



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 7, 2007

Mr. Miguel A. Saldaña
Law Office of Miguel A. Saldaña
For Brownsville Independent School District
Three North Park Plaza
Brownsville, Texas 78521

OR2007-01617

Dear Mr.Saldaña:

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# 270927.

The Brownsville Independent School District (the "district"), which you represent, received two requests for information relating to a named employee of the district. You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, and 552.111 of the Government Code. We also understand you to claim the attorney-client privilege. We have considered your arguments and have reviewed the information you submitted.

We first note that the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information.¹ In this instance, some of the submitted information does not appear to have been in existence when the district received these requests for information. Thus, that information, which we have marked, is not responsive to these requests. This decision does not address the public availability of the non-responsive information, and that information need not be released.

¹See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App. – San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

We also note that the submitted information includes education records. The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that the Family Education Rights and Privacy Act of 1974 ("FERPA"), section 1232g of title 20 of the United States Code, 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.² 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 "personally identifiable information"). Among other things, you have submitted unredacted education records for our review. Because our office is prohibited from reviewing these education records to determine the applicability of FERPA, we will not address FERPA with respect to the submitted records. Such determinations under FERPA must be made by the educational authority in possession of the education records.³

Next, we address the district's obligations under section 552.301 of the Government Code. Section 552.301 prescribes procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Subsection 552.301(b) requires a governmental body to ask for the attorney general's decision and state the exceptions to disclosure that it claims not later than the tenth business day after the date of its receipt of the written request for information. *See* Gov't Code § 552.301(b). Subsection 552.301(e) provides that the governmental body must submit to this office, not later than the fifteenth business day after the date of its receipt of the request, (1) written comments stating why the governmental body's claimed exceptions apply to the information that it seeks to withhold; (2) a copy of the written request for information; (3) a signed statement of the date on which the governmental body received the request or evidence sufficient to establish that date; and (4) the specific information that the governmental body seeks to withhold or representative samples if the information is voluminous. *See id.* § 552.301(e)(1)(A)-(D).

You inform us that the district received these requests for information on November 16 and 17, 2006. You also state that the district was closed for the Thanksgiving holidays from November 22 through November 24. Accordingly, with respect to the November 16 request, the district's deadlines under subsections 552.301(b) and 552.301(e) were December 5 and December 12, 2006, respectively. With respect to the November 17 request, the district's

²A copy of this letter may be found on the attorney general's website, available at http://www.oag.state.tx.us/opinopen/og_resources.shtml.

³In 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.

deadlines under subsections 552.301(b) and 552.301(e) were December 6 and December 13, respectively. The district did not claim the attorney-client privilege, as encompassed by section 552.107(1) of the Government Code, within either of its ten-business-day deadlines under subsection 552.301(b).⁴ Moreover, the district did not submit the information that is responsive to the November 16 request within its fifteen-business day deadline under subsection 552.301(e).⁵ The district also failed to submit some of the information encompassed by the November 17 request within its deadline under subsection 552.301(e).⁶ Thus, the district did not comply with section 552.301 in requesting this decision.

If a governmental body fails to comply with section 552.301, the requested information is presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold any of the information. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ). This statutory presumption can generally be overcome when the information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). Sections 552.107(1) and 552.111 of the Government Code are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 470 at 7 (1987) (statutory predecessor to Gov't Code § 552.111 subject to waiver). The district's claims under sections 552.107(1) and 552.111 are not compelling reasons for non-disclosure under section 552.302. In failing to timely claim section 552.107(1), the district waived that exception and may not withhold any of the information that is responsive to these requests under section 552.107(1).

Likewise, in failing to comply with subsection 552.301(e) with respect to the November 16 request, the district also waived section 552.111 and may not withhold any of the information that is responsive to the November 16 request under section 552.111. Moreover, in waiving section 552.111 with respect to the information that is responsive to the November 16 request, the district also waived section 552.111 to the extent that the same information is responsive to the November 17 request. *See* Gov't Code § 552.007; Open Records Decision Nos. 518 at 3 (1989) (governmental body may not withhold from further disclosure information that it previously released, where previous disclosure was not expressly prohibited by law), 490 at 2 (1988) (generally, if governmental body releases information to one member of public, Act's exceptions to disclosure are waived unless information is

⁴The district's initial assertions of the attorney-client privilege appear in letters dated December 12, 2006, that were submitted to this office on December 13, 2006.

⁵The information encompassed by the first request was submitted to this office by facsimile on December 13, 2006, and by letter postmarked December 14, 2006.

⁶The information in question was submitted by letter postmarked December 14, 2006.

deemed confidential under Act), 400 at 2 (1983) (governmental body waived statutory predecessor to Gov't Code § 552.111 when it permitted members of public to examine information). Therefore, because the district has submitted the same information as being responsive to both requests, the district may not withhold any of the responsive information under section 552.111. However, we will address the district's claims under sections 552.101 and 552.102 of the Government Code, as the applicability of those exceptions can provide compelling reasons for non-disclosure.

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 exception encompasses the common-law right to privacy. Common-law privacy protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Common-law privacy protects the specific types of information that are held to be intimate or embarrassing in *Industrial Foundation*. *See id.* at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has determined that other types of information also are private under section 552.101. *See generally* Open Records Decision No. 659 at 4-5 (1999) (summarizing information attorney general has held to be private).

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). Section 552.102(a) protects information that relates to public officials and employees. The privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101 of the Government Code and *Industrial Foundation*. *See Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.) (addressing statutory predecessor to Gov't Code § 552.102). Therefore, we will address your privacy claims together.

In this instance, the information at issue relates to an employee of the district and his conduct as an employee. As this office has frequently stated, information relating to public employment and public employees is generally a matter of legitimate public interest. *See, e.g.*, Open Records Decision Nos. 470 at 4 (1987) (job performance does not generally constitute public employee's private affairs), 405 at 2 (1983) (manner in which public employee's job was performed cannot be said to be of minimal public interest). We have marked a small amount of information that is protected by common-law privacy and must be withheld from the requestors under section 552.101. The district may not withhold any of the remaining information on privacy grounds under section 552.101 or section 552.102. *See also* Open Records Decision Nos. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs, but in fact touches on matters of legitimate public concern), 542 at 5 (1990) (information in public employee's resume not private under

statutory predecessors to Gov't Code §§ 552.101 and 552.102), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of governmental employees).

We also understand you to raise section 552.102(b), which provides that “[i]nformation is excepted from [public disclosure] if it is 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). As the submitted documents do not include a transcript from an institution of higher education, the district may not withhold any of the submitted information under section 552.102(b).

We note that section 552.117 of the Government Code may be applicable to some of the responsive information.⁷ Section 552.117(a)(1) excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code. Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See Open Records Decision No. 530 at 5 (1989)*. Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who did not timely request confidentiality under section 552.024.

We have marked the submitted information that may be excepted from disclosure under section 552.117. To the extent that the employee who is the subject of that information timely requested confidentiality for the information under section 552.024, the marked information must be withheld under section 552.117(a)(1).

Section 552.117(a)(2) excepts from disclosure the home address and telephone number, social security number, and family member information of a peace officer, regardless of whether the peace officer complies with sections 552.024 or 552.1175 of the Government Code.⁸ If the information that we have marked under section 552.117(a)(2) relates to a peace

⁷Unlike other exceptions to disclosure, this office will raise section 552.117 on behalf of a governmental body, as this exception is mandatory and may not be waived. *See Gov't Code §§ 552.007, .352*; *Open Records Decision No. 674 at 3 n.4 (2001)* (mandatory exceptions).

⁸Section 552.117(a)(2) adopts the definition of peace officer found at article 2.12 of the Code of Criminal Procedure.

officer employed by the district, then that information must be withheld under section 552.117(a)(2).

In the event that the information in question does not relate to a peace officer employed by the district, then the district may be required to withhold that information under section 552.1175.⁹ Section 552.1175 provides in part:

(a) This section applies only to:

(1) peace officers as defined by Article 2.12, Code of Criminal Procedure[.]

(b) Information that relates to the home address, home telephone number, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

(1) chooses to restrict public access to the information; and

(2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

Gov't Code § 552.1175(a)-(b). Thus, if the information in question relates to a peace officer employed by another governmental entity, that information must be withheld under section 552.1175 if the officer elects to restrict access to it in accordance with section 552.1175(b).

Lastly, we note that under section 552.147 of the Government Code, "[t]he social security number of a living person is excepted from" required public disclosure under the Act.¹⁰ Gov't Code § 552.147(a). The district must withhold the employee's social security number that we have marked under section 552.147.

In summary: (1) the district must withhold the marked information that is confidential under section 552.101 of the Government Code in conjunction with common-law privacy; (2) the

⁹Section 552.1175 also is mandatory and may not be waived. Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001).

¹⁰We also 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.

district must withhold the information that we have marked under section 552.117(a)(1) of the Government Code, to the extent that the employee who is the subject of that information timely requested confidentiality for the information under section 552.024 of the Government Code; (3) the district must withhold the information that we have marked under section 552.117(a)(2) of the Government Code if the information relates to a peace officer employed by the district; (4) if section 552.117(a)(2) is not applicable to that information, then it must be withheld under section 552.1175 of the Government Code if it relates to a peace officer employed by another governmental entity who elects to restrict access to the information in accordance with section 552.1175(b); and (5) the marked social security number must be withheld under section 552.147 of the Government Code. The rest of the information must be released. 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.

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).

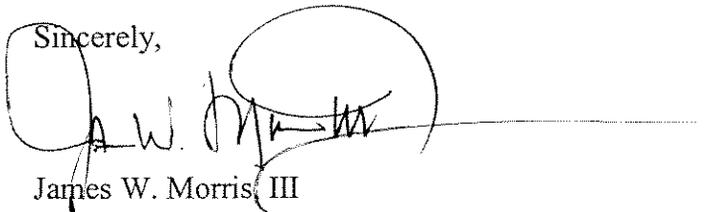
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental

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,

A handwritten signature in black ink, appearing to read "J.W. Morris, III", is written over a horizontal line. The signature is stylized and includes a large circular flourish on the left side.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/jww

Ref: ID# 270927

Enc: Submitted documents

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