timely elected to keep her personal information confidential, the district must withhold her address and telephone numbers in the submitted documents. The district may not withhold this information under section 552.117 if the employee did not make a timely election to keep the information confidential. We have marked the submitted information that may be subject to section 552.117.

In summary, we have marked the information the district must withhold under FERPA. We have also marked the redacted information that must be released unless it is protected by FERPA. The district must withhold the marked medical information under section 552.101 and common law privacy. If the employee whose personal information is at issue timely elected to keep her personal information confidential, the district must withhold the marked address and telephone numbers under section 552.117. The remaining submitted information must be released.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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,



Ramsey A. Abarca
Assistant Attorney General
Open Records Division

RAA/krl

Ref: ID# 237186

Enc. Submitted documents

c: Mr. Brian Collister
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