



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 24, 2009

Ms. Ellen House  
School Attorney  
Midland Independent School District  
615 West Missouri  
Midland, Texas 79701-5092

OR2009-10269

Dear Ms. House:

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# 350069.

The Midland Independent School District (the "district") received a request for information relating to a named former district coach, including any personnel records and his personnel file, his separation agreement, and e-mails between the district staff and the staff of another school district regarding the coach at issue.<sup>1</sup> You state you do not have information responsive to portions of the request.<sup>2</sup> You state you have released most of the responsive information. You state the district is redacting some information pursuant to the Family

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<sup>1</sup>You inform us the district requested and received clarification of the request. *See* Gov't Code §552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

<sup>2</sup>The Act does not require a governmental body to release information that did not exist when a request for information was received or create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232(a).<sup>3</sup> You claim the submitted information is excepted from disclosure under sections 552.101 and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the requestor agreed to exclude from his request the social security number of the coach at issue, as well as his transcripts. Thus, the coach's social security number and transcripts are not responsive to the present request for information. The district need not release non-responsive information in response to this request, and this ruling will not address that information.

Next, we address your assertion that portions of the submitted information are not responsive to the request. We note the request seeks personnel records and e-mails related to a named coach. The submitted information consists of personnel records and e-mails concerning this coach. We note a governmental body has a duty to make a good faith effort to relate the request to information that it holds. Open Records Decision No. 590 at 1 n. 1 (1991). We have reviewed the submitted information and conclude that it is all responsive to the request. We will therefore address your claimed exceptions for the entirety of 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 protected by other statutes, including section 21.355 of the Education Code which provides that "[a] document evaluating the performance of a teacher or administrator is confidential." Educ. Code § 21.355. This office has interpreted this section to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. See Open Records Decision No. 643 (1996). In that opinion, we concluded that 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. See *id.* In addition, the Third Court of Appeals has held a written reprimand constitutes an evaluation for purposes of section 21.355 because "it reflects the principal's judgment regarding [a teacher's] actions, gives corrective direction, and provides for further review." *North East Indep. Sch. Dist. v. Abbott*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.).

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<sup>3</sup>The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office 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 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>.

You contend the documents in Tabs 2 through 4 constitute evaluative information regarding a teacher and should therefore be withheld from disclosure under section 21.355. You state, and provide documentation showing, the coach in question held the appropriate certificate and was teaching at the time of the evaluation. Upon review, we conclude some of the submitted documents constitute evaluations subject to section 21.355 of the Education Code. Therefore, the district must withhold these documents, which we have marked, pursuant to section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. However, we find the remaining documents in Tabs 2 through 4 do not consist of evaluations or written reprimands as contemplated by section 21.355 of the Education Code or as interpreted by the court in *North East Independent School District*. Accordingly, the district may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.

Section 552.101 also encompasses chapter 411 of the Government Code. Criminal history record information ("CHRI") generated by the National Crime Information Center or by the Texas Crime Information Center is confidential under federal and state law. 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 at 7 (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 the Department of Public Safety ("DPS") maintains, except 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 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). Accordingly, the district must withhold the criminal history record information in Tab 5 under section 552.101 of the Government Code in conjunction with federal law and chapter 411 of the Government Code.

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:

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 and TECAT exam results of the teacher at issue. We note 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 in Tab 6 under section 552.101 of the Government Code in conjunction with section 21.048(c-1) of the Education Code.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy and excepts from public disclosure private information about an individual if the information (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 satisfied. *Id.* at 681-82. This office has found personal financial information not relating to a financial transaction between an individual and a governmental body is excepted from required public disclosure. *See* Open Records Decision Nos. 600 (1992) (employee's designation of retirement beneficiary, choice of insurance carrier, election of optional coverages, direct deposit authorization, forms allowing employee to allocate pre-tax compensation to group insurance, health care or dependent care), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). Upon review, we agree the information we have marked in Tab 7 is highly intimate or embarrassing and of no legitimate interest to the public. Accordingly, the district must withhold the information we have marked in Tab 7 under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find the remaining information in Tab 7 is not highly intimate or embarrassing. Therefore, none of the remaining information in Tab 7 may be withheld on the basis of common-law privacy.

Section 552.137 of the Government Code states "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. We agree the highlighted e-mail addresses in Tabs 2 and 4 fall within the scope of section 552.137. Additionally, we have marked other e-mail addresses in Tab 4 that are subject to this exception. The district must withhold the highlighted e-mail addresses, as well as the e-mail addresses we have marked, under section 552.137, unless the owner of a particular e-mail address has affirmatively consented to its public disclosure.

In summary, the evaluation information we have marked in Tabs 3 and 4 must be withheld pursuant to section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. The CHRI in Tab 5 must be withheld pursuant to section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code. The information we have marked in Tab 6 must be withheld under section 552.101 of the Government Code in conjunction with section 21.048(c-1) of the Education Code. The information we have marked in Tab 7 must be withheld pursuant to section 552.101 of the Government Code in conjunction with common-law privacy. The e-mail addresses you have marked, as well as the e-mail addresses we have marked, in Tabs 2 and 4 must be withheld under section 552.137 of the Government Code, unless their owners have affirmatively consented to their release. The remaining 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](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,



Karen E. Stack  
Assistant Attorney General  
Open Records Division

KES/eeg

Ref: ID# 350069

Enc. Submitted documents

c: Requestor  
(w/o enclosures)