



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 8, 2008

Mr. James R. Raup  
McGinnis, Lochridge, & Kilgore, L.L.P.  
600 Congress Avenue, Suite 2100  
Austin, Texas 78701

OR2008-06304

Dear Mr. Raup:

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# 309729.

The Sherman Independent School District (the "district"), which you represent, received a request for employment records and evaluations pertaining to a named individual for the 2003/2004 and 2004/2005 school years.<sup>1</sup> You state that you have released a portion of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.102 of the Government Code. We have considered the exceptions you claim and reviewed the information you have submitted.

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. Section 552.101 encompasses section 21.355 of the Education Code, which provides, "[a] document evaluating the performance of a teacher or administrator is confidential." Educ. Code § 21.355. In addition, the court has concluded a written reprimand constitutes an evaluation for purposes of section 21.355 because "it reflects the principal's judgment regarding [a teacher's] actions, gives corrective direction, and provides for further review." *North East Indep. Sch. Dist. v. Abbott*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.). This office has interpreted this section to apply to any

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<sup>1</sup>You state that the district sought and received a clarification of the information requested. See Gov't Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request); see also Open Records Decision No. 31 (1974) (when presented with broad requests for information rather than for specific records, governmental body may advise requestor of types of information available so that request may be properly narrowed).

document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. Open Records Decision No. 643 (1996). This office has 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 evaluation. *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.*

You seek to withhold documents written by the superintendent and a school board member concerning a former district principal. However, you do not state or provide documentation showing, that the administrator at issue held an administrator's certificate under subchapter B of chapter 21 of the Education Code and was performing the functions of an administrator at the time of the evaluations. Thus, if the administrator at issue held an administrator's certificate and was performing the functions of an administrator at the time of the evaluations, the information we have marked is confidential under section 21.355, and must be withheld under section 552.101 of the Government Code. To the extent that the administrator does not satisfy these criteria, the information we have marked is not confidential under section 21.355 and may not be withheld under section 552.101 on that ground. In either case, you have failed to demonstrate how the remaining information consists of evaluations or written reprimands as contemplated by section 21.355 or as interpreted by *North East Indep. Sch. Dist.* Accordingly, the district may not withhold any of this information under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. Therefore, we will address your remaining argument for the information potentially subject to section 21.355, as well as the remaining information.

Next, section 552.102(a) of the Government Code 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. 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. Accordingly, we will address privacy under sections 552.101 and 552.102(a) together.

For information to be protected from public disclosure by the common-law right of privacy under section 552.101, the information must meet the criteria set out in *Industrial Foundation*. In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts, the release of which would be highly objectionable to a reasonable person, and (2) the information 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. However, there is a legitimate public interest in the qualifications of a public employee and how that employee performs job functions and satisfies employment conditions. *See generally* Open Records Decision Nos. 470 at 4 (1987) (public has legitimate interest in job performance of public employees), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees), 423 at 2 (1984) (scope of public employee privacy is narrow). Therefore, we find that the submitted information is of legitimate public interest. Accordingly, the district may not withhold the submitted information from public disclosure under sections 552.101 and 552.102(a) in conjunction with common-law privacy.

We note that the information that is not subject to section 21.355 of the Education Code contains information that may be excepted from disclosure under section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) provides that information is excepted from disclosure if it relates to a current or former employee's home address, home telephone number, social security number, or reveals whether the employee has family members.<sup>2</sup> *See* Gov't Code § 552.117(a)(1). The district is required to withhold this information if the employee timely requested that this information be kept confidential under section 552.024 of the Government Code. *See* Open Records Decision Nos. 622 (1994), 455 (1987); *see generally* Open Records Decision No. 530 (1989) (stating that whether particular piece of information is public must be determined at time request for it is made). Therefore, pursuant to section 552.117(a)(1), the district must withhold the personal information we have marked, if the employees at issue made timely elections under section 552.024 of the Government Code. If these individuals did not make proper elections under section 552.024, then the information we have marked may not be withheld under section 552.117(a)(1).

In summary, if the administrator at issue held an administrator's certificate and was performing the functions of an administrator at the time of the evaluations, the information we have marked is confidential under section 21.355 and must be withheld under section 552.101 of the Government Code. The district must also withhold the information we have marked in the remaining information under section 552.117(a)(1), if the individuals at issue made timely elections. 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

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

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,



Melanie J. Villars  
Assistant Attorney General  
Open Records Division

MJV/jh

Ref: ID# 309729

Enc. Submitted documents

c: Mr. Daniel A. Ortiz  
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(w/o enclosures)