



ATTORNEY GENERAL OF TEXAS
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December 19, 2007

Ms. Mari M. McGowan
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OR2007-16830

Dear Ms. McGowan:

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# 297682.

The Plano Independent School District (the "district"), which you represent, received a request for all investigative reports pertaining to a specified incident, as well as the employment status and personnel file of a named district employee. You state you have provided the requestor with a portion of the requested information. You inform us that some of the submitted information has been redacted pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232(a).¹ You claim that the submitted information is excepted from disclosure under sections 552.101, 552.108, 552.117, and 552.135 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by three interested third parties. *See* Gov't Code § 552.304 (interested third party may submit comments explaining why submitted information should or should not be released).

Initially, we must address the district's obligations under section 552.301 of the Government Code. You inform us that you have released some records to the requestor with certain information redacted. Further, we note that, in addition to the redactions made pursuant to FERPA, the district has redacted portions of the submitted documents. A governmental body that seeks to withhold information from disclosure must seek a ruling from this office unless

¹ We note that our office is prohibited from reviewing these education records to determine whether appropriate redactions under FERPA have been made; therefore, we will not address the applicability of FERPA to any of the submitted records.

this office has previously issued a ruling to the governmental body on the precise information at issue or has issued a prior determination that the governmental body may withhold a specific category of information without the necessity of requesting a determination from this office. Gov't Code § 552.301(a); *see* Open Records Decision No. 673 (2001) (discussing standard for issuance of previous determinations). Pursuant to section 552.301(e) of the Government Code, a governmental body must, within fifteen business days of receiving the request, submit to this office (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *Id.* § 552.301(e)(1)(A)-(D). You did not submit to this office for our review the information you redacted from the records released to the requestor. Additionally, we are unable to discern the nature of the non-FERPA information redacted in the submitted documents. Furthermore, you do not inform us that a previous determination has been made regarding the redacted information. *See id.* § 552.301(a), (e)(1)(D). Thus, 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 submit to this office the information required in section 552.301(e) results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). Normally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third-party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). However, because you have not submitted for our review the redacted information you released to the requestor, and we cannot discern the nature of the non-FERPA information redacted from the submitted documents, we have no basis for finding the redacted information confidential. Thus, we have no choice but to order the redacted information released pursuant to section 552.302. If you believe the information is confidential and may not lawfully be released, you must challenge this ruling in court as outlined below.

We first address your arguments under section 552.108, as it is potentially the most encompassing exception you raise. Section 552.108 of the Government Code provides in part:

- (a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:

(1) release of the information would interfere with the detection, investigation or prosecution of crime.

Gov't Code § 552.108(a)(1). A governmental body claiming section 552.108(a)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). In this instance, you state the information in Exhibit B pertains to a pending criminal investigation being conducted by the district police department. Based upon your representation and our review, we find that the release of the information in Exhibit B would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases).

As you acknowledge, section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. Gov't Code § 552.108(c). Such basic information refers to the information held to be public in *Houston Chronicle*, and includes a detailed description of the offense. *See* 531 S.W.2d at 186-87; Open Records Decision No. 127 (summarizing types of information considered to be basic information). Thus, with the exception of basic information, the district may withhold the information in Exhibit B under section 552.108(a)(1) of the Government Code.² We note that you have the discretion to release all or part of Exhibit B that is not otherwise confidential by law. Gov't Code § 552.007.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov't Code § 552.101. This section encompasses information protected by other statutes. Section 552.101 encompasses the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code. The MPA governs the public availability of medical records. Section 159.002 of the MPA provides in part:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(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.

² As our ruling for this information is dispositive, we need not address your remaining arguments against disclosure.

(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(a)-(c). This office has determined that in governing access to a specific subset of information, the MPA prevails over the more general provisions of the Act. *See* Open Records Decision No. 598 (1991). Although you contend that portions of the remaining information are confidential under the MPA, you have failed to demonstrate how the remaining information constitutes medical records for the purposes of the MPA. We therefore conclude that the district may not withhold any of the remaining information on the basis of the MPA.

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 section 21.355 to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or an administrator. *See* Open Records Decision No. 643 (1996). In Open Records Decision No. 643, we determined that for purposes of section 21.355, the word “teacher” means 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* ORD 643 at 4.

You claim that portions of the remaining information constitute evaluations of an individual who is certified as an educational aide by the State Board for Educator Certification, and was employed as a certified educational aide at the time of the evaluations. *See* 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). Based on your representation and our review of the remaining information, we agree that portions of the remaining information in Exhibits C and D, which we have marked, are confidential under section 21.355 of the Education Code and must be withheld from disclosure under section 552.101 of the Government Code.

Section 552.101 also encompasses the doctrine of common-law privacy, which 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). To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *Id.* at 681-82. 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 the following types of information are excepted from required public disclosure under common-law privacy: personal financial information not relating to a financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990); some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps); and identities of victims and sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). We have marked some information in Exhibits C and D that must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy. You have failed to demonstrate, however, how any of the remaining information constitutes highly intimate or embarrassing information the release of which would be highly objectionable to a reasonable person. Thus, none of the remaining information may be withheld under section 552.101 in conjunction with common-law privacy.

Section 552.101 also encompasses the common-law informer's privilege, which has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). It protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law enforcement authority, provided that the subject of the information does not already know the informer's identity. Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978). The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 at 2 (1981) (citing Wigmore, Evidence, § 2374, at 767 (McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5 (1988).

You argue that the remaining information may be withheld under section 552.101 of the Government Code in conjunction with the informer's privilege. Upon review, however, we find that none of the remaining information indicates or documents any individual reporting violations of statutes as contemplated by the informer's privilege. Accordingly, we conclude that you have failed to demonstrate the applicability of the common-law informer's privilege with regard to the remaining information. Therefore, the remaining information may not be withheld under section 552.101 in conjunction with the common-law informer's privilege.

Finally, you claim that the remaining information is excepted under section 552.135 of the Government Code, which provides in relevant part:

(a) "Informer" means a student or a former student or an employee or former employee of a school district who has furnished a report of another person's 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). Section 552.135 protects an informer's identity, but does not encompass protection for witness information or statements. Upon review, we find that you have failed to demonstrate that the remaining information identifies an informer for purposes of section 552.135. Thus, the district may not withhold any of the remaining information under section 552.135.

In summary, with the exception of basic information, the district may withhold Exhibit B under section 552.108 of the Government Code. The district must withhold the information we have marked in Exhibits C and D under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code and in conjunction with common-law privacy. The remaining information must be released.

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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,

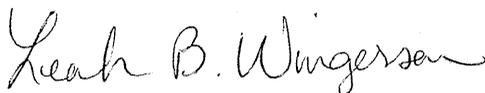
toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can challenge 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,



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/ma

Ref: ID# 297682

Enc. Submitted documents

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(w/o enclosures)