



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 6, 2006

Ms. Laura C. Rodriguez
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P.O. Box 460606
San Antonio, Texas 78246

OR2006-00215

Dear Ms. Rodriguez:

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# 239205.

The Northside Independent School District (the "district"), which you represent, received a request from an investigator with the Texas Education Agency ("TEA") for seven categories of information related to a former district employee. You state that the district has released some of the requested information, but claim that the submitted information is excepted from disclosure under sections 552.101, 552.108, 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 public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses the Family Educational Rights and Privacy Act of 1974 ("FERPA"), section 1232g of title 20 of the United States Code. Section 552.026 of the Government Code incorporates FERPA into the Act. *See* Gov't Code § 552.026 (Act does not require release of information contained in education records of educational agency or institution, except in conformity with 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. *See* 20 U.S.C. § 1232g(b)(1); *see also* 34 C.F.R. § 99.3 (defining personally identifiable information); Open Records Decision No. 224 (1979) (release of

document in student's handwriting would make student's identity easily traceable). "Education records" under FERPA are those records that contain information directly related to a student and that are maintained by an educational agency or institution or by a person acting for such agency or institution. *See* 20 U.S.C. § 1232g(a)(4)(A). However, the definition of "education records" under FERPA does not include "records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement." *See* 20 U.S.C. § 1232g(a)(4)(B)(ii).

Section 552.114 of the Government Code excepts from public disclosure "information in a student record at an educational institution funded wholly or partly by state revenue." Gov't Code § 552.114(a). This office generally has treated "student record" information under section 552.114(a) as the equivalent of "education record" information that is protected by FERPA. *See* Open Records Decision No. 634 at 5 (1995).¹

You assert that the submitted police report contains information that identifies a student of the district or that would allow that student's identity to be easily traced. However, we note, and you acknowledge, that the submitted police report was created by the district's police department, whose primary function is to investigate crimes and enforce criminal laws. This report was created by a law enforcement unit for a law enforcement purpose. Therefore, the submitted police report is not subject to FERPA, and none of the information contained in the report may be withheld on that basis. *See* 20 U.S.C. § 1232g(a)(4)(B)(ii).

You also claim that some of the submitted information is excepted from disclosure under section 552.101 in conjunction with section 21.355 of the Education Code. Section 21.355 provides that, "[a] document evaluating the performance of a teacher or administrator is confidential." This office has 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, we 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, we concluded that 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.* You claim that information you have marked under section 21.355 amounts to an evaluation of a former district teacher. You also state that this teacher holds a certificate under chapter 21 of the Education Code. However, after reviewing

¹In Open Records Decision No. 634 (1995), this office concluded that (1) an educational agency or institution may withhold from the public information that is protected by FERPA and excepted from required public disclosure under sections 552.026 and 552.101 of the Government Code without the necessity of requesting an attorney general decision as to those exceptions; and (2) a state-funded educational agency or institution may withhold from the public information that is excepted from required public disclosure under section 552.114 of the Government Code as a "student record," insofar as the "student record" is protected by FERPA, without the necessity of requesting an attorney general decision as to that exception. *See* Open Records Decision No. 634 at 6-8 (1995).

the information at issue, we find that it does not amount to an evaluation of the individual's performance as a teacher, and it is not protected under section 21.355.

Next, you claim that the submitted police report is excepted under section 552.108 of the Government Code, which provides in relevant part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime

Gov't Code § 552.108(a)(1). Generally, a governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See* Gov't Code §§ 552.108(a)(1), (b)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You advise that the submitted police report is maintained by the district's police department. You also state that while the district's police department has concluded its criminal investigation, it has been forwarded to the justice of the peace court prosecutors for prosecution. You indicate that prosecution is pending. Because section 552.108 may be invoked by any proper custodian of information that relates to an incident involving alleged criminal conduct that is still under active investigation or prosecution, we agree that section 552.108 is applicable to the submitted police report. *See* Open Records Decision Nos. 474 (1987), 372 (1983); *see also Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases). *But see Morales v. Ellen*, 840 S. W. 2d 519, 525-26 (Tex. Civ. App.—El Paso 1992, writ denied) (statutory predecessor to section 552.108 not applicable to internal investigation that did not result in criminal investigation or prosecution).

In this instance, however, the requestor is an investigator with the TEA. Section 411.122(a) of the Government Code provides that

an agency of this state listed in Subsection (d) . . . that licenses or regulates members of a particular trade, occupation, business, vocation, or profession is entitled to obtain from the [Department of Public Safety] criminal history record information maintained by the [Department of Public Safety] that relates to a person who: (1) is an applicant for a license from the agency; (2) is the holder of a license from the agency; or (3) requests a determination of eligibility for a license from the agency.

Gov't Code § 411.122(a). We note that the TEA is specifically subject to section 411.122 of the Government Code. *See id.* § 411.122(d)(27). In addition, section 411.087(a) of the Government Code provides in pertinent part:

(a) A person, agency, department, political subdivision, or other entity that is authorized by this subchapter to obtain from the [Department of Public Safety] criminal history record information maintained by the [Department of Public Safety] that relates to another person is authorized to:

...

(2) obtain from any other criminal justice agency in this state criminal history record information maintained by that criminal justice agency that relates to that person.

Id. § 411.087(a)(2).

“Criminal history record information” is defined 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.” *See id.* § 411.082(2). In this instance, the submitted police report contains “criminal history record information.”

We understand that the former district employee in question is a holder of a license from the TEA. Accordingly, the TEA is authorized to obtain criminal history record information in the submitted police report pursuant to section 411.087(a)(2) of the Government Code. *See id.* §§ 411.087(a)(2), .122(a). Consequently, criminal history record information in the police report must be released to the requestor. *See* Open Records Decision No. 451 (1986) (specific statutory right of access provisions overcome general exceptions to disclosure under the Act). Furthermore, section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. Gov’t Code § 552.108(c). Basic information refers to the information held to be public in *Houston Chronicle Publishing Co.*, 531 S.W.2d at 177. Therefore, with the exception of criminal history record information and basic information, the district may withhold the submitted police report under section 552.108 of the Government Code.

Next, you assert that section 552.117 of the Government Code may be applicable to some of the submitted information. Section 552.117(a)(1) 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. 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). Therefore, 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 received. The district may not withhold this information under section 552.117 if a timely election was not made. We have marked the information that must be withheld under section 552.117 if that section is applicable.

We note, however, that the protections of section 552.117 apply only to information that a governmental body holds in its capacity as an employer. *See* Gov't Code § 552.117 (providing that employees of governmental entities may protect certain personal information in hands of their employer); *see also* Gov't Code § 552.024 (establishing election process for section 552.117). Some of the information you seek to withhold pursuant to this exception is basic information contained in the submitted police report. You state that the submitted police report is maintained by the district's police department. Because the district is holding this information in a law enforcement capacity, and not as an employer, we find that none of the basic information contained in the police report may be withheld under section 552.117 of the Government Code.

We also note, however, that even if the former district 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

Lastly, we note that the TEA's request states that it is seeking the requested information under the authority provided by section 249.14 of title 19 of the Texas Administrative Code.⁵ Accordingly, we will consider whether this section permits the TEA to obtain information that is otherwise protected by exceptions discussed above. *See* Open Records Decision No. 451 at 4 (1986) (specific access provision prevails over generally applicable exception to public disclosure). Chapter 249 of title 19 of the Texas Administrative Code governs disciplinary proceedings, sanctions, and contested cases involving the State Board for Educator Certification ("SBEC"). *See* 19 T.A.C. § 249.1. Section 249.14 provides in relevant part:

(a) Staff [of SBEC] may obtain and investigate information concerning alleged improper conduct by an educator, applicant, examinee, or other

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.

⁵Chapter 21 of the Education Code authorizes the State Board for Educator Certification to regulate and oversee all aspects of the certification, continuing education, and standards of conduct of public school educators. *See* Educ. Code § 21.031(a). Section 21.041 of the Education Code states that SBEC may "provide for disciplinary proceedings, including the suspension or revocation of an educator certificate, as provided by Chapter 2001, Government Code." *Id.* § 21.041(b)(7). Section 21.041 also authorizes SBEC to "adopt rules as necessary for its own procedures." *Id.* § 21.041(a).

person subject to this chapter that would warrant [SBEC] denying relief to or taking disciplinary action against the person or certificate.

...

(c) The executive director and staff may also obtain and act on other information providing grounds for investigation and possible action under this chapter.

(d) A person who serves as the superintendent of a school district or the director of an open-enrollment charter school, private school, regional education service center, or shared services arrangement shall promptly notify [SBEC] in writing . . . by filing a report with the executive director within seven calendar days of the date the person first obtains or has knowledge of information indicating any of the following circumstances:

(1) that an applicant for or a holder of a certificate has a reported criminal history;

(2) that a certificate holder was terminated from employment based on a determination that he or she committed any of the following acts:

(A) sexually or physically abused a minor or engaged in any other illegal conduct with a minor;

(B) possessed, transferred, sold, or distributed a controlled substance;

(C) illegally transferred, appropriated, or expended school property or funds;

(D) attempted by fraudulent or unauthorized means to obtain or to alter any certificate or permit that would entitle the individual to be employed in a position requiring such certificate or permit or to receive additional compensation associated with a position; or

(E) committed a crime, any part of such crime having occurred on school property or at a school-sponsored event, or;

(3) that a certificate holder resigned and reasonable evidence supported a recommendation by the person to terminate a certificate holder because he or she committed one of the acts specified in paragraph (2) of this subsection.

...

(e) A report filed under subsection (d) of this section shall, at a minimum, summarize the factual circumstances requiring the report and identify the subject of the report by providing the following available information: name and any aliases; certificate number, if any, or social security number; and last known mailing address and home and daytime phone numbers. A person who is required to file a report under subsection (d) of this section but fails to do so timely is subject to sanctions under this chapter.

19 T.A.C. § 249.14. We note that this statute specifically applies to the SBEC. We were unable to determine whether the access provisions of this statute also apply to the TEA. Accordingly, we determined that additional information was required to render a decision in this instance and provided written notice of this determination to the TEA. *See* Gov't Code § 552.303(b), (c). As of the date of this ruling, the TEA has not submitted the necessary additional information. *See id.* § 552.303(d) (upon notice a governmental body shall submit the necessary additional information not later than the seventh calendar day after the date notice is received). Accordingly, we find that the TEA has failed to establish a right of access to any of the submitted information under section 249.14.

In summary, with the exception of criminal history record information and basic information, which must be released, the submitted police report may be withheld under section 552.108 of the Government Code. The information we have marked under section 552.117 of the Government Code must be withheld if that section is applicable. Even if section 552.117 is not applicable, the former district employee's social security number must be withheld under section 552.147 of the Government Code. The remaining 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,



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Assistant Attorney General
Open Records Division

JAP/sdk

Ref: ID# 239205

Enc. Submitted documents

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