



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 12, 2009

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

OR2009-08103

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# 345813 (ORR # 8352).

The Dallas Independent School District (the "district") received a request for all final reports for investigations conducted by the Office of Professional Responsibility in 2008 and 2009. You have informed us the requestor subsequently narrowed her request to only those final reports from 2009. *See Gov't Code § 552.222(b)* (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information). We note you have redacted a portion of the social security numbers in the submitted information.¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.116, 552.117, 552.1175, 552.130, 552.135, 552.136, and 552.137 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information.

¹Section 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.

²We note although the district also raises sections 552.102, 552.104, 552.107, 552.108, 552.122, and 552.142 of the Government Code, the district makes no arguments to support these exceptions. Therefore, we assume the district has withdrawn its claim that these sections apply to the submitted information.

The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g, 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.³ 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"). The submitted information includes unredacted education records. Because our office is prohibited from reviewing these records to determine whether appropriate redactions under FERPA have been made, we will not address the applicability of FERPA to any of the submitted records. Such determinations under FERPA must be made by the educational authority in possession of such records.⁴ We will, however, address the applicability of the claimed exceptions to the submitted information.

We note the submitted information consists of completed reports and investigations, which are subject to section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) provides for the required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108." Gov't Code § 552.022(a)(1). Although you raise sections 552.103 and 552.116 of the Government Code, sections 552.103 and 552.116 are discretionary exceptions to disclosure that protect the governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 (1999) (governmental body may waive section 552.103). As such, sections 552.103 and 552.116 are not other laws that make information confidential for the purposes of section 552.022. Therefore, the district may not withhold the submitted information under section 552.103 or 552.116. However, we will address the applicability of sections 552.101, 552.117, 552.1175, 552.130, 552.135, 552.136, and 552.137 to the submitted information.

Section 552.101 of the Government Code exempts 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 protected by other statutes, such as

³A copy of this letter may be found on the Office of the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

⁴In 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.

the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. *See* Occ. Code § 151.001. Section 159.002 of the MPA provides, in part:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(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.

Id. § 159.002(a)-(c). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004; Open Records Decision No. 598 (1991). Upon review, we find you must withhold the documents, which we have marked, that are records of the diagnosis of a patient by a physician that were created or maintained by a physician.⁵ However, you have failed to demonstrate how the remaining submitted information constitutes a communication between a physician and a patient or records of the identity, diagnosis, evaluation, or treatment of a patient by a physician for the purposes of the MPA. Accordingly, the remaining submitted information may not be withheld under section 552.101 of the Government Code in conjunction with the MPA.

Section 552.101 of the Government Code also encompasses section 58.007 of the Family Code. Juvenile law enforcement records relating to conduct that occurred on or after September 1, 1997 are confidential under section 58.007(c). Section 58.007 provides in relevant part:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

⁵As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

- (1) if maintained on paper or microfilm, kept separate from adult files and records;
- (2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and
- (3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapter B, D, and E.

Fam. Code § 58.007(c). In order for section 58.007(c) to apply, a child must be identified in the information at issue as a suspect or offender. *See id.* § 51.02(2) (defining “child” as a person who is ten years of age or older and under seventeen years of age at the time of the conduct). Section 58.007(c) is not applicable to information that relates to a juvenile as a complainant, victim, witness, or other involved party. Upon review, we find none of the submitted information identifies a juvenile suspect or offender engaged in delinquent conduct or conduct indicating a need for supervision for purposes of this section. Therefore, we conclude you have failed to establish section 58.007(c) is applicable to the submitted information, and it may not be withheld under section 552.101 on this basis.

Section 552.101 of the Government Code encompasses section 261.201(a) of the Family Code, which provides as follows:

(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.

Id. § 261.201(a); *see also id.* § 261.001(1), (4) (defining “abuse” and “neglect” for purposes of Family Code chapter 261). We note the district is not an agency authorized to conduct a chapter 261 investigation. *See id.* §§ 261.103 (listing agencies that may conduct child abuse investigations), .406. However, a portion of the remaining information involves reports of alleged or suspected abuse made to the district’s police department and to the Child Protective Services Division of the Texas Department of Family and Protective Services

("CPS"), as well as other information used or developed in investigations by CPS and the police department. In addition, a portion of the remaining information reveals the identities of individuals reporting alleged or suspected child abuse. Upon review, we find this information, which we have marked, is within the scope of section 261.201 of the Family Code. Therefore, 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.⁶ The district has failed to demonstrate, however, that any of the remaining information is confidential pursuant to section 261.201; therefore, no portion of the remaining information may be withheld under section 552.101 on that basis.

Criminal history record information ("CHRI") generated by the National Crime Information Center or by the Texas Crime Information Center is confidential. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety ("DPS") maintains, except that 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 DPS as authorized by section 411.097 and subchapter C of 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); *see also Gov't Code* § 411.087. 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. *Id.* Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. *See ORD 565.* Furthermore, any CHRI the district obtained from DPS or any other criminal justice agency in this state must be withheld under section 552.101 of the Government Code in conjunction with section 411.097(d) of the Government Code. *See Educ. Code* § 22.083(c)(1). However, the definition of CHRI does not include driving record information maintained by DPS under chapter 521 of the Transportation Code. *See Gov't Code* § 411.082(2)(B). You indicate the remaining information contains CHRI that is confidential under chapter 411. We agree a portion of the remaining information, which we have marked, constitutes CHRI that is confidential under chapter 411 and must be withheld under section 552.101.

Section 21.355 of the Education Code provides "a document evaluating the performance of a teacher or administrator is confidential." Additionally, the court has concluded a written reprimand constitutes an evaluation for purposes of section 21.355 as it "reflects the principal's judgment regarding [a teacher's] actions, gives corrective direction, and provides

⁶As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

for further review.” *North East Indep. Sch. Dist. v. Abbott*, 212 S.W.3d 364 (Tex. App.–Austin 2006, no pet.). 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 concluded a “teacher” for purposes of section 21.355 means a person who (1) is required to and does in fact hold a certificate or permit required under chapter 21 of the Education Code and (2) is teaching at the time of his or her evaluation. *Id.* You contend a portion of the remaining information is confidential under section 21.355 of the Education Code. You assert the information at issue evaluates the performances of teachers who held the appropriate certificate and were serving as teachers at the time of the evaluations. Upon review of your arguments and the information at issue, we agree a portion of the remaining information, which we have marked, is confidential under section 21.355 of the Education Code and must be withheld under section 552.101 of the Government Code.

We note a portion of the remaining information is subject to section 611.002 of the Health and Safety Code. Section 552.101 encompasses chapter 611 of the Health and Safety Code, which provides for the confidentiality of records created or maintained by a mental health professional. Section 611.002 provides in part:

(a) Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

(b) Confidential communications or records may not be disclosed except as provided by Section 611.004 or 611.0045.

Health & Safety Code § 611.002(a)-(b). Section 611.001 defines a “professional” as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. *Id.* § 611.001(2). Section 611.001 defines a “patient” as a person who consults or is interviewed by a professional for diagnosis, evaluation, or treatment of any mental or emotional condition or disorder. *Id.* § 611.001(1). The district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code.⁷

Section 552.101 also encompasses the doctrine of common-law privacy, which 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. v. Tex. Indus. Accident*

⁷As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

Bd., 540 S.W.2d 668, 685 (Tex. 1976). The types 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. This office has found some kinds of medical information or information indicating disabilities or specific illnesses are 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). Therefore, the district must withhold the information we have marked under section 552.101 in conjunction with common-law privacy.⁸

Section 552.117(a)(1) of the Government Code excepts from disclosure the 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 a particular piece of 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. 30 at 5 (1989). The district may only withhold the information at issue under section 552.117(a)(1) if the individuals in question elected confidentiality under section 552.024 prior to the date on which the request for this information was made. If the individuals made timely elections under section 552.024, the district must withhold the information we have marked under section 552.117(a)(1). If the employees did not make timely elections under section 552.024, the district may not withhold the information we have marked under section 552.117(a)(1) of the Government Code.

We note a portion of the remaining information contains information subject to section 552.117(a)(2) of the Government Code. Section 552.117(a)(2) excepts from public disclosure a peace officer's home address and telephone number, social security number, and family member information regardless of whether the peace officer made an election under section 552.024 of the Government Code. Gov't Code § 552.117(a)(2). Section 552.117(a)(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure. Accordingly, the district must withhold the information we have marked under section 552.117(a)(2) of the Government Code.

Next, you assert portions of the remaining information are excepted under section 552.135 of the Government Code, which 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

⁸As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.