



ATTORNEY GENERAL OF TEXAS  
G R E G A B B O T T

November 3, 2006

Mr. David Galbraith  
Assistant General Counsel  
Houston Independent School District  
Hattie May White Educational Support Center  
4400 West 18th Street  
Houston, Texas 77092-8501

OR2006-13055

Dear Mr. Galbraith:

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# 262629.

The Houston Independent School District (the "district") received a request for information regarding a specified lawsuit filed against the district, as well as all information the requestor has previously requested from the district. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.107, 552.111, 552.114, 552.115, and 552.117 of the Government Code, as well as the Family Educational Rights and Privacy Act ("FERPA"), Texas Rule of Civil Procedure 192.5, and Texas Rule of Evidence 503. We have considered your arguments and reviewed the submitted information.

Initially, we address your assertion that the portion of the request pertaining to all information previously requested by the requestor is repetitious and redundant of previous requests that the district has received from her. Section 552.232 of the Government Code, "Responding to Repetitious or Redundant Requests," provides in relevant part:

(a) A governmental body that determines that a requestor has made a request for information for which the governmental body has previously furnished copies to the requestor or made copies available to the requestor on payment of applicable charges under Subchapter F, shall respond to the request, in

relation to the information for which copies have been already furnished or made available, in accordance with this section[.]

(b) The governmental body shall certify to the requestor that copies of all or part of the requested information, as applicable, were previously furnished to the requestor or made available to the requestor on payment of applicable charges under Subchapter F. The certification must include:

- (1) a description of the information for which copies have been previously furnished or made available to the requestor;
- (2) the date that the governmental body received the requestor's original request for that information;
- (3) the date that the governmental body previously furnished copies of or made available copies of the information to the requestor;
- (4) a certification that no subsequent additions, deletions, or corrections have been made to that information; and
- (5) the name, title, and signature of the officer for public information or the officer's agent making the certification.

Gov't Code § 552.232(a)-(b). You indicate that the information that was encompassed by the requestor's previous requests was made available to the requestor pursuant to the Act. You also indicate that no additions, deletions, or corrections have been made to that information. Based on your representations, we conclude that upon provision to the requestor of the certification required by section 552.232 of the Government Code, the district need not again provide the requestor with any information that was made available to her in response to her previous requests.

Next, we note that recently, the United States Department of Education Family Policy Compliance Office (the "DOE") informed this office that the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. §1232g, does not permit state and local educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act.<sup>1</sup> Consequently, state and local educational authorities that receive a request for education records from a member of the public under the Act must not submit education records to this office in unredacted form, that is, in a form in which "personally identifiable information" is disclosed. *See* 34 C.F.R. § 99.3 (defining

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<sup>1</sup>A copy of this letter may be found on the attorney general's website at:  
[http://www.oag.state.tx.us/opinopen/og\\_resources.shtml](http://www.oag.state.tx.us/opinopen/og_resources.shtml).

“personally identifiable information”). You have submitted, among other things, unredacted education records for our review. Because our office is prohibited from reviewing these education records to determine whether appropriate redactions under FERPA have been made, we will not address the applicability of FERPA to any of the submitted records. Such determinations under FERPA must be made by the educational authority in possession of the education records.<sup>2</sup> Accordingly, we also do not address your arguments under section 552.114 of the Government Code. *See* Gov’t Code §§ 552.026 (incorporating FERPA into the Act); .114 (excepting from disclosure “student records”); Open Records Decision No. 539 (1990) (determining the same analysis applies under section 552.114 of the Government Code and FERPA). We will, however, address the applicability of the remaining claimed exceptions to the submitted information.

Next, 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 the 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 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 July 13, 2006. However, you did not request a ruling from this office until August 18, 2006. *See id.* § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Furthermore, you did not forward the submitted information for our review until August 24, 2006. 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 information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See 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). A compelling reason exists when third-party interests are at stake, or when information is confidential under other law. Open Records Decision No. 150 (1977).

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<sup>2</sup>In the future, if the district does obtain parental consent to submit unredacted education records and the district seeks a ruling from this office on the proper redaction of those education records in compliance with FERPA, we will rule accordingly.

Although you raise sections 552.103, 552.107, and 552.111 of the Government Code, and Texas Rule of Civil Procedure 192.5 and Texas Rule of Evidence 503, these exceptions and rules are discretionary in nature. They serve only to protect a governmental body's interests and may be waived; as such, they do not constitute compelling reasons to withhold information for purposes of section 552.302. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 677 at 10 (2002) (attorney work-product privilege under section 552.111 or rule 192.5 is not compelling reason to withhold information under section 552.302), 676 at 12 (2002) (attorney-client privilege under section 552.107 or rule 503 constitutes compelling reason to withhold information under section 552.302 only if information's release would harm third party), 663 at 5 (1999) (governmental body may waive sections 552.103, 552.107, and 552.111), 470 (1987) (statutory predecessor to section 552.111 is discretionary exception). *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions in general). Accordingly, the district may not withhold the remaining information pursuant to sections 552.103, 552.107, or 552.111, or Rule 192.5 or Rule 503. However, sections 552.101, 552.102, 552.115, and 552.117 of the Government Code are mandatory exceptions that each may constitute 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). Thus, we will address your arguments under sections 552.101, 552.102, 552.115, and 552.117 of the Government Code.

Next, however, we note that portions of the remaining submitted information are subject to section 552.022 of the Government Code. Section 552.022 provides in relevant part:

(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:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[;]

...

(16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege; [and]

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(1), (16), (17). The submitted information includes completed reports and a completed evaluation made for the district, attorney fee bills, and court-filed documents. Section 522.022 makes this information expressly public unless it is confidential

under other law. You claim that this information is subject to section 552.101 of the Government Code which constitutes other law for purposes of section 552.022.

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 statute. 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 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). This office has determined 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 the evaluation. Open Records Decision No. 634. Upon review, we find that the completed evaluations, which we have marked, are confidential under section 21.355 of the Education Code and must be withheld under section 552.101 of the Government Code.

Section 552.101 also encompasses section 261.201(a) of the Family Code, which provides as follows:

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

- (1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and
- (2) except as otherwise provided in this section, the files, reports, records, communications, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). We note that the district is not an agency authorized to conduct a chapter 261 investigation. *See id.* § 261.103 (listing agencies that may conduct child abuse investigations). However, a portion of the submitted information subject to section 552.022 involves the report of alleged or suspected abuse made to the Child Protective Services Division of the Texas Department of Family and Protective Services ("CPS"), as well as other information used or developed in an investigation by CPS. Upon review, we find that this information is within the scope of section 261.201 of the Family Code. Therefore, this information, which we have marked, is confidential pursuant to section 261.201 of the Family Code and the district must withhold it under section 552.101 of the Government Code as information made confidential by law.

Section 552.101 also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). 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.

The submitted reports and fee bills reference an alleged sexual assault victim. Generally, only the information that either identifies or tends to identify a victim of sexual assault or other sex-related offense may be withheld under common-law privacy. However, a governmental body is required to withhold relevant information in its entirety when identifying information is inextricably intertwined with other releasable information or when the requestor knows the identity of the alleged victim. *See* Open Records Decisions Nos. 393 (1983), 339 (1982); *see also Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied) (identity of witnesses to and victims of sexual harassment was highly intimate or embarrassing information and public did not have legitimate interest in such information); Open Records Decision No. 440 (1986) (detailed descriptions of serious sexual offenses must be withheld).

In this instance, the requestor knows the identity of the alleged victim. Thus, withholding only the identifying information from the requestor would not preserve the victim's common-law right to privacy. We therefore conclude that the district must withhold the submitted reports in their entirety, as well as the portions of the submitted fee bills we have marked, pursuant to section 552.101 of the Government Code in conjunction with common-law privacy. However, the district may not withhold the remaining information that is subject to section 552.022 pursuant to section 552.101 in conjunction with common-law privacy. Because you raise no other exceptions to disclosure for this information, it must be released. We have marked the information that is subject to section 552.022 that must be released. We now address your arguments for the remaining submitted information.

We begin by noting that most of the remaining submitted information that is not subject to section 552.022 also pertains to the alleged sexual assault victim. As previously noted, the requestor knows the identity of the alleged victim and, in this instance, withholding only the identifying information from the requestor would not preserve the victim's common-law right to privacy. Accordingly, the district must withhold this information in its entirety pursuant to section 552.101 of the Government Code in conjunction with common-law privacy. However, the remaining submitted information consists of district personnel files that do not pertain to the victim at issue. Thus, we will address your remaining arguments for this information.

Section 552.102(a) of the Government Code 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 *Indus. Found.*, 540 S.W.2d at 683-85. Accordingly, we consider your privacy claim for this information under sections 552.102(a) and section 552.101 together.

You assert that the information at issue is also protected by common-law privacy. However, this information relates to the employment of specific district personnel. Since there is a legitimate public interest in how a public employee performs job functions and satisfies employment conditions, the district may not withhold this 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).*

We note that the submitted college transcripts are excepted from disclosure under section 552.102(b) of the Government Code. Section 552.102(b) provides:

a transcript from an institution of higher education maintained in the personnel file of a professional public school employee, except that this section does not exempt from disclosure the degree obtained or the curriculum on a transcript in the personnel file of the employee.

Gov’t Code § 552.102(b). Thus, with the exception of information concerning employees’ curricula and degrees obtained, you must withhold the submitted transcripts pursuant to section 552.102(b) of the Government Code.

You claim the submitted birth certificates are excepted under section 552.115 of the Government Code. This section provides that a birth record maintained by the bureau of vital statistics of the Texas Department of Health or a local registration official is excepted from required public disclosure except that “a birth record is public information and available to the public on and after the 75th anniversary of the date of birth as shown on the record filed with the bureau of vital statistics or local registration official.” Gov’t Code § 552.115(a)(1). Since section 552.115 only applies to a birth certificate maintained by the bureau of vital statistics or local registration official, the district may not withhold the submitted birth certificates pursuant to that section. See *Open Records Decision No. 338 (1982)*.

You claim that some of the remaining information is excepted from disclosure under section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the

home addresses, home 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. 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 on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date on which the request for information was received. If the employees at issue timely elected to keep their personal information confidential, the district must withhold the personal information we have marked under section 552.117. The district may not withhold this information under section 552.117 if the employees at issue did not make timely elections to keep the information confidential.

The submitted information also includes Texas motor vehicle information. Section 552.130 of the Government Code excepts from disclosure information that “relates to . . . a motor vehicle operator’s or driver’s license or permit issued by an agency of this state [or] a motor vehicle title or registration issued by an agency of this state.”<sup>3</sup> Gov’t Code § 552.130. The district must withhold the Texas motor vehicle information we have marked in the remaining submitted information under section 552.130.

The remaining submitted information also includes account numbers. Section 552.136 of the Government Code states that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136. The district must, therefore, withhold the account numbers we have marked under section 552.136.

Section 552.137 of the Government Code 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 addresses marked in the submitted information are not of a type specifically excluded by section 552.137(c). Therefore, the district must withhold the marked e-mail addresses in accordance with section 552.137 unless the district receives consent for their release.

The remaining submitted information contains social security numbers. Section 552.147 of the Government Code provides that “[t]he social security number of a living person is excepted from” required public disclosure under the Act. Gov’t Code § 552.147. Therefore,

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<sup>3</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

the district must withhold the social security numbers contained in the remaining submitted information under section 552.147.<sup>4</sup>

In summary, this ruling does not address the applicability of FERPA to the submitted information. Should the district determine that all or portions of the submitted information consists of "education records" subject to FERPA, the district must dispose of that information in accordance with FERPA, rather than the Act. The district must withhold the information subject to section 552.022 of the Government Code that we have marked under section 552.101 of the Government Code in conjunction with (1) section 21.355 of the Education Code, (2) section 261.201 of the Family Code, and (3) common-law privacy. The district must release the information subject to section 552.022 that is not excepted under section 552.101 of the Government Code. We have marked the information subject to section 552.022 of the Government Code accordingly. The district must withhold most of the remaining submitted information under section 552.101 of the Government Code in conjunction with common-law privacy; we have marked this information as well. Except for information concerning employees' curricula and degrees obtained, you must withhold the submitted transcripts pursuant to section 552.102(b) of the Government Code. The district must also withhold the personal information we have marked under section 552.117 of the Government Code if the employees at issue made timely elections under section 552.024 of the Government Code. The marked Texas motor vehicle information must be withheld under section 552.130 of the Government Code. The marked account numbers must be withheld under section 552.136 of the Government Code. The district must withhold the marked e-mail addresses in accordance with section 552.137 unless the district receives consent for their release. The social security numbers in the submitted information must be withheld under section 552.147 of the Government Code. The remainder of the submitted 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).

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<sup>4</sup>We 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.

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# 262629

Enc. Submitted documents

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