



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 6, 2007

Mr. Joe R. Tanguma
Walsh, Anderson, Brown, Schulze & Alderidge, P.C.
P.O. Box 168046
Irving, Texas 75016

OR2007-08540

Dear Mr. Tanguma:

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# 283040.

The Wichita Falls Independent School District (the "district"), which you represent, received a request for the following information: 1) a transcript and/or copy of a specified tape recorded IEP meeting, 2) all correspondence sent to and from Rider Principal regarding the IEP meeting, 3) all correspondence sent to and from the Superintendent regarding the IEP meeting, 4) all correspondence sent to and from district personnel regarding the IEP meeting, 5) all correspondence sent to and from school board members regarding the IEP meeting, 6) the personnel files of three named individuals, 7) any complaints filed against three named individuals, 8) any correspondence requesting that the Wichita Falls police department investigate the possible illegal recording of an educational meeting, and 9) the website advanced agenda postings of school board meetings during a specified time period. You state that some of the requested information has been released to the requestor. You claim that the submitted information is excepted from disclosure pursuant to sections 552.101, 552.102, 552.107(2), 552.114, 552.117, 552.130, 552.136, 552.139, and 552.147 of the

Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

Initially, we note that 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. § 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.³ 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 state that a portion of the requested information regarding the IEP tape recording and related correspondence consists of student identifying education records that is protected under FERPA. 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 this information. Such determinations under FERPA must be made by the educational authority in possession of the education records.⁴ 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).

¹Although you initially raised sections 552.106, 552.108, 552.115, and 552.137 of the Government Code, you have not submitted arguments explaining how these exceptions apply to the submitted information. Therefore, we presume that you have withdrawn these exceptions. *See* Gov't Code §§ 552.301, .302.

²We 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.

³A 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.

⁴In 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 the Texas Comptroller of Public Accounts currently has a lawsuit pending against the Office of the Attorney General that pertains, in part, to individuals' dates of birth: *Tex. Comptroller of Public Accounts v. Abbott*, No. 03-07-00102-CV (Tex. App.—Austin, Feb. 13, 2007, n.w.h.). Accordingly, we do not address your arguments under section 552.101 with regard to the birth dates that the district seeks to withhold. We will allow the trial court to determine whether that type of information must be released to the public.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses information protected by other statutes such as the Medical Practice Act (“MPA”), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides in 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). Upon review, we conclude that none of the submitted information consists of medical records subject to the MPA. Thus, the district may not withhold any portion of the submitted information under the MPA.

You argue a portion of the submitted information includes information that is subject to chapter 611 of the Health and Safety Code, which provides for the confidentiality of records *created or maintained by a mental health professional*. Section 611.002 of the Health and Safety Code provides in part the following:

Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

Health & Safety Code § 611.002(a). Sections 611.004 and 611.0045 of the Health and Safety Code provide for access to mental health records only by certain individuals. *See* Open Records Decision No. 565 (1990). Upon review, we find that none of the submitted information constitutes mental health records subject to chapter 611 of the Health and Safety Code and none of the submitted information may be withheld under section 552.101 of the Government Code on that basis.

You also raise section 552.101 of the Government Code in conjunction with the Americans with Disabilities Act of 1990 (the "ADA"). Title I of the ADA provides that information about the medical conditions and medical histories of applicants or employees must be (1) collected and maintained on separate forms, (2) kept in separate medical files, and (3) treated as a confidential medical record. *See* 42 U.S.C. § 12101 *et seq.* Information obtained in the course of a "fitness for duty examination," conducted to determine whether an employee is still able to perform the essential functions of his or her job, is to be treated as a confidential medical record as well. *See* 29 C.F.R. § 1630.14(c); Open Records Decision No. 641 (1996). Furthermore, the federal Equal Employment Opportunity Commission (the "EEOC") has determined that medical information for the purposes of the ADA includes "specific information about an individual's disability and related functional limitations, as well as general statements that an individual has a disability or that an ADA reasonable accommodation has been provided for a particular individual." *See* Letter from Ellen J. Vargyas, Legal Counsel, EEOC, to Barry Kearney, Associate General Counsel, National Labor Relations Board, 3 (Oct. 1, 1997). Having considered your arguments and reviewed the information that you believe is confidential under the ADA, we find that the federal law is not applicable to that information. We therefore conclude that the district may not withhold any of the submitted information under section 552.101 of the Government Code on the basis of the ADA.

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 section 21.355 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 decision, we determined that the word "teacher," for purposes of section 21.355, is a person who is required to and does in fact hold a teaching certificate under subchapter B of chapter 21 of the Education Code or a school district teaching permit under section 21.055 and who is engaged in the process of teaching, as that term, is commonly defined, at the time of the evaluation. *See* Open Records Decision No. 643 at 4. We also concluded that the word "administrator" in section 21.355 means a person who is required to and does 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.*

In this instance, we note that the submitted evaluation relates to an educational diagnostician/associate school psychologist, performing the duties of a diagnostician/associate school psychologist, rather than a teacher or an administrator. Consequently, we find that section 21.355 of the Education Code is not applicable to the submitted evaluation of the diagnostician/associate school psychologist, and thus, the evaluation is not excepted from disclosure under section 552.101 of the Government Code. *See* Educ. Code § 21.355; Open Records Decision No. 643 at 4. *See also* Educ. Code § 21.003(a) (person may not be employed as a teacher, teacher intern or teacher trainee, librarian, education aide, administrator, or counselor by a school district unless the person

holds an appropriate certificate or permit issued as provided by Subchapter B); *compare* Educ. Code § 21.003(b) (person may not be employed by a school district as an audiologist, occupational therapist, physical therapist, physician, nurse, school psychologist, associate school psychologist, social work, or speech language pathologist unless the person is licensed by the state agency that licenses that profession).

You also assert that a portion of the submitted information should be withheld under the doctrines of common-law and constitutional privacy, which are also encompassed by section 552.101 of the Government Code. 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. However, information relating to public employees and public employment 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). Upon review, we have marked the information that must be withheld under section 552.101 in conjunction with common-law privacy. However, we find that the remaining information at issue is either not intimate or embarrassing or is of a legitimate public interest. Thus, none of the remaining information at issue is confidential under common-law privacy and the district may not withhold it under section 552.101 of the Government Code on that basis.

Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common-law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). After reviewing remaining information at issue, we find that no portion of it is protected by constitutional privacy. Therefore, the district may not withhold any of the remaining submitted information under section 552.101 of the Government Code on that basis.

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 III under section 552.102(b) of the Government Code.

Section 552.117(a)(1) excepts from disclosure the current and former 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 of the Government Code. Whether information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Pursuant to section 552.117(a)(1), the district must withhold this personal information that pertains to a current or former employee of the district who elected, prior to the district's receipt of the request for information, to keep such information confidential. Such information may not be withheld for individuals who did not make a timely election. We have marked information that must be withheld if section 552.117 applies.

Section 552.130 of the Government Code 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). The district must withhold the Texas motor vehicle record information we have marked under section 552.130.

Section 552.136(b) 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." The district must withhold the account numbers we have marked under section 552.136.

Next, you claim that a portion of the remaining submitted information, which you have marked, is excepted from public disclosure under section 552.139(a) of the Government Code. Section 552.139(a) provides as follows:

- (a) Information is excepted from the requirements of Section 552.021 if it is information that relates to computer network security or to the design, operation, or defense of a computer network.

Id. § 552.139(a). Therefore, the department must withhold the information you have marked pursuant to section 552.139 of the Government Code.

Finally, 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.⁵ *Id.* § 552.147. Therefore, the department may withhold the social security numbers you have marked pursuant to section 552.147 of the Government Code.

In summary, this ruling does not address the applicability of FERPA to the requested information. Should the district determine that all or portions of the requested information consist 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 district must withhold the marked information under section 552.101 in conjunction with common-law privacy. Other than the employee’s name, the courses taken, and the degree obtained, the submitted transcripts must be withheld under section 552.102(b) of the Government Code. The district must withhold the information we have marked if section 552.117(a)(1) of the Government Code applies. The district must also withhold the marked information under sections 552.130, 552.136, and 552.139 of the Government Code. The social security numbers may be withheld under section 552.147 of the Government Code. The remaining submitted information must be released.⁶

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

⁵We 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 officer under the Act.

⁶As our ruling is dispositive, we do not address your remaining arguments.

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,



Debbie K. Lee
Assistant Attorney General
Open Records Division

DKL/eeg

Ref: ID# 283040

Enc. Submitted documents

c: Times Record News
P.O. Box 120
Wichita Falls, Texas 76301
(w/o enclosures)