ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 17, 2009

Mr. Mark Anthony Sanchez
Gale, Wilson, & Sanchez
115 East Travis, 19th Floor
San Antonio, Texas 78205

OR2009-08391

Dear Mr. Sanchez:

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# 346168.

The South San Antonio Independent School District (the "district"), which you represent, received a request for the personnel file of a named individual. You claim that the submitted information is excepted from disclosure under section 552.108 of the Government Code. We have considered the exception you claim and reviewed the information you have submitted.

Section 552.108(a)(1) of the Government Code generally excepts from disclosure information held by a law enforcement agency that deals with the detection, investigation, or prosecution of crime, if release of the information would interfere with the detection, investigation, or prosecution of crime. *See* Gov't Code § 552.108(a)(1). A governmental body that claims information is excepted from disclosure under section 552.108 must reasonably explain how and why section 552.108 is applicable to the information. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986).

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 incident involving allegedly criminal conduct is still under active investigation or prosecution, section 552.108 may be invoked by any proper custodian of information relating

to incident). Where a non-law enforcement agency has custody of information relating to a pending case of a law enforcement agency, the agency having custody of the information may withhold the information under section 552.108 if the agency demonstrates that the information relates to the pending case and provides this office with a representation from the law enforcement entity that the law enforcement entity wishes to withhold the information.

In this instance, you inform us that the information at issue was "referred to the Federal Bureau of Investigation [the "FBI"] for review and further investigation into possible misconduct by District employees involving the award of bids." You have also provided an affidavit from an employee of the district stating that the district was informed by an agent of the FBI that the FBI would commence an investigation. The district has not, however, provided our office with any representation to indicate that the FBI wishes to have the information at issue withheld. Therefore, the district may not withhold any of the submitted information under section 552.108 of the Government Code. We will, however, address other exceptions to disclosure of the submitted information.[1]

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, and encompasses section 21.355 of the Education Code. Section 21.355 provides that, "[any] document evaluating the performance of a teacher or administrator is confidential." This office 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, this office also concluded that a teacher is someone who is required to hold and does hold a certificate or permit required under chapter 21 of the Education Code and is teaching at the time of his or her evaluation. *Id* at 4. Similarly, an administrator is someone who is required to hold and does hold a certificate required under chapter 21 of the Education Code and is administering at the time of his or her evaluation. *See id.* The submitted information demonstrates that the individual who is the subject of the submitted evaluations was performing the functions of a teacher or an administrator at the time of the evaluations, and that she held a teaching certificate under subchapter B of chapter 21 of the Education Code. We also assume that she held an administrator's certificate under chapter 21 of the Education Code at the time of her administrator evaluations. Accordingly, we conclude that the evaluations we have marked are confidential under section 21.355 of the Education Code and must be withheld under section 552.101.

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:

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[1]The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

> 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). A portion of the submitted information contains ExCET Exam results of the teacher at issue. We note that subsection 21.048(c-1)(1) is not applicable in this instance. Furthermore, the information reflects the named educator has not failed the examinations more than five times. Thus, the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 21.048(c-1) of the Education Code.

Section 552.101 also encompasses the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. Section159.002 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 that 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).

Medical records must be released upon the governmental body's receipt of the patient's 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. *See* Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. *See* Open Records Decision No. 565 at 7

(1990). We have marked the medical records that are subject to the MPA. The district may only disclose these records in accordance with the MPA.

Section 552.101 also encompasses federal law. The submitted information includes a I-9 form, which is governed by section 1324a of title 8 of the United States Code. This section provides that this form "may not be used for purposes other than for enforcement of this chapter" and for enforcement of other federal statutes governing crime and criminal investigations. 8 U.S.C. § 1324a(b)(5). Release of these documents under the Act would be "for purposes other than for enforcement" of the referenced federal statute. Accordingly, we conclude that the submitted I-9 form is confidential for purposes of section 552.101 of the Government Code and may only be released in compliance with the federal laws and regulations governing the employment verification system.

We note that the submitted information also includes college transcripts. Section 552.102(b) of the Government Code excepts from public 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 exception 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. *Id.*; *see also* Open Records Decision No. 526 (1989). Thus, except for those portions of the documents that reveal the degree obtained and the courses taken, the district must withhold the transcripts that we have marked under section 552.102(b) of the Government Code.

Section 552.117(a)(1) of the Government Code provides that information is excepted from disclosure if it relates to a current or former employee's home address, home telephone number, social security number, or reveals whether the employee has family members. *See* Gov't Code § 552.117(a)(1). The district is required to withhold this information if the employee timely requested that this information be kept confidential under section 552.024 of the Government Code. *See* Open Records Decision Nos. 622 (1994), 455 (1987); *see generally* Open Records Decision No. 530 (1989) (stating that whether particular piece of information is public must be determined at time request for it is made). The submitted information reflects that the individual at issue elected to restrict access to her home address and telephone number prior to the date the request was received. Therefore, pursuant to section 552.117(a)(1), the district must withhold the home address and telephone number information we have marked from the requestor. If the employee at issue made a timely election under section 552.024 of the Government Code to withhold her social security number and family member information, this information, which we have marked, must also be withheld under section 552.117(a)(1). If this individual did not make a proper election under section 552.024 for her social security number and family member information, then this information may not be withheld under section 552.117.[2]

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[2]Regardless of whether the individual at issue made a timely election to withhold her social security number under section 552.024, we 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.

We note that the remaining information contains information that is subject to sections 552.130 of the Government Code. Section 552.130 of the Government Code excepts from disclosure information relating to a motor vehicle operator's or driver's license or permit or a motor vehicle title or registration issued by an agency of this state. *See id.* § 552.130 (a)(1)-(2). The district must withhold the marked Texas motor vehicle record information from the requestor under section 552.130.

In summary, the district must withhold the following information: (1) the submitted I-9 form under section 552.101 and federal law; (2) the marked evaluations under section 552.101 in conjunction with section 21.355 of the Education Code; (3) the marked exam results under section 552.101 in conjunction with section 21.048(c-1) of the Education Code; (4) with the exception of the employee's name, courses taken, and degree obtained, the submitted transcripts under section 552.102(b); (5) the home address and telephone number information we have marked under section 552.117(a)(1), as well as the marked family member information and social security number if the individual made a timely election to withhold this information; (6) and the Texas motor vehicle record information we have marked under section 552.130. The district may only release the marked medical records in accordance with the MPA. 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, 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,

Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/cc

Ref: ID# 346168

Enc. Submitted documents

c: Requestor
(w/o enclosures)