



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 1, 2007

Mr. Juan Cruz  
Escamilla & Poneck, Inc.  
Falcon International Building  
5219 McPherson Road, Suite 306  
Laredo, Texas 78041

OR2007-05065

Dear Mr. Cruz:

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# 277212.

The United Independent School District (the "district"), which you represent, received a request for a personnel file of a named person, including all complaints filed against him. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.107, 552.114, 552.117, 552.130, and 552.135 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Recently, the United States Department of Education Family Policy Compliance Office informed this office that the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232(a), 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 "personally identifiable information"). You have submitted, among other things, redacted education records for our review. Because our office is prohibited from reviewing these education records to

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

determine whether appropriate redactions under FERPA have been made, we will not address the applicability of FERPA to any of the submitted records.<sup>2</sup> Such determinations under FERPA must be made by the educational authority in possession of the education records.<sup>3</sup> 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(b). The district states that it received the request for information on February 7, 2007. Thus, you were required to request a decision from this office by February 22, 2007. However, the envelope in which the district submitted its request bears a postmark of February 23, 2007. *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); *see also* Open Records Decision No. 663 (1999). Accordingly, we conclude the district failed to comply with the procedural requirements mandated by 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 the governmental body demonstrates a compelling reason 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). Section 552.107 of the Government Code is a discretionary exception to public disclosure that protects the governmental body's interest and may be waived. *See* Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the district may not withhold any of the submitted information under section 552.107 of the Government Code. Generally, 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). Because sections 552.101, 552.102, 552.117, 552.130, and 552.135 can provide compelling reasons to withhold information, we will address your arguments concerning these exceptions.

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<sup>2</sup>Thus, we will not address your arguments under section 552.114 of the Government Code.

<sup>3</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.

Next, we note that Exhibit G consists of a medical record. Section 552.101 of the Government Code exempts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This exception encompasses information that other statutes make confidential. Access to medical records is governed by the Medical Practice Act (the “MPA”), subtitle B of the Occupations Code. *See* Occ. Code §§ 151.001-165.160. 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(b)-(c). Information subject to the MPA includes both medical records and information obtained from those medical records. *See* Open Records Decision No. 598 (1991). Medical records may be released only as provided under the MPA. *Id.* Accordingly, the document in Exhibit G may be released only in accordance with the MPA.

You claim that the submitted information contains a Form I-9. Section 1324a of title 8 of the United States Code provides that an Employment Eligibility Verification Form I-9 “may not be used for purposes other than for enforcement of this chapter” and for enforcement of other federal statutes governing crime and criminal investigations. *See* 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). Release of this form under the Act would be “for purposes other than for enforcement” of the referenced federal statutes. Upon review, however, we do not find a Form I-9 within the submitted information. Thus, none of the submitted information may be withheld under section 552.101 of the Government Code on this basis.

You claim that Exhibit I is excepted from public disclosure under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. Section 261.201(a) of the Family Code 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). Here, you state that the district's police department reports in Exhibit I were used or developed in an investigation of alleged or suspected child abuse. *See* Fam. Code § 261.001(1) (defining "abuse" for the purposes of chapter 261 of the Family Code). Thus, based on your representations and our review, we find that the information is within the scope of section 261.201 of the Family Code. You have not indicated that the district has adopted a rule that governs the release of this type of information; therefore, we assume that no such regulation exists. Given that assumption, the district must withhold Exhibit I in its entirety under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. *See* Open Records Decision No. 440 at 2 (1986) (predecessor statute).

You claim that Exhibit C is excepted from public disclosure under section 552.101 of the Government Code 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." 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). In that opinion, this office also 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 evaluations. *Id.* Similarly, an administrator is someone who is required to hold and does hold a certificate required under chapter 21 of the Education Code and is serving as an administrator at the time of the evaluation. *Id.*

You claim that Exhibit C consists of evaluations of the named teacher that are confidential under section 21.355. You do not indicate, however, whether this individual held a teacher's certificate or permit under chapter 21 of the Education Code and was performing the functions of a teacher at the time of the evaluations. Nevertheless, to the extent the individual in question did hold a teacher's certificate or permit and was functioning as a teacher at the time of the evaluation, the district must withhold Exhibit C under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. *See Abbott v. North East Indep. Sch. Dist.*, No. 03-04-00744-CV (Tex. App.—Austin 2006, no pet.) (concluding that written reprimand constitutes an evaluation for purposes of Educ. Code § 21.355). To the extent the individual in question did not hold a teacher's certificate or permit or was not functioning as a teacher at the time of the evaluation, the information at issue is not confidential under section 21.355 of the Education Code and may not be withheld under section 552.101 of the Government Code.

You claim that portions of the submitted information are excepted from public disclosure under sections 552.101 and 552.102 of the Government Code. 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 of the Government Code. Thus, we will consider your section 552.102(a) and section 552.101 claims together.

In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if it (1) contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person and (2) is not of legitimate concern to the public. 540 S.W.2d 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. This office has also found that a compilation of an individual’s criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. *Cf. United States Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (when considering prong regarding individual’s privacy interest, court recognized distinction between public records found in courthouse files and local police stations and compiled summary of information and noted that individual has significant privacy interest in compilation of one’s criminal history). Furthermore, we find that a compilation of a private citizen’s criminal history is generally not of legitimate concern to the public. We note, however, that information pertaining to a person’s current involvement in the criminal justice system is considered of legitimate concern to the public and is not private. Accordingly, upon review, we have marked the information in Exhibit D that must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.<sup>4</sup> The remaining information, however, consists of employment information that is of a legitimate public interest and may not be withheld under section 552.101 of the Government Code in conjunction with common-law privacy. 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); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow).

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<sup>4</sup>As this ruling is dispositive, we need not address your remaining argument for this information.

You claim that portions of the transcripts in Exhibit D are excepted from public 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; 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 transcript information in Exhibit D under section 552.102(b) of the Government Code.

You claim that portions of the submitted 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 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 received. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the district may only withhold information under section 552.117 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. In this case, the submitted documentation shows that the named employee at issue elected to not keep his information confidential under section 552.024. Therefore, the district may not withhold any of his personal information in the submitted information under section 552.117(a)(1) of the Government Code. However, the submitted information contains the personal information of other employees. In this case, you do not inform us nor provide documentation showing whether those employees timely elected confidentiality under section 552.024. Nevertheless, for any who timely elected to keep his or her personal information confidential, you must withhold this information, which we have marked, under section 552.117(a)(1) of the Government Code. The district may not withhold this information under section 552.117(a)(1) for employees who did not make a timely election to keep the information confidential.

We note that some of the submitted information is excepted under section 552.117(a)(2) of the Government Code.<sup>5</sup> Section 552.117(a)(2) excepts from public disclosure a peace officer's home address and telephone number, social security number, and family member information regardless of whether the peace officer made an election under section 552.024 of the Government Code. Gov't Code § 552.117(a)(2). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. Accordingly, we have marked information that the district must withhold under section 552.117(a)(2) of the Government Code.

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<sup>5</sup>The Office of the Attorney General will raise a mandatory exception like sections 552.117(a)(2), 552.136, and 137 on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

You claim that some of the submitted information is excepted from public disclosure under section 552.130 of the Government Code. In relevant part, section 552.130 provides:

(a) Information is excepted from required public disclosure if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state[.]

Gov't Code § 552.130(a)(1). Upon review, we agree that you must withhold the Texas-issued motor vehicle record information we have marked under section 552.130 of the Government Code.

You also claim that portions of Exhibit B are excepted under section 552.135 of the Government Code. Section 552.135 provides in relevant part:

(a) "Informer" means a student or former student or an employee or former employee of a school district who has furnished a report of another person's or persons' possible violation of criminal, civil, or regulatory law to the school district or the proper regulatory enforcement authority.

(b) An informer's name or information that would substantially reveal the identity of an informer is excepted from [required public disclosure].

Gov't Code § 552.135(a)-(b). Upon review, we find that the allegations against the named teacher were reported by students, whose names you have already redacted under FERPA. Further, section 552.135 only protects an informers' identities and does not encompass protection for witness statements. Thus, none of the information in Exhibit B may withheld under section 552.135 of the Government Code.

We note that Exhibit D contains a bank account number that is excepted from public disclosure under section 552.136 of the Government Code. Section 552.136 provides:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

(1) obtain money, goods, services, or another thing of value; or

(2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding 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. Thus, we find that the bank account number we have marked in Exhibit D must be withheld under section 552.136 of the Government Code.

We note that Exhibit F contains an e-mail address subject to section 552.137 of the Government Code. Section 552.137 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 is not the type specifically excluded by section 552.137(c). Therefore, unless the individual whose e-mail address we have marked in Exhibit F consented to release of the e-mail address, the district must withhold it in accordance with section 552.137 of the Government Code.

Finally, we note that some of the materials at issue are protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are protected by copyright. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of materials protected by copyright, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

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" that must be withheld under FERPA, the district must dispose of that information in accordance with FERPA, rather than the Act. The document in Exhibit G may be released only in accordance with the MPA. To the extent the individual in question did hold a teacher's certificate or permit and was functioning as a teacher at the time of the evaluation, the district must withhold Exhibit C under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. To the extent the individual in question did not hold a teacher's certificate or permit or was not functioning as a teacher at the time of the evaluation, the information at issue is not confidential under section 21.355 of the Education Code and may not be withheld under section 552.101 of the Government Code. We have marked the information in Exhibit D that must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy. With the exception of the employee's name, the courses taken, and the degree obtained, the district must withhold the transcript information in Exhibit D under section 552.102(b) of the Government Code. For employees who timely elected to keep his or her personal

information confidential, you must withhold this information, which we have marked, under section 552.117(a)(1) of the Government Code. The district may not withhold this information under section 552.117(a)(1) for employees who did not make a timely election to keep the information confidential. We have marked information that the district must withhold under section 552.117(a)(2) of the Government Code. The district must withhold the Texas-issued motor vehicle record information we have marked under section 552.130 of the Government Code. The district must withhold the bank account number we have marked in Exhibit D under section 552.136 of the Government Code. Unless the individual whose e-mail address we have marked in Exhibit F consented to release of the e-mail address, the district must withhold it in accordance with section 552.137 of the Government Code. As you do not raise any other exceptions against disclosure, the remaining information must be released, but any copyrighted information may only be released in accordance with copyright law.<sup>6</sup>

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).

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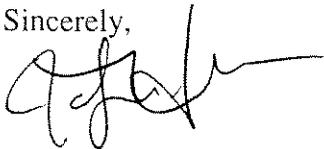
<sup>6</sup>We note that the submitted information contains social security numbers. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

If this ruling requires 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,



Jaclyn N. Thompson  
Assistant Attorney General  
Open Records Division

JNT/jb

Ref: ID# 277212

Enc. Submitted documents

c: Mr. Thomas Piland  
KGNS  
120 West Del Mar  
Laredo, Texas 78045  
(w/o enclosures)