



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

April 6, 2009

Ms. Marianna M. McGowan  
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OR2009-04504

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# 338941.

The Mansfield Independent School District (the "district"), which you represent, received two requests from the same requestor for information pertaining to a specified investigation and for a copy of a named individual's personnel file. You state that the district has redacted student-identifying information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g(a).<sup>1</sup> You also state that the district will release some of the responsive information to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.108, 552.117, 552.135, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

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 section encompasses information made confidential by other statutes.

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<sup>1</sup>We note that the United States Department of Education Family Policy Compliance Office (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>. Because our office is prohibited from reviewing education records, we will not address the applicability of FERPA to the information at issue, other than to note that parents generally have a right of access to their own child's education records. See 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.3.

We note the submitted information contains medical records, to which access is governed by the Medical Practice Act ("MPA"), chapter 159 of the Occupations Code. Section 159.002 of the Occupations Code provides in pertinent part:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(b), (c). This office has concluded the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Further, information that is subject to the MPA also includes information that was obtained from medical records. *See* Occ. Code § 159.002(a), (b), (c); *see also* Open Records Decision No. 598 (1991).

When medical records pertain to minors, such records may only be released upon the parents' or legal guardians' signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. Any subsequent release of medical records must be consistent with the purposes for which the governmental body obtained the records. *See id.* § 159.002(c); Open Records Decision No. 565 at 7 (1990). We have marked the medical records in the submitted information. In this instance, the requestor appears to be the legal representative of the parent and the minor whose medical records are at issue. Thus, the requestor may have a right of access to the marked medical records. The district may only disclose this information in accordance with the MPA.

Section 552.101 also encompasses section 261.201 of the Family Code, which provides in pertinent part:

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). A portion of the submitted information relates to an investigation of alleged or suspected child abuse conducted by the district's police department and is therefore subject to section 261.201. *See id.* § 261.001(1) (defining "abuse" for the purposes of chapter 261 of the Family Code); *see also id.* § 101.003(a) (defining "child" for purposes of section 261.201 as "person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes"). You do not indicate that the district's police department has adopted a rule that governs the release of this type of information. We therefore assume no such rule exists. Given that assumption, we conclude the district's police department investigation information, which we have marked, is confidential under section 261.201 of the Family Code. *See Open Records Decision No. 440 at 2 (1986) (predecessor statute).* Accordingly, the district must withhold the marked information under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code.<sup>2</sup> As our ruling is dispositive with respect to the information we have marked under section 261.201, we need not address your remaining arguments against the disclosure of that information.

Next, we address your arguments against the disclosure of the remaining information, which consists of the named individual's personnel file. You claim that the remaining information is excepted in its entirety under section 552.103 of the Government Code. Section 552.103 of the Government Code provides:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

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<sup>2</sup>We note that if the Texas Department of Family and Protective Services has created a file on this case, the child's parent may have the statutory right to review the file. *See* Fam. Code § 261.201(g).

Gov't Code § 552.103(a), (c). The district has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The district must meet both prongs of this test for information to be excepted under 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. ORD 452 at 4. Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); see Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. See Open Records Decision No. 331 (1982).

In this instance, you state that "it is apparent from [the requestor's] request for information . . . that a civil action is being pursued against the [d]istrict." However, upon review of the request letters, while the requestor mentions a civil action, the request letter does not reveal that the civil action at issue is against the district. Further, you do not provide any explanation of why the district anticipates litigation in this instance. Thus, we conclude that you have failed to demonstrate that the requestor or any other potential opposing party has taken any objective step toward filing litigation against the district. Accordingly, we find that you have failed to establish by concrete evidence that the district reasonably anticipated litigation when it received this request for information. See Gov't Code § 552.103(c). We therefore conclude that the district may not withhold the submitted information under section 552.103.

Next, you assert the personnel file is excepted in its entirety under section 552.108 of the Government Code. Section 552.108 of the Government Code provides in relevant part the following:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:

(1) release of the information would interfere with the detection, investigation, or prosecution of crime;

...

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from the requirements of Section 552.021 if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution[.]

*Id.* § 552.108(a)(1), (b)(1). A governmental body claiming subsection 552.108(a)(1) or subsection 552.108(b)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), (b)(1), 552.301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977).

We note that the personnel file at issue is maintained by the district administration as part of the employment process and not by the district's police department. A school district is not a law enforcement agency. By its terms, section 552.108 applies only to a law enforcement agency or a prosecutor. This office has determined, however, that where an incident involving alleged criminal conduct is still under active investigation or prosecution, section 552.108 may be invoked by any proper custodian of information that relates to the incident. *See Open Records Decision Nos. 474 (1987), 372 (1983)*. Where a non-law enforcement agency is in the custody of information that would otherwise qualify for exception under section 552.108 as information relating to the pending case of a law enforcement agency, the custodian of the records may withhold the information if it provides the attorney general with a demonstration that the information relates to the pending case and a representation from the law enforcement entity that it wishes to withhold the information. In this instance, you state that the submitted personnel information relates to an ongoing criminal investigation by the district's police department. However, the affidavit of a district police officer you have provided to this office states that the criminal case at issue has been closed with the conclusion of deferred adjudication. Consequently, we find that you have failed to demonstrate that either section 552.108(a)(1) or section 552.108(b)(1) is applicable to any of the information at issue, and none of the remaining information may be withheld on that basis.

Section 552.101 of the Government Code also encompasses the common-law right of privacy, while section 552.102(a) 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). Section 552.102 is applicable to information that relates to public officials and employees. *See Open Records Decision No. 327 at 2 (1982)* (anything relating to employee's employment and its terms constitutes information relevant to person's employment relationship and is part of employee's personnel file). The privacy analysis under section 552.102(a) is the same as the common-law privacy standard under section 552.101. *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). We will

therefore consider the applicability of common-law privacy under section 552.101 together with your claim regarding section 552.102(a).

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 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 established. *Id.* at 681-82. You claim the remaining information is confidential in its entirety under common-law privacy in accordance with the holding in *Morales v. Ellen*, 840 S.W.2d 519 (Tex.App.—El Paso 1992, writ denied). The court in *Ellen* addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. In this instance, the remaining information consists of personnel records and do not involve a sexual harassment investigation. Thus, *Ellen* is not applicable to any of the remaining information at issue and none of the remaining information may be withheld on that basis.

We note that this office has found that the public has a legitimate interest in the qualifications and work conduct of employees of governmental bodies. 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). You generally claim that portions of the submitted personnel file are confidential pursuant to common-law privacy. Upon review of your arguments and the remaining information, we find that you have failed to establish that any portion of the remaining information is highly intimate or embarrassing and of no legitimate public interest. Thus, the remaining information is not confidential under common-law privacy, and the district may not withhold it on that ground.

You also assert that the remaining information is excepted in its entirety pursuant to section 552.101 in conjunction with the common-law informer's privilege and section 552.135 of the Government Code. Section 552.101 also encompasses the common-law informer's privilege, which Texas courts have long recognized. See *Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969); *Hawthorne v. State*, 10 S.W.2d 724, 725 (Tex. Crim. App. 1928). The common-law informer's privilege protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer's identity. Open Records Decision Nos. 515 at 3 (1988), 208 at 1-2 (1978).

Section 552.135 of the Government Code provides the following:

- (a) "Informer" means a student or former student or an employee or former employee of a school district who has furnished a report of another person's or persons' possible violation of criminal, civil, or regulatory law to the school district or the proper regulatory enforcement authority.

(b) An informer's name or information that would substantially reveal the identity of an informer is excepted from [required public disclosure].

(c) Subsection (b) does not apply:

(1) if the informer is a student or former student, and the student or former student, or the legal guardian, or spouse of the student or former student consents to disclosure of the student's or former student's name; or

(2) if the informer is an employee or former employee who consents to disclosure of the employee's or former employee's name; or

(3) if the informer planned, initiated, or participated in the possible violation.

Gov't Code § 552.135(a)-(c). Section 552.135 protects an informer's identity, but does not encompass protection for witness information or statements.

Upon review, we find that none of the remaining information identifies informers for purposes of the common-law informer's privilege or section 552.135. Thus, the district may not withhold the remaining information under section 552.101 of the Government Code in conjunction with the common-law informer's privilege or section 552.135 of the Government Code.

You claim portions of the named individual's college transcripts are excepted under section 552.102(b). This section excepts from disclosure all information in transcripts of professional public school employees other than the employee's name, the courses taken, and the degree obtained. Gov't Code § 552.102(b); Open Records Decision No. 526 (1989). Thus, with the exception of the employee's name, courses taken, and degree obtained, the district must withhold the submitted transcripts, which we have marked in Exhibit E, pursuant to section 552.102(b) of the Government Code.<sup>3</sup>

We note that the remaining information contains tax return information. Section 552.101 also encompasses section 6103(a) of title 26 of the United States Code. Prior decisions of this office have held section 6103(a) of title 26 of the United States Code renders tax return information confidential. Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision No. 600 (1992) (W-4 forms). Section 6103(b) defines the term "return information" as "a taxpayer's identity, the nature, source, or amount of income, payments, tax withheld, deficiencies, overassessments or tax payments . . . or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Internal

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<sup>3</sup>As our ruling is dispositive for this information, we need not address your remaining argument against disclosure of a portion of this information.

Revenue Service] with respect to a return . . . or the determination of the existence, or possible existence, of liability . . . for any tax, . . . penalty, . . . , or offense[.]” See 26 U.S.C. § 6103(b)(2)(A). Federal courts have construed the term “return information” expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer’s liability under title 26 of the United States Code. See *Mallas v. Kolak*, 721 F. Supp 748, 754 (M.D.N.C. 1989), aff’d in part, 993 F.2d 1111 (4th Cir. 1993). The district must withhold the W-4 form we have marked in Exhibit E pursuant to federal law.<sup>4</sup>

You claim some of the remaining information is protected under section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the current and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government Code. Gov’t Code § 552.117(a)(1). Whether information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. See Open Records Decision No. 530 at 5 (1989). Pursuant to section 552.117(a)(1), the district must withhold the home address, telephone number, and social security number of a current or former employee of the district who elected, prior to the district’s receipt of the request for information, to keep such information confidential. You have not informed us whether or not the named former employee whose home address, telephone number, and social security number are at issue chose to withhold his personal information prior to the district’s receipt of the request for information. Therefore, if the former employee timely elected to withhold his home address, telephone number, and social security number, the district must withhold this information, which we have marked, in Exhibit E pursuant to section 552.117(a)(1) of the Government Code. If the former employee did not timely elect to withhold his personal information, then the district may not withhold any of the marked information in Exhibit E under section 552.117(a)(1) of the Government Code.

Section 552.137 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). We have marked the e-mail addresses that the district must withhold under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their disclosure.

In summary, the marked medical records in Exhibit E may only be released in accordance with the MPA. The district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. With the exception of the employee’s name, courses taken, and degree obtained, the

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<sup>4</sup>As our ruling is dispositive for this information, we need not address your argument against disclosure of portions of this information.

district must withhold the submitted transcripts in Exhibit E pursuant to section 552.102(b) of the Government Code. The district must withhold the marked W-4 form in Exhibit E pursuant to federal law. If the former employee timely elected to withhold his personal information, the district must withhold the marked home address, telephone number, and social security number in Exhibit E pursuant to section 552.117(a)(1) of the Government Code.<sup>5</sup> The district must withhold the marked e-mail addresses under section 552.137 of the Government Code, unless the owners of the e-mail address affirmatively consented to their disclosure. The remaining information must be released to the requestor.

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](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,



Laura E. Ream  
Assistant Attorney General  
Open Records Division

LER/dls

Ref: ID# 338941

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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<sup>5</sup>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. Gov't Code § 552.147. Thus, if section 552.117(a)(1) does not apply to the marked social security numbers, the district may withhold the social security numbers under section 552.147(b).