



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

October 1, 2008

Ms. Meredith L. Hayes
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P.O. Box 1210
McKinney, Texas 75070-1210

OR2008-13489

Dear Ms. Hayes:

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# 323246.

The Lovejoy Independent School District (the "district"), which you represent, received two requests for specified e-mail communications involving two named district employees and created during particular time periods. One of the requestors is an investigator for the Texas Education Agency (the "TEA").¹ You inform us the district has released some of the requested information to the requestors. You state the district has redacted student information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g.² You claim the remaining information is excepted from disclosure under sections 552.101, 552.102, and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we must address your contention that most of the requested e-mail communications are not in the district's possession. The Act does not require a governmental body to disclose

¹You state this requestor originally requested e-mail communications sent and received by eleven named district employees from August 1, 2007 to June 24, 2008. However, you state, and provide documentation showing, this requestor modified his request to include only e-mails sent and received by two named district employees from February 1, 2008 to February 29, 2008 in response to an estimate of charges he received from the district. *See* Gov't Code § 552.2615(b) (requiring the requestor to accept the charges, modify the request, or send complaint of overcharge to this office within ten days after date estimate is sent to the requestor).

²We 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>.

information that did not exist when a request for information was received or to prepare new information in response to a request. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983). You state the district e-mail system only keeps e-mail for up to ninety days. Based on this representation, we determine the e-mail communications that were deleted were no longer being “maintained” by the district at the time of the requests, and are not public information subject to disclosure under the Act. *Econ. Opportunities Dev. Corp.*, 562 S.W.2d at 266; see also Gov't Code §§ 552.002, .021 (public information consists of information collected, assembled, or maintained by or for governmental body in connection with transaction of official business). Accordingly, we conclude that the Act does not require the district to release the deleted e-mail communications in this instance.

You also explain, however, that some e-mails were saved to the district's server and the district was able to recover these e-mails, which are responsive to the requests. Therefore, we find these e-mails are in the district's possession and must be released unless they fall within an exception to public disclosure under the Act. Thus, we will address your arguments for the submitted e-mail communications.

Next, we note that a portion of the submitted information is not responsive to the requests because it was created after the specified time periods. We have marked the non-responsive information. This ruling does not address the public availability of any information that is not responsive to the request and the district is not required to release that information in response to the requests.

You raise sections 552.101 and 552.102 of the Government Code. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision” and encompasses the doctrine of common-law privacy. See Gov't Code § 552.101. 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.” *Id.* § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 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* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Act. See *Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546, 550 (Tex. App.—Austin 1983, writ ref'd n.r.e.) (citing *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976)). We will therefore consider your common-law privacy claim under section 552.101 of the Government Code.

Common-law privacy 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.*, 540 S.W.2d at 685. To demonstrate the applicability of common-law privacy, both elements of this test must be established. *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 some kinds of medical information or information indicating disabilities or specific illnesses are protected by 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). After reviewing your arguments and the submitted information, we agree the e-mails at issue contain information that constitutes highly intimate or embarrassing information, the release of which would be highly objectionable to a reasonable person. Further, we find that the information is not of legitimate concern to the public. Therefore, portions of the e-mails are protected by common-law privacy. Because the private information is so inextricably intertwined with the remainder of the information, we conclude the district must withhold the submitted e-mails in their entirety under section 552.101 of the Government Code in conjunction with common-law privacy.³

The first requestor is an investigator with the TEA and states he is seeking the requested information under the authority provided to the State Board for Educator Certification ("SBEC") by section 249.14 of title 19 of the Texas Administrative Code to determine whether enforcement action is warranted.⁴ Chapter 249 of title 19 of the Texas Administrative Code governs disciplinary proceedings, sanctions, and contested cases involving SBEC. *See* 19 T.A.C. § 249.1. Section 249.14 provides the following in relevant part:

(a) [TEA] staff may obtain and investigate information concerning alleged improper conduct by an educator, applicant, examinee, or other person subject to this chapter that would warrant the board denying relief to or taking disciplinary action against the person or certificate.

Id. § 249.14. In this instance, the requestor states he is investigating alleged improper conduct by one of the named district employees and he needs to review the requested records "to determine whether enforcement actions are warranted against [the named employee]." Thus, we find the information at issue is subject to the general right of access afforded to the TEA under section 249.14 of title 19 of the Texas Administrative Code. However, because the submitted information is protected from public disclosure by the exception discussed

³As our ruling is dispositive, we do not address your remaining arguments against disclosure.

⁴Chapter 21 of the Education Code authorizes SBEC to regulate and oversee all aspects of the certification, continuing education, and standards of conduct of public school educators. *See* Educ. Code § 21.031(a). Section 21.041 of the Education Code states that SBEC may "provide for disciplinary proceedings, including the suspension or revocation of an educator certificate, as provided by Chapter 2001, Government Code." *Id.* § 21.041(b)(7). Section 21.041 also authorizes SBEC to "adopt rules as necessary for its own procedures." *Id.* § 21.041(a). Effective September 1, 2005, SBEC's administrative functions and services transferred to TEA. *Id.* § 21.035.

above, we find that there is a conflict between this exception and the right of access afforded to TEA investigators under section 249.14. Where general and specific statutes are in irreconcilable conflict, the specific provision typically prevails as an exception to the general provision unless the general provision was enacted later and there is clear evidence that the legislature intended the general provision to prevail. See Gov't Code § 311.026(b); *City of Lake Dallas v. Lake Cities Mun. Util. Auth.*, 555 S.W.2d 163, 168 (Tex.App.—Fort Worth 1977, writ ref'd n.r.e.).

Common-law privacy, as well as section 552.103 of the Government Code, are general exceptions to disclosure under the Act. Therefore, we find that TEA's statutory right of access prevails over these general exceptions. See Open Records Decision No. 451 (1986) (specific statutory right of access provisions overcome general exceptions to disclosure under the Act). Accordingly, the TEA requestor has a right of access to the submitted information pursuant to section 249.14 of title 19 of the Texas Administrative Code.

In summary, the district must release the submitted information in its entirety to the TEA requestor. The district must withhold submitted information in its entirety from the other requestor pursuant to section 552.101 in conjunction with common-law privacy.

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).

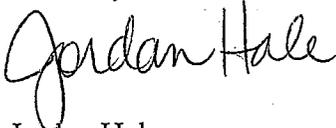
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records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



Jordan Hale
Assistant Attorney General
Open Records Division

JH/jb

Ref: ID# 323246

Enc. Submitted documents

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