



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 31, 2009

Ms. Meridith L. Hayes
Abernathy Roeder Boyd & Joplin P.C.
P.O. Box 1210
McKinney, Texas 75070-1210

OR2009-01955A

Dear Ms. Hayes:

This office issued Open Records Letter No. 2009-01955 (2009) on February 13, 2009. We have examined this ruling and determined that an error was made. When this office determines that an error was made in the decisional process under sections 552.301 and 552.306 of the Government Code and that the error resulted in an incorrect decision, we will correct the previous ruling. *See generally* Gov't Code § 552.011 (Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Act). Therefore, we hereby withdraw the ruling issued on February 13, 2009 and substitute the following decision as the correct ruling.

The Plano Independent School District (the "district"), which you represent, received two requests from the same requestor for information involving a specified time interval and relating to evaluations of all substitute teachers in the district and blocks on substitute employees at all district schools. You state that some of the requested information has been released. You claim that other responsive information is excepted from disclosure under sections 552.101, 552.102, 552.117, 552.137, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the information you submitted.¹ We also have considered the comments that we received from the requestor.²

¹This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the district to withhold any information that is substantially different from the submitted information. *See* Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

²*See* Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

We first note, and you acknowledge, that the district did not comply with its deadlines under section 552.301 of the Government Code in requesting this decision. *See* Gov't Code § 552.301(a)-(b), (e). Pursuant to section 552.302 of the Government Code, the submitted information is therefore presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold any of the information. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ). This statutory presumption can generally be overcome when information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). Because your claims under sections 552.101, 552.102, 552.117, and 552.137 of the Government Code can provide compelling reasons for non-disclosure, we will address those exceptions.

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. This exception encompasses information that other statutes make confidential. You raise section 552.101 in conjunction with section 21.355 of the Education Code. Section 21.355 provides that “[a] document evaluating the performance of a teacher or administrator is confidential.” Educ. Code § 21.355. In Open Records Decision No. 643 (1996), this office 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. We also determined that for the 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.

You state that the submitted information is related to substitute teachers, evaluations of their performance, and blocks placed on substitute teachers as a result of negative evaluations. You contend that this information is confidential in its entirety under section 21.355 of the Education Code. In the alternative, you contend that all evaluative information should be redacted from the submitted documents under section 21.355. Having considered your arguments, we note that an individual is a teacher, for the purposes of section 21.355, only if he or she is required to hold a teaching certificate under subchapter B of chapter 21 of the Education Code or a school district teaching permit under section 21.055 of the Education Code. *See* ORD 643 at 4; *see also* Educ. Code § 21.003(a) (person may not be employed as teacher by school district unless person holds appropriate certificate or permit as provided by [Educ. Code] subch. B); Attorney General Opinion No. GA-0055 at 1 (2003) (school district may not employ someone as teacher unless person holds appropriate certificate or permit). You state that the submitted information pertains to substitute teachers who were certificated under chapter 21 of the Education Code when they were employed by the district. We note, however, that an individual need not hold such a certificate or a teaching permit in order to be employed by the district as a substitute teacher. Instead, relevant district policy provides: “The [d]istrict shall attempt to hire certified teachers as substitutes whenever

possible; however, *no person shall be employed as a substitute who does not have at least a bachelor's degree.*" See Plano ISD DPB(LOCAL), "Substitute, Temporary, and Part-Time Positions" (emphasis supplied).³ Thus, although the submitted information involves individuals who happened to hold teaching certificates, the district does not require either these individuals or other substitutes to hold teaching certificates or permits under chapter 21 of the Education Code. Therefore, the submitted information does not pertain to teachers, for the purposes of section 21.355 of the Education Code. See ORD 643 at 4. Accordingly, because section 21.355 is applicable only to an evaluation of the performance of a teacher, the district may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.

Next, we address your claims under sections 552.102, 552.117, and 552.137 of the Government Code. Section 552.102(a) 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(a). Section 552.102(a) is applicable to information that relates to public officials and employees. The privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101 and *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668, 685 (Tex. 1976). See *Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.) (addressing statutory predecessor). Under section 552.101, common-law privacy protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. See *Indus. Found.*, 540 S.W.2d at 685. Common-law privacy encompasses the specific types of information that are held to be intimate or embarrassing in *Industrial Foundation*. See *id.* at 683 (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). This office has determined that other types of information also are private under section 552.101. See Open Records Decision No. 659 at 4-5 (1999) (summarizing information attorney general has held to be private).

The submitted information is related to substitute teachers employed by the district and their professional performance as such. Information relating to public employees and public employment is generally a matter of legitimate public interest. See Open Records Decision No. 470 at 4 (1987) (job performance does not generally constitute public employee's private affairs). We have marked a small portion of the submitted information that is intimate or embarrassing and not a matter of legitimate public interest. The district must withhold that information under section 552.101 in conjunction with common-law privacy. We conclude that the district may not withhold any of the remaining information on privacy grounds under section 552.101 or section 552.102. See also Open Records Decision Nos. 473 at 3 (1987) (fact that public employee received less than perfect or even very bad evaluation not

³We note that the district's policies are available on-line at <http://www.pisd.edu/about.us/policies/index.shtml>.

private), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of governmental employees).

Section 552.117(a)(1) excepts from 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. *See* Gov't Code §§ 552.117, .024. Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who did not timely request under section 552.024 that the information be kept confidential.

The submitted information appears to contain the social security numbers of two substitute teachers. You state that several substitute teachers had made requests for confidentiality at the time of these requests for information. You do inform us, however, whether the teachers to whom the submitted information pertains requested confidentiality for their social security numbers under section 552.024 prior to the district's receipt of these requests for information. Nevertheless, we conclude that to the extent that the individuals concerned timely requested that their social security numbers be kept confidential, the district must withhold that information under section 552.117(a)(1). The district may not withhold any of the remaining information under this exception.

Section 552.137 of the Government Code states that "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its public disclosure. Gov't Code § 552.137(a)-(b). The types of e-mail addresses listed in section 552.137(c) may not be withheld under this exception. *See id.* § 552.137(c). Likewise, section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. The e-mail addresses that appear in the submitted information are maintained by the district for its employees and may not be withheld under section 552.137 of the Government Code.

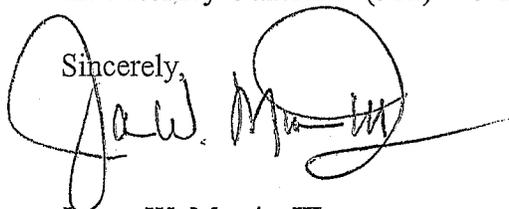
In summary: (1) the district must withhold the information that we have marked under section 552.101 of the Government Code in conjunction with common-law privacy; and (2) the district must withhold the marked social security numbers under section 552.117(a)(1) of the Government Code to the extent that the individuals concerned timely requested

confidentiality for their social security numbers under section 552.024 of the Government Code.⁴ The rest of the submitted information must be released.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,

A handwritten signature in black ink, appearing to read 'Jaw Morris', written over the word 'Sincerely,'.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/cc

Ref: ID# 341571

Enc: Submitted documents

c: Requestor
(w/o enclosures)

⁴We 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.