



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 27, 2007

Ms. Laura C. Rodriguez
Walsh, Anderson, Brown, Schulze & Aldridge, P.C.
P.O. Box 460606
San Antonio, Texas 78246

OR2007-16982

Dear Ms. Rodriguez:

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# 298131.

The Northside Independent School District (the "district"), which you represent, received a request for all e-mail messages from a specified address during a specified time period and the personnel file of a named teacher. You claim that the submitted information is excepted from disclosure pursuant to sections 552.101, 552.102, 552.117, 552.130, 552.137, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, you assert that the request for information was withdrawn by operation of law because the district sent the requestor a cost estimate pertaining to this information on October 18, 2007, and as of November 6, 2007 the district has not received a response from the requestor. *See* Gov't Code §§ 552.2615(a), .263(f). However, we have examined the cost estimate upon which your representation is based and have determined that it does not comply with the provisions of section 552.2615 of the Act. Accordingly, we conclude the requestor's public information request has not been withdrawn by operation of law because the requestor has not received a cost estimate that complies with section 552.2615 for providing this information. *See id.* § 552.2615. We will, therefore, address your arguments against disclosure of this information under the Act.

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 section encompasses information protected by other statutes. Access to medical records is governed by the Medical Practice Act (the “MPA”), Occ. Code §§ 151.001-165.160. Section 159.002 of the MPA provides:

(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.

(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. 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. *See* Occ. Code §§ 159.004, .005. Any subsequent release of medical records must be consistent with the purposes for which the governmental body obtained the records. *See id.* § 159.002(c); Open Records Decision No. 565 at 7 (1990). We agree that the pages marked AG-0032 through AG-0036 and AG-0053 through AG-0054 are medical records that are subject to the MPA. The district may only disclose these records in accordance with the access provisions of the MPA. Absent the applicability of an MPA access provision, the district must withhold these records pursuant to the MPA. *See* Open Records Decision No. 598 (1991).

Next, you claim that the pages marked AG-0023 through AG-0028 and AG-0055 are evaluations of the named district employee. Section 21.355 of the Education Code, which is also encompassed by section 552.101 of the Government Code, provides, “a document evaluating the performance of a teacher or administrator is confidential.” 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, we 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. *Id.*

You claim that the submitted information constitutes an evaluation of an individual who held a teaching certificate and was employed as a teacher at the time of the evaluation. Upon review, we agree that the information you have marked as AG-0023 through AG-0028 are confidential evaluations under section 21.355 and thus must be withheld under section 552.101 of the Government Code. We note however, that AG-0055 consists of an evaluation of a substitute teacher. You do not indicate, and it is not otherwise clear from the information itself, whether the substitute teacher at issue held a teacher's certificate or permit and was performing the functions of a teacher at the time of this evaluation. Therefore, to the extent that the substitute teacher at issue in this evaluation held a teacher's certificate or permit and was performing the functions of a teacher at the time of the evaluation, AG-0055 is confidential under section 21.355 of the Education Code and must be withheld under section 552.101 of the Government Code. *See id.* at 4. To the extent that the evaluation found on AG-0055 does not satisfy these criteria, it is not confidential under section 21.355 and must be released.

Section 552.101 also encompasses section 21.408 of the Education Code, which addresses teacher certification examinations. Section 21.408(c-1) provides the following

The results of an examination administered under this section are confidential and are not subject to disclosure under Chapter 552, Government Code, unless:

- (1) the disclosure is regarding notification to a parent of the assignment of an uncertified teacher to a classroom as required by Section 21.057; or
- (2) the educator has failed the examination more than five times.

Educ. Code § 21.048(c-1). We note that subsection 21.048(c-1), as added to section 21.048 by the Eightieth Legislature, is a new statute that took effect June 15, 2007. *See* Act of May 28, 2007, 80th Leg., R.S., S.B. 9, § 4 (to be codified at Educ. Code Ann. § 21.048 (c-1)). The information you have submitted as AG-0056 is the examinee score report from the educator certification exam administered under section 21.048 of the Education Code. You do not inform us that subsection 21.408(c-1)(1) or (2) is applicable to this report. Therefore, the district must withhold AG-0056 under section 552.101 in conjunction with section 21.408 of the Education Code.

You claim that the some of the submitted information is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with a federal statute. 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. Accordingly, we agree that the I-9 form you have submitted as AG-0030 and AG-0031 is confidential under section 552.101 of the Government Code and may only be released in compliance with the federal laws and regulations governing the employment verification system.

Section 552.101 encompasses the federal Family and Medical Leave Act (the “FMLA”), section 2654 of title 29 of the United States Code. Section 825.500 of chapter V of title 29 of the Code of Federal Regulations identifies the record-keeping requirements for employers that are subject to the FMLA. Subsection (g) of section 825.500 states that

[r]ecords and documents relating to medical certifications, recertifications or medical histories of employees or employees’ family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files, and if ADA is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements[], except that:

- (1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;
- (2) First aid and safety personnel may be informed (when appropriate) if the employee’s physical or medical condition might require emergency treatment; and
- (3) Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

29 C.F.R. § 825.500(g). We agree that the information you have marked as AG-0037 through AG-0041 is confidential under the FMLA, and must be withheld on this basis under section 552.101 of the Government Code.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information if it (1) contains highly intimate or embarrassing facts,

the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. See *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. This office has also found that personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from 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, protected under common-law privacy). The district must withhold AG-0022 under section 552.101 of the Government Code in conjunction with common-law privacy. We find, however, that none of the remaining information constitutes highly intimate or embarrassing information that is of no legitimate concern to the public. Therefore, the district may not withhold any of the remaining information under section 552.101 in conjunction with common-law privacy.

You state the pages marked AG-0002 through AG-0005 and AG-0052 consist of the named employee's transcripts. Section 552.102(b) of the Government Code 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, except for the information that reveals the degree obtained and the courses taken, the district must withhold the information in pages AG-0002 through AG-0005 and AG-0052 pursuant to section 552.102(b) of the Government Code.

Section 552.117(a)(1) excepts from disclosure the current and former home addresses, 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. Gov't § 552.117 (a)(1). Whether a particular piece of information is protected under 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). You state, and provide documentation showing, that the employee at issue elected to keep her home address and telephone number confidential prior to the time that the district received the instant request for information. Thus, the district withhold the information you have marked throughout the remaining submitted information, except for the information we have marked for release, under section 552.117 of the Government Code.

Section 552.130 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 you have marked in the remaining submitted information,

in addition to the information we have marked, under section 552.130 of the Government Code.

Section 552.137 of the Government Code 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). *Id.* § 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. The e-mail addresses at issue are not a type specifically excluded by section 552.137(c) of the Government Code. You do not inform us that a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. Therefore, the district must withhold the e-mail addresses you have marked under section 552.137 of the Government Code.

You assert that some of the remaining information is excepted under section 552.147 of the Government Code, which provides that “[t]he social security number of a living person is excepted from” required public disclosure under the Act. The district may withhold the social security numbers you have marked from the remaining submitted information under section 552.147.¹

In summary, district must withhold the pages marked AG-0032 through AG-0036 and AG-0053 pursuant to section 552.101 of the Government Code in conjunction with the MPA. The district must withhold AG-0023 through AG-0028 under section 552.101 in conjunction with section 21.355 of the Education Code. To the extent that the substitute teacher at issue in the evaluation found in AG-0055 held a teacher’s certificate or permit and was performing the functions of a teacher at the time of the evaluation, AG-0055 is confidential under section 21.355 of the Education Code and must also be withheld under section 552.101. The district must withhold the information you have submitted as AG-0056 under section 552.101 in conjunction with section 21.048 of the Education Code. The submitted I-9 form is confidential under section 1324a of Title 8 of the United States Code and must be withheld under section 552.101. The information submitted as AG-0037 through AG-0041 must be withheld under section 552.101 in conjunction with the FMLA. The district must withhold AG-0022 under section 552.101 of the Government Code in conjunction with common-law privacy. Except for the information that reveals the degree obtained and the courses taken, the district must withhold the information in pages AG-0002 through AG-0005 and AG-0052 pursuant to section 552.102(b) of the Government Code.

¹We 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.

The district must withhold the information you have marked throughout the remaining submitted information, except for the information we have marked for release, under section 552.117(a)(1) of the Government Code. The district must also withhold the marked information pursuant to sections 552.130 and 552.137 of the Government Code. The marked social security numbers may be withheld under section 552.147 of the Government Code. The district must release the remaining submitted information.

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).

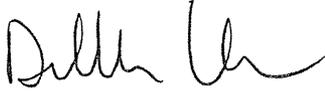
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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,



Debbie K. Lee
Assistant Attorney General
Open Records Division

DKL/eeg

Ref: ID# 298131

Enc. Submitted documents

c: Mr. Robert Herrera
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(w/o enclosures)