



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 8, 2008

Ms. Leticia D. McGowan
School Attorney
Dallas Independent School District
3700 Ross Avenue
Dallas, Texas 75204

OR2008-09236

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# 315191.

The Dallas Independent School District (the "district") received four requests from the same requestor for the incoming and outgoing e-mails of five named district employees. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.107, 552.116, 552.117, 552.130, and 552.136 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the requestor seeks incoming and outgoing e-mails of five named district employees. However, a portion of the information consists of records that do not consist of e-mails to or from any of the named employees. Thus, this information, which we have marked, is not responsive to this request for information. This decision does not address the public availability of the non-responsive information, and the district need not release that information to the requestor.

¹Although you also raised section 552.108 of the Government Code in your initial correspondence to this office, you did not refer to this section and provided no arguments regarding the applicability of this exception in your May 8, 2008 letter to this office. We therefore assume that you no longer urge this exception. See Gov't Code §§.552.301(b), (e); .302.

We also note that the United States Department of Education Family Policy Compliance Office has informed this office that the Family Educational Rights and Privacy Act of 1974 ("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, 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 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 have submitted, among other things, unredacted education records for our review. Because our office is prohibited from reviewing these education records to determine the applicability of FERPA, we will not address FERPA with respect to the submitted records. Such determinations under FERPA must be made by the educational authority in possession of the education records.³

Next, we must address the district's procedural obligations under the Act. Section 552.301 prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is exempted from public disclosure. Section 552.301(b) requires the governmental body to ask for the attorney general's decision and state the exceptions to disclosure not later than the tenth business day after the date of its receipt of the written request for information. See Gov't Code § 552.301(b). Although you raised sections 552.101, 552.116, 552.117, 552.130, and 552.136 within the ten-business-day time period as required by subsection 552.301(b), you did not raise section 552.107 until after the ten-business-day deadline passed. As you have failed to comply with the requirements of section 552.301 with respect to your claim under section 552.107, we find that the district has waived this exception. See *id.* Code § 552.007; Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)). Accordingly, you may withhold no portion of the submitted information under section 552.107. However, we will address your timely raised exceptions to disclosure of the submitted information.

Next, we note that the submitted information contains completed financial reports. Section 552.022(a)(1) of the Government Code provides for the required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body," unless the information is expressly confidential under other law or exempted from

²A copy of this letter may be found on the attorney general's website, available at <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

³In 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.

disclosure under section 552.108 of the Government Code. Gov't Code § 552.022(a)(1). Thus, section 552.022(a)(1) is applicable to this information, which we have marked. The district raises section 552.116 of the Government Code for the submitted reports, which is a discretionary exception to disclosure that a governmental body may waive. *See id.* § 552.007; Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). ~~As such, section 552.116 is not other law that makes information expressly confidential for purposes of section 552.022. Therefore, the district may not withhold the information subject to section 552.022 under section 552.116 of the Government Code, and as you raise no other exception to disclosure of this information it must be released to the requestor.~~

We now address your arguments for the information not subject to section 552.022. 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 information made confidential by section 21.355 of the Education Code, which 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. 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 state that a portion of the submitted information, which you have marked, consists of evaluations for the purposes of section 21.355, and that the individuals at issue held the appropriate certifications under subchapter B of chapter 21 of the Education Code. Based upon your representations and our review, we conclude that you may withhold the evaluations that we have marked under section 552.101 in conjunction with section 21.355 of the Education Code.

You also seek to withhold a portion of the remaining information under section 552.101 in conjunction with provisions of chapter 62 of the Code of Criminal Procedure. Chapter 62 establishes a sex-offender-registration program under which persons with a "reportable conviction or adjudication" or who are "required to register as a condition of parole, release to mandatory supervision, or community supervision" must register "with the local law enforcement authority in any municipality where the person resides or intends to reside for more than seven days[.]" Crim. Proc. Code art. 62.051(a). Article 62.051(c) requires a sex

offender registrant to provide the department with certain enumerated categories of information. *See id.* art. 62.051(c). Article 62.005 states that this information is public information, with the exception of the person's social security number, driver's license number, telephone number, all information required by the department outside of the enumerated categories of information, and any information that would identify the victim of the offense for which the person is subject to registration. *Crim. Proc. Code art. 62.005(b)*. In this instance, the sex offender information that you have identified consists only of the public information that must be provided pursuant to article 62.051(c). Accordingly, this information may not be withheld under section 552.101 and must be released.

Section 552.101 also encompasses chapter 411 of the Government Code. Chapter 411 deems confidential criminal history information ("CHRI") generated by the National Crime Information Center or by the Texas Crime Information Center. CHRI means "information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions." *Id.* § 411.082(2). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* at 10-12. Section 411.083 of the Government Code deems confidential CHRI that the 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*.

A school district may obtain CHRI from the DPS if authorized by section 411.097 and subchapter C, chapter 22 of the Education Code; however, a school district may not release CHRI except as provided by section 411.097(d). *See id.* § 411.097(d); Educ. Code § 22.083(c)(1) (authorizing school district to obtain from any law enforcement or criminal justice agency all CHRI relating to school district employee). Section 411.087 authorizes a school district to obtain CHRI from the Federal Bureau of Investigation (the "FBI") or any other criminal justice agency in this state. Gov't Code § 411.087. However, in this instance you have failed to establish that any of the submitted information constitutes CHRI generated by the National Crime Information Center or by the Texas Crime Information Center. Accordingly, none of the submitted information may be withheld on this basis.

Section 552.101 also encompasses common-law privacy. Common-law privacy protects information that (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. *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 medical information or information indicating disabilities or specific illnesses is excepted from required public disclosure under

common-law privacy. See Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). We have marked certain information that is intimate and embarrassing and of no legitimate public interest. Thus, you must withhold this marked information under common-law privacy.

This office has also found that a compilation of an individual's criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. Cf. *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (when considering prong regarding individual's privacy interest, court recognized distinction between public records found in courthouse files and local police stations and compiled summary of information and noted that individual has significant privacy interest in compilation of one's criminal history). Moreover, we find that a compilation of a private citizen's criminal history is generally not of legitimate concern to the public. However, this office has also found that the public has a legitimate interest in information relating to employees of governmental bodies and their employment qualifications and job performance. See Open Records Decision Nos. 562 at 10 (1990), 542 at 5 (1990); see also Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). In this instance, the criminal history information you seek to withhold pertains to district teachers, not private citizens. Because the criminal history information appears to have been gathered in the course of an employment decision including an employee's removal, there is a legitimate public interest in this information. Accordingly, the doctrine of common-law privacy is not applicable in this instance, and the information at issue may not be withheld on this basis. As you raise no other exception to disclosure of this information it must be released.

Section 552.116 of the Government Code provides:

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, a school district, or a joint board operating under Section 22.074, Transportation Code, including any audit relating to the criminal history background check of a public school employee, is excepted from the requirements of Section 552.021. If information in an audit working paper is also maintained in another record, that other record is not excepted from the requirements of Section 552.021 by this section.

(b) In this section:

(1) "Audit" means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, a

resolution or other action of a board of trustees of a school district, including an audit by the district relating to the criminal history background check of a public school employee, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.

(2) "Audit working paper" includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov't Code § 552.116. You state that a portion of the submitted information consists of audit working papers pertaining to an audit that the district is currently undergoing. However, for the purposes of section 552.116, a school district must establish that an audit is authorized by a resolution or other action of a board of trustees of a school district. *Id.* § 552.116(b)(1). Beyond a general statement that the information pertains to an audit of the district, you have provided no arguments demonstrating that the audit at issue was authorized by a resolution or other action of the district's board of trustees. Thus, we conclude that you have failed to establish that section 552.116 is applicable to any portion of the submitted information, and accordingly none of the submitted information may be withheld on this basis.

You also assert that some of the remaining information is subject to section 552.117(a)(1) of the Government Code, which excepts from public disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). We note that some of the information pertains to applicants for district job openings. Since you have failed to identify which, if any of these applicants were actually hired as district employees, we must rule conditionally. The district may only withhold information under section 552.117 on behalf of current or former employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. For those employees who timely elected to keep their personal information confidential, the district must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The district may not withhold the information we have marked under section 552.117 for those individuals who were not employees or who did not make a timely election to keep the information confidential.

We also note that a portion of the submitted information contains cellular telephone numbers pertaining to district employees. Section 552.117 encompasses personal cellular telephone numbers, provided that the cellular telephone service is paid for by the employee with his or her own funds. *See* Open Records Decision No. 670 at 6 (2001) (extending section 552.117(a)(1) exception to personal cellular phone number and personal pager number of employee who elects to withhold home phone number in accordance with section 552.024). In this instance we are unable to determine whether the cellular telephone services at issue are paid for by the employees with their own funds. Thus, to the extent that the employees at issue pay for the cellular telephone service with their own funds, and timely elected confidentiality, the district must withhold the personal cellular telephone numbers of district employees under section 552.117(a)(1). The district may not withhold any cellular telephone number that pertains to cellular telephone service paid for by the district.

Next, you claim that the submitted information contains Texas motor vehicle record information. Section 552.130 of the Government Code excepts from disclosure information relating to a Texas motor vehicle driver's license and information relating to a Texas motor vehicle title or registration. Gov't Code § 552.130. We have marked the Texas motor vehicle record information that the district must withhold under section 552.130 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." *Id.* § 552.136(b). You generally seek to withhold a portion of the submitted information under section 552.136. Based upon our review of the documents at issue, we have marked credit card, bank account, and routing numbers which we agree must be withheld under section 552.136. However, you have not explained how any other number in the information at issue, whether used alone or in conjunction with another device, may be used to initiate a transfer of funds. Thus, you have failed to establish that any of the remaining information at issue constitutes access device numbers for the purposes of section 552.136, and none of it may be withheld on this basis.

The remaining information also contains e-mail addresses that are excepted from disclosure under section 552.137 of the Government Code, which requires a governmental body to withhold the e-mail address of a member of the general public, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure.⁴ *See id.* § 552.137(b). We note that section 552.137 (a) does not apply to the e-mail address provided by a person who has a contractual relationship with the governmental body or by the contractor's agent. *Id.* § 552.137 (c)(1). You do not inform us that the owners of the e-mail addresses we have marked have affirmatively consented to release. Therefore, unless the

⁴The Office of the Attorney General will raise a mandatory exception, such as section 552.137, on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

district receives consent to release them, the district must withhold the e-mail addresses we have marked under section 552.137.

In summary, this ruling does not address the applicability of FERPA to the submitted information. You must withhold the evaluations you have marked under section 552.101 in conjunction with section 21.355 of the Education Code. You must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. For those employees who timely elected to keep their personal information confidential, the district must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The district may not withhold the information we have marked under section 552.117 for those individuals who were not employees or who did not make a timely election to keep the information confidential. To the extent that the employees at issue pay for the cellular telephone service with their own funds, and timely elected confidentiality, the district must also withhold the personal cellular telephone numbers of district employees under section 552.117(a)(1). You must withhold the Texas motor vehicle record information we have marked under section 552.130. You must withhold the credit card, bank account, and routing numbers marked under section 552.136. Unless you receive consent to release them, you must withhold the e-mail addresses we have marked under section 552.137. The remaining responsive 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). If the governmental body does not file suit over 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,

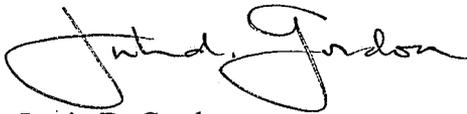
toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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,



Justin D. Gordon
Assistant Attorney General
Open Records Division

JDG/eeg

Ref: ID# 315191

Enc. Submitted documents

c: Mr. Jason Whitely
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(w/o enclosures)