



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 20, 2005

Mr. Francisco Canseco
Escamilla & Poneck, Inc.
5219 McPherson Road, Suite 306
Laredo, Texas 78041

OR2005-11472

Dear Mr. Canseco:

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# 238483.

The San Marcos Consolidated Independent School District (the "district"), which you represent, received a request for information regarding a named district teacher. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.114, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

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 information made confidential by other statutes. Section 21.355 of the Education Code provides that "[a] document evaluating the performance of a teacher or administrator is confidential." Educ. Code § 21.355. 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 or an administrator. *See* Open Records Decision No. 643 (1996). In that decision, we determined that the word "teacher," for purposes of section 21.355, is a person who 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 who is engaged in the process of teaching, as that term is commonly defined, at the time of the evaluation. *See id* at 4.

You state that some of the submitted information consists of teacher evaluations. Thus, assuming that the teacher at issue was required to hold and did hold the appropriate certificate and was performing the functions of a teacher at the time of the submitted evaluations, we find that these evaluations, which we have marked, must be withheld under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.

Next, we address the district's privacy arguments. Section 552.102(a) 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 v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101. Accordingly, we will consider your privacy claims under sections 552.101 and 552.102 together.

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 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. 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, attempted suicide, and injuries to sexual organs. *Id.* at 683. Prior decisions of this office have determined that some kinds of medical information and personal financial information not related to a transaction between an individual and a governmental body are protected by common law privacy. *See* Open Records Decision Nos. 600 (1992) (personal financial information not related to transaction with governmental body generally not subject to legitimate public interest), 470 (1987) (information pertaining to illness from severe emotional and job-related stress protected by privacy), 455 (1987) (information pertaining to prescription drugs, specific illnesses, procedures, and physical disabilities protected by privacy). However, this office has also determined that the essential facts about a financial transaction between an individual and a governmental body generally are subject to a legitimate public interest. *See* Open Decision Nos. 545 (1990) (financial information pertaining to receipt of funds from governmental body or debts owed to governmental body not protected by common law privacy), 523 (1989).

Based on our review of the information at issue, we find that the information we have marked is confidential under common law privacy and must be withheld under

sections 552.101 and 552.102 on that basis.¹ We find, however, that no portion of the remaining information is confidential under common law privacy, and therefore none of it may be withheld under either section 552.101 or 552.102 on that basis. *See* Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute his private affairs), 455 (1987) (public employee's job performances or abilities generally not protected by privacy), 423 at 2 (1984) (scope of public employee privacy is narrow).

Section 552.101 of the Government Code also encompasses the Family Educational Rights and Privacy Act of 1974 ("FERPA"). 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. 20 U.S.C. § 1232g(b)(1). Section 552.114 of the Government Code provides a similar prohibition against public release of student records from an educational institution funded wholly or in part by state funds. "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. 20 U.S.C. § 1232g(a)(4)(A). This office generally applies the same analysis under section 552.114 of the Government Code, which excepts from disclosure student records at an educational institution funded completely or in part by state revenue, and FERPA. *See* Open Records Decision No. 539 (1990); *see also* Gov't Code § 552.026 (providing that Act only requires release of information from education records in conformity with FERPA).

In this instance, while you claim that the submitted transcript is subject to FERPA, we note that this information is being held by the district as an employer, not as an educational institution. Accordingly, this transcript may not be withheld under section 552.114 and FERPA.

You also claim that the submitted transcript is excepted from disclosure under section 552.102(b) of the Government Code. Section 552.102(b) excepts from disclosure all information from transcripts of professional public school employees other than the employee's name, the courses taken, and the degree obtained. Gov't Code § 552.102(b); Open Records Decision No. 526 (1989). Thus, with the exception of the employee's name, the courses taken, and the degree obtained, the district must withhold the submitted transcript pursuant to section 552.102(b).

You claim that portions of the remaining information are excepted from disclosure under section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member

¹As we are able to make this determination, we need not address your remaining claims against disclosure for this information.

information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. *See* Gov't Code § 552.117(a)(1). 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). We understand you to represent that the employee at issue elected to keep his social security number and family member information confidential. However, you do not indicate whether this employee made his election prior to the date on which the district received the instant request for information. If the employee at issue elected prior to the receipt of this request to keep his social security number and family member information confidential, the district must withhold the information we have marked pursuant to section 552.117(a)(1). The district may not withhold this information under section 552.117(a)(1) if the employee did not make such a timely election.

We note, however, that even if the employee's social security number is not protected under section 552.117(a)(1), it must be withheld under section 552.147 of the Government Code,² which provides that "[t]he social security number of a living person is excepted from" required public disclosure under the Act.³ Therefore, the district must withhold the social security number contained in the submitted information under section 552.147.⁴

We note that the remaining information includes an e-mail address that is subject to section 552.137 of the Government Code. This section excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). The e-mail address at issue does not appear to be of a type specifically excluded by section 552.137(c). You do not inform us that the relevant member of the public has affirmatively consented to the release of this e-mail address. Therefore, the district must withhold the e-mail address we have marked under section 552.137.

In summary, the district must withhold the marked teaching evaluations under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code if the teacher at issue was required to hold and did hold the appropriate certificate and was performing the functions of a teacher at the time of the evaluations. We have marked the information that must be withheld under sections 552.101 and 552.102 of

²Added by Act of May 23, 2005, 79th Leg., R.S., S.B. 1485, ch. 397, 2005 Tex. Sess. Law Serv. 1091 (Vernon) (to be codified at Tex. Gov't Code § 552.147).

³This office will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

⁴We note that section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

the Government in conjunction with common law privacy. Except for the information that reveals the employee's name, degree obtained and courses taken, the submitted transcript must be withheld under section 552.102(b) of the Government Code. The district must withhold the information we have marked under section 552.117(a)(1) of the Government Code if the employee at issue made a timely election to withhold such information under section 552.024 of the Government Code. Regardless of whether section 552.117(a)(1) of the Government Code applies, the employee's social security number must be withheld under section 552.147 of the Government Code. The marked e-mail address must be withheld under section 552.137 of the Government Code. The remaining information must be released to the requestor.

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,



Caroline E. Cho
Assistant Attorney General
Open Records Division

CEC/segh

Ref: ID# 238483

Enc. Submitted documents

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