



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 18, 2008

Ms. Amanda M. Bigbee  
Henslee Schwartz, L.L.P.  
306 West 7<sup>th</sup> Street, Suite 1045  
Fort Worth, Texas 76102

OR2008-09824

Dear Ms. Bigbee:

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# 316157.

The Little Elm Independent School District (the "district"), which you represent, received a request for personnel files as related to job performance for named district employees. You state that you have released some information. You further state that you will withhold or redact responsive documents pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g.<sup>1</sup> You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.117, and 552.136 of the Government Code.<sup>2</sup> We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the requestor excludes from his request social security numbers, home addresses, home phone numbers, and family information. Therefore, any such information

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<sup>1</sup>We note that the United States Department of Education Family Policy Compliance Office (the "DOE") informed this office that FERPA 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. The DOE has determined that FERPA determinations must be made by the educational authority in possession of the education records. We have posted a copy of the letter from the DOE to this office on the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

<sup>2</sup>We note that although you raise sections 552.110, 552.137, and 552.143 of the Government Code, you make no arguments to support these exceptions. Therefore, we assume you have withdrawn your claim that these sections apply to the submitted information. See Gov't Code §§ 552.301(b), (e); .302.

is not responsive to the request and we do not address such information in this ruling. As this information is not responsive, we do not need to address your argument under section 552.117.

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 protected by other statutes. 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 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 Open Records Decision No. 643, we determined that a “teacher” for purposes of section 21.355 means a person who (1) 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 (2) is engaged in the process of teaching, as that term is commonly defined, at the time of the evaluation. *See id.* at 4. We also concluded 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. *See id.; Abbott v. North East Independent School District*, 212 S.W.3d 364, 367 (Tex. App.—Austin 2006, no pet.).

Upon review, we agree that most of the documents in Exhibit A and the document in Exhibit B are evaluations. However, you do not state or provide documentation that the employees who were the subject of these evaluations held a teacher’s certificate or permit or administrator’s certificate under subchapter B of chapter 21 of the Education Code and were performing the functions of a teacher or administrator at the time of the evaluations. Thus, we are unable to conclude that section 21.355 is applicable in this instance. If the employees held a teacher’s certificate or permit or an administrator’s certificate and were performing the functions of a teacher or administrator at the time of the evaluation, the documents in Exhibits A and B are confidential under section 21.355, and must be withheld under section 552.101 of the Government Code, except as we have marked for release. To the extent that the employees do not satisfy these criteria, the evaluations in Exhibits A and B are not confidential under section 21.355 and may not be withheld under section 552.101 on that ground.

Section 552.101 also encompasses section 21.048 of the Education Code, which addresses teacher certification examinations. Section 21.048(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). The remaining information in Exhibit A contains ExCET Exam results of the teacher at issue. You do not inform us that subsection 21.048(c-1)(1) or (2) is applicable; therefore, the district must withhold the information we have marked in Exhibit A under section 552.101 in conjunction with section 21.048 of the Education Code. We note however, that if the individual has failed the examinations more than five times, the information we have marked under section 21.048(c-1) must be released.

Section 552.102(a) of the Government Code excepts from public disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]” Gov’t Code § 552.102(a). In *Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (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 is the same test 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. We will therefore consider your claims regarding sections 552.101 and 552.102 together.

Common law privacy 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 a legitimate concern to the public. 540 S.W.2d at 685. To demonstrate the applicability of common law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. This office has also found that financial information relating only to an individual ordinarily satisfies the first requirement of the test for common law privacy, but that there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. See Open Records Decision No. 600 (1992) (finding personal financial information to include designation of beneficiary of employee’s retirement benefits and optional insurance coverage; choice of particular insurance carrier; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, health care, or dependent care). The information in Exhibit D pertains to a financial transaction between an individual and a governmental body. Therefore, the district may not withhold the information in Exhibit D under sections 552.101 and 552.102 of the Government Code in conjunction with common law privacy.

Section 552.102(b) of the Government Code excepts from disclosure “a transcript from an institution of higher education maintained in the personnel file of a professional public school employee.” Gov’t Code § 552.102(b). This section further provides, however, that “the degree obtained or the curriculum on a transcript in the personnel file of the employee” are not excepted from disclosure. Thus, except for the information that reveals the degree

obtained and the courses taken, the district must withhold the transcripts in Exhibit C under section 552.102(b) of the Government Code.

Section 552.136 of the Government Code 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). We note that because check numbers do not constitute access device numbers, section 552.136 is not applicable to this information. Accordingly, the district must only withhold the bank account and routing numbers we have marked under section 552.136 of the Government Code.

Finally, we note that some of the submitted information is protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, to the extent that each employee held a teacher’s certificate or permit or an administrator’s certificate and was functioning as a teacher or administrator at the time of the evaluations, the district must withhold the documents in Exhibits A and B under section 21.355 of the Education Code in conjunction with section 552.101 of the Government Code, except as we have marked for release. The district must withhold the transcripts in Exhibit C under section 552.102(b) of the Government Code, except for the information that reveals the degree obtained and the courses taken. The district must withhold the bank account and routing numbers that we have marked in Exhibit D under section 552.136 of the Government Code. The remaining information must be released, but any copyrighted information may only be released in accordance with copyright law. This ruling does not address the applicability of FERPA to the submitted information. Should the district determine that all or portions of the submitted 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.

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,



Olivia A. Maceo  
Assistant Attorney General  
Open Records Division

OM/jb

Ref: ID# 316157

Enc. Submitted documents

c: Mr. Carl McMurphy  
c/o Henslee Schwartz, L.L.P.  
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Fort Worth, Texas 76102  
(w/o enclosures)