



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 7, 2007

Ms. Janice S. Parker
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7400 Gaylord Parkway, Suite 200
Frisco, Texas 75034

OR2007-05367

Dear Ms. Parker:

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# 277911.

The Education Center (the "center"), which you represent, received a request for information pertaining to the center's personnel, finances, Board of Trustees, and business operations. You claim that some of the requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.107, 552.114, 552.117, 552.130, 552.136, and 552.137 of the Government Code. We have considered the claimed exceptions and reviewed the submitted representative sample of information.¹ We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note that the United States Department of Education Family Policy Compliance Office (the "DOE") recently informed this office that the Family Educational Rights and Privacy Act ("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,

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

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 PIA 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, 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.³ We will, however, address the applicability of the remaining claimed exceptions to the submitted information.

Next, you claim exception for the submitted information under section 552.107(2) of the Government Code. Section 552.107(2) excepts information from public disclosure if “a court by order has prohibited disclosure of the information.” Gov’t Code § 552.107(2). You state that the requested information is the subject of two agreed orders in cause number 2006-51087-367 before the 367th Judicial District Court of Denton County, Texas. You claim that this information is thereby excepted from disclosure under section 552.107(2). We note, however, that the first agreed order expired prior to the center’s receipt of the request. Accordingly, this order cannot serve as the basis for withholding any of the submitted information under section 552.107(2). Furthermore, the second agreed order does not prohibit the center from disclosing information, but instead prohibits specific actions by the named defendants. Having reviewed the second agreed order, we find that it does not prohibit disclosure of information for the purposes of section 552.107(2). Gov’t Code § 552.107(2). We therefore conclude that the center may not withhold any of the submitted information under section 552.107(2) on the basis of either agreed order.

Next, we note that some of the submitted information is 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:

²A copy of this letter may be found on the Office of the Attorney General’s website: http://www.oag.state.tx.us/opinopen/og_resources.shtml.

³In the future, if the center does obtain parental consent to submit unredacted education records and the center seeks a ruling from this office on the proper redaction of those education records in compliance with FERPA, we will rule accordingly.

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

(2) the name, sex, ethnicity, salary, title, and dates of employment of each employee and officer of a governmental body;

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(1)-(3). Thus, the center may only withhold this information if it is confidential under other law. Section 552.103 is a discretionary exception to disclosure that protects the governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); *see also* Open Records Decision No. 665 at 2 n.5 (discretionary exceptions generally). As such, section 552.103 is not other law that makes information confidential for the purposes of section 552.022. Therefore, you may not withhold any of this information under section 552.103. However, as sections 552.101, 552.102, 552.117, 552.130, 552.136, and 552.137 of the Government Code do constitute "other law" that makes information confidential, we will consider your arguments under these exceptions for the information subject to section 552.022 and the remaining submitted information.

Section 552.103 of the Government Code provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103. The center has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The center must meet both prongs of this test for information to be excepted under 552.103(a).

You state that the remaining information relates to a pending lawsuit in which the center intervened as a plaintiff prior to its receipt of the request. Accordingly, the center has established that litigation was pending at the time the request was received. However, after review of your arguments and the information at issue, we conclude you have not established that the information at issue is related to the pending litigation. Therefore, the center may not withhold any of the remaining information under section 552.103 on that ground.

You assert that some of the remaining information is excepted under section 552.101 of the Government Code, which excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov't Code § 552.101. Section 552.101 encompasses federal statutes. The submitted information contains I-9 forms (Employment Eligibility Verification), which are governed by section 1324a of Title 8 of the United States Code. This section provides that an I-9 form and “any information contained in or appended to such form, 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 the forms in this instance would be “for purposes other than for enforcement” of the referenced federal statutes. Accordingly, we conclude that the I-9 forms, along with the attachments we have marked, are confidential and may only be released in compliance with the federal laws and regulations governing the employment verification system.

We also note that the submitted information includes W-2 and W-4 forms, which are also excepted from disclosure under section 552.101. Section 6103(a) of title 26 of the United States Code renders tax return information confidential. This term has been interpreted by federal courts to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. *Mallas v. Kolak*, 721 F. Supp 748 (M.D.N.C. 1989). Because the W-2 and W-4 forms constitute tax return information, the center must withhold this information under section 552.101 of the Government Code in conjunction with federal law.

Some of the remaining information constitutes medical records, access to which is governed by the Medical Practice Act (“MPA”), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides in pertinent part:

(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 that is subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004; Open Records Decision No. 598 (1991). This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982).*

Medical records must be released upon the patient's signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). We have marked medical records that may be released only as provided under the MPA. Open Records Decision No. 598 (1991).

Section 552.101 also encompasses criminal history record information ("CHRI") generated by the National Crime Information Center or by the Texas Crime Information Center. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states *obtain from the federal government or other states.* Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Texas Department of Public Safety ("DPS") maintains, except that the DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See Gov't Code* § 411.083. Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090 - .127. Accordingly, the center must withhold the CHRI that you have marked under section 552.101 of the Government Code in conjunction with federal law and chapter 411 of the Government Code.

Section 552.101 also encompasses 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. *See* Open Records Decision No. 643 (1996). In that opinion, this office also 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. *See id.* We also determined that the word “administrator” in section 21.355 means a person who is required to and does in fact hold an administrator’s certificate under subchapter B of chapter 21 of the Education Code and is performing the functions of an administrator, as that term is commonly defined, at the time of the evaluation. *Id.* The Third Court of Appeals has held that a written reprimand constitutes an evaluation for purposes of section 21.355. *See Abbott v. North East Indep. Sch. Dist.*, 212 S.W.3rd 364 (Tex. App.—Austin, 2006).

Although you contend that section 21.355 is applicable to the completed evaluations, you do not inform us whether the employees who are the subjects of the evaluations held a teacher’s certificate or permit or an administrator’s certificate under subchapter B of chapter 21 of the Education Code and were performing the functions of a teacher or administrator at the time of each evaluation. Nevertheless, to the extent that the employee in question held a teacher’s certificate or permit or an administrator’s certificate and was functioning as a teacher or administrator at the time of a given evaluation, we find that the completed evaluations are confidential under section 21.355 of the Education Code and must be withheld from disclosure under section 552.101 of the Government Code. *See id.* at 4. To the extent the completed evaluations do not satisfy these criteria, they may not be withheld under section 552.101 in conjunction with section 21.355. We have labeled the completed evaluations that are subject to section 21.355.

Section 552.101 also encompasses the doctrine of common-law privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (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.

In addition, this office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is excepted from required public disclosure under common-law privacy. *See* Open Records Decision No. 600 (1992) (public employee’s withholding allowance certificate, designation of beneficiary of employee’s retirement benefits, direct deposit authorization, and employee’s decisions regarding

voluntary benefits programs, among others, are protected under common-law privacy). We have marked the information in the submitted records that must be withheld under section 552.101 in conjunction with common-law privacy. But the remaining information is either not highly intimate or embarrassing, or is of legitimate public interest; therefore, the remaining information is not confidential under common-law privacy, and the center may not withhold it under section 552.101 on that ground.

Section 552.102(b) of the Government Code excepts from disclosure “a transcript from an institution of higher education maintained in the personnel file of a professional public school employee.” Gov’t Code § 552.102(b). This section further provides, however, that “the degree obtained or the curriculum on a transcript in the personnel file of the employee” are not excepted from disclosure. Thus, with the exception of the employee’s name, courses taken, and degree obtained, the center must withhold the submitted transcripts that we have marked pursuant to section 552.102(b). The center may not withhold any of the remaining information under section 552.102.

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 employee of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code. However, we note an individual’s personal post office box number is not a “home address” and therefore may not be withheld under section 552.117. *See* Gov’t Code § 552.117; Open Records Decision No. 622 at 4 (1994) (“The legislative history of section 552.117(1)(A) makes clear that its purpose is to protect public employees from being harassed *at home*. *See* House Committee on State Affairs, Bill Analysis, H.B. 1976, 69th Leg. (1985); Senate Committee on State Affairs, Bill Analysis, H.B. 1976, 69th Leg. (1985).” (Emphasis added.)); *see also* Open Records Decision Nos. 658 at 4 (1998), 478 at 2 (1987), 465 at 4-5 (1987).

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 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 employee who did not timely request under section 552.024 that the information be kept confidential. We have marked the information that the center must withhold under section 552.117(a)(1), to the extent that the employee who is the subject of the information timely requested confidentiality for this information under section 552.024.

You also claim that some of the remaining information is excepted from disclosure under section 552.130 of the Government Code, which provides that information relating to a motor vehicle operator’s license, driver’s license, motor vehicle title, or registration issued

by a Texas agency is excepted from public release. Gov't Code § 552.130(a)(1), (2). We have marked the Texas motor vehicle record information that the center must withhold under section 552.130 of the Government Code.

Next, the center argues that portions of the submitted information are protected from disclosure pursuant to section 552.136 of the Government Code. Section 552.136 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. We have marked the information that must be withheld pursuant to section 552.136. The center may not withhold any of the remaining information under section 552.136.

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). Gov't Code § 552.137(a)-(c). We note that section 552.137 does not apply to a government employee's work e-mail address because such an address is not that of the employee as a “member of the public” but is instead the address of the individual as a government employee. Section 552.137 also does not protect from public disclosure “an e-mail address... provided to a governmental body by a person who has a contractual relationship with the governmental body.” Gov't Code § 552.137(c)(1). The center must withhold the personal e-mail addresses we have marked under section 552.137, unless the owners of the e-mail addresses have affirmatively consented to their public disclosure.

Lastly, 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 copyrighted. 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 copyrighted materials, 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, we have marked the medical records that may only be released in accordance with the MPA. The center must withhold the following: (1) the submitted W-2, W-4, and I-9 forms, and the I-9 attachments we have marked under section 552.101 of the Government Code in conjunction with federal law; (2) the CHRI you have marked under section 552.101 in conjunction with federal law and subchapter F of chapter 411 of the Government Code; (3) the teacher evaluations we have marked, to the extent that the employee in question held a teacher's certificate or permit or an administrator's certificate and was functioning as a teacher or administrator at the time of a given evaluation; (4) the information that we have marked under section 552.101 in conjunction with common-law privacy; (5) the submitted

transcripts that we have marked pursuant to section 552.102(b), with the exception of the employee's name, courses taken, and degree obtained; (6) the information that we have marked under section 552.117 of the Government Code, to the extent the employees timely requested confidentiality for that information under section 552.024 of the Government Code;⁴ (7) the Texas motor vehicle record information that we have marked under section 552.130 of the Government Code; (8) the information that we have marked under section 552.136 of the Government Code; and (9) the e-mail address we have marked under section 552.137, unless the owners of the e-mail addresses have affirmatively consented to their public disclosure. The remaining information must be released to the requestor, but any information protected by copyright must be released in accordance with copyright law. This ruling does not address the applicability of FERPA to the submitted information. Should the center determine that all or portions of the submitted information consist of "education records" that must be withheld under FERPA, the center 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,

⁴To the extent that the employees' social security numbers are not excepted from disclosure under section 552.117(a)(1), 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.

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

HPR/sdk

Ref: ID# 277911

Enc: Submitted documents

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