ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 30, 2009

Ms. Laura C. Rodriguez
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P.O. Box 460606
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OR2009-16871

Dear Ms. Rodriguez:

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# 362435.

The Northside Independent School District (the "district"), which you represent, received a request for information regarding all teachers and administrators that have been placed on paid administrative leave during a specified time period.[1] You state the district will redact social security numbers pursuant to section 552.147 of the Government Code.[2] You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.108, and 552.136 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 her request the following: 1) home addresses, telephone numbers, family member information, personal cellular telephone numbers, and personal e-mail addresses of district employees; 2) vehicle identification

[1]You state the district received clarification from the requestor regarding the request. *See* Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used).

[2]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.

numbers; 3) driver's license numbers; 4) the names of sexual harassment or sexual assault victims; and 5) communications to Child Protective Services. Further, you have marked some of the submitted information as not responsive. Thus, any such information within the submitted documents is not responsive to the present request for information. This ruling does not address the public availability of any information that is not responsive to the request, and the district need not release this information to the requestor.

You inform this office that some of the requested information was the subject of a previous request received by the district, as a result of which this office issued Open Records Letter No. 2009-12418 (2009). We have no indication that there has been any change in the law, facts, or circumstances on which this previous ruling was based. We therefore conclude that the district must continue to rely on Open Records Letter No. 2009-12418 as a previous determination and withhold or release the previously ruled upon information in accordance with this ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

You state you have redacted portions of the responsive information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code. We note that the United States Department of Education Family Policy Compliance Office has informed this office that 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.[3] *See* 20 U.S.C. § 1232g(d). 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"). FERPA is generally not applicable to law enforcement records maintained for a law enforcement purpose. *See* 20 U.S.C. § 1232g(a)(4)(B)(ii); 34 C.F.R. §§ 99.3, 99.8. However, records created by a law enforcement entity for a law enforcement purpose that are maintained by a component of an educational agency or institution other than the law enforcement unit or that are used exclusively for a non-law enforcement purpose such as a disciplinary proceeding are not records of the law enforcement unit and, therefore, are education records subject to FERPA. *See id.* § 99.8(b)(2). You inform us that the responsive information is maintained in the employees' personnel files and used for purposes other than law enforcement. Because our office is prohibited from reviewing education records to determine whether appropriate redactions under FERPA have been made, we will not address the applicability of FERPA

[3]A 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.

to any of the responsive information. Such determinations under FERPA must be made by the educational authority in possession of the education records.

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, such as 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. 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. Open Records Decision No. 643 (1996). In that opinion, this office also concluded that a teacher is someone who is required to hold and does hold a certificate required under chapter 21 of the Education Code and is teaching at the time of his or her evaluation. *Id.* In addition, the Third Court of Appeals has concluded 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.).

You argue that a portion of the responsive information consists of written reprimands of educators subject to section 21.355. You inform us that the employees at issue are certified teachers. Based on your representations and our review, we conclude the information we have marked is confidential under section 21.355 of the Education Code. Therefore, the district must withhold the marked letters of reprimand under section 552.101 of the Government Code. However, you have failed to explain how the remaining information you seek to withhold consists of evaluations or written reprimands as contemplated by section 21.355 of the Education Code or as interpreted by *North East Indep. Sch. Dist.* 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.

Next, you claim a portion of the remaining responsive information is confidential under the Medical Practice Act (the "MPA"), Occ. Code §§ 151.001-165.160, which is also encompassed by section 552.101. Section 159.002 of the Occupations Code provides in pertinent 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.

Occ. Code § 159.002(a)-(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)-(c); *see also* Open Records Decision No. 598 (1991). We have marked information taken from a medical record that is subject to the MPA. Thus, this information may be released only in accordance with the MPA. *See* ORD 598. However, we find you have failed to show how the remaining information at issue constitutes a record of the identity, diagnosis, evaluation, or treatment of a patient by a physician for purposes of the MPA. Furthermore, we find you have not shown that this information was obtained directly from a medical record. Thus, the district may not withhold any portion of the remaining responsive information under section 552.101 on this basis.

You raise section 552.101 in conjunction with the Americans with Disabilities Act of 1990 (the "ADA") for some of the remaining responsive information. *See* 42 U.S.C. § 12101 *et seq*. Title I of the ADA provides that information about the medical conditions and medical histories of applicants or employees must be (1) collected and maintained on separate forms, (2) kept in separate medical files, and (3) treated as a confidential medical record. Information obtained in the course of a "fitness for duty examination" conducted to determine whether an employee is still able to perform the essential functions of his or her job is to be treated as a confidential medical record as well. *See* 29 C.F.R. § 1630.14(c); *see also* Open Records Decision No. 641 (1996). Furthermore, the federal Equal Employment Opportunity Commission (the "EEOC") has determined that medical information for the purposes of the ADA includes "specific information about an individual's disability and related functional limitations, as well as general statements that an individual has a disability or that an ADA reasonable accommodation has been provided for a particular individual." *See* Letter from Ellen J. Vargyas, Legal Counsel, EEOC, to Barry Kearney, Associate General Counsel, National Labor Relations Board, 3 (Oct. 1, 1997). Federal regulations define "disability" for the purposes of the ADA as "(1) a physical or mental impairment that substantially limits one or more of the major life activities of the individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment." 29 C.F.R. § 1630.2(g). The regulations further provide that physical or mental impairment means: (1) any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or (2) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. *See id.* § 1630.2(h). You generally assert some of the

remaining responsive information is subject to the ADA. However, upon review, we find you have failed to demonstrate the ADA is applicable to any portion of the information at issue. Thus, none of this information may be withheld under section 552.101 on that basis.

We note some of the remaining responsive information is subject to section 261.201 of the Family Code. Section 552.101 also encompasses section 261.201(a), which provides as follows:

> (a) [T]he 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:
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> > (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). Some of the remaining responsive information, which we have marked, consists of files, reports, records, communications, audiotapes, videotapes, or working papers used or developed in an investigation under chapter 261 of the Family Code. *See id.* § 261.001 (defining "abuse" and "neglect" for purposes of Fam. Code ch. 261); *see also id.* § 101.003(a) (defining "child" for purposes of this section 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). Therefore, this information is within the scope of section 261.201. You have not indicated that the district's police department has adopted a rule that governs the release of this type of information. Therefore, we assume that no such regulation exists. Given that assumption, we conclude the information we have marked is confidential pursuant to section 261.201 of the Family Code, and the district must withhold this information in its entirety under section 552.101 of the Government Code.

Section 552.101 also encompasses the doctrine of common-law privacy, which protects information that: (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. *See 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. *See id.* at 681-82. Section 552.102(a) of the Government Code 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). *In Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd

n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102(a) is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Bd.*, 540 S.W.2d 668 (Tex. 1976) for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101. Accordingly, we address the asserted section 552.102(a) claim in conjunction with the common-law privacy claim under section 552.101 of the Government Code.

This office has found that 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), 545 (1990). This office has also recognized that public employees may have a privacy interest in their drug test results. *See* Open Records Decision Nos. 594 (1991) (suggesting identification of individual as having tested positive for use of illegal drug may raise privacy issues), 455 at 5 (citing *Shoemaker v. Handel*, 619 F. Supp. 1089 (D.N.J. 1985), aff'd, 795 F.2d. 1136 (3rd Cir. 1986)). Generally, however, the public has a legitimate interest in information that relates to public employment and public employees. *See* Open Records Decision No. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs, but in fact touches on matters of legitimate public concern). Information pertaining to the work conduct and job performance of public employees is subject to a legitimate public interest and, therefore, generally not protected from disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute employee's private affairs), 455 (1987) (public employee's job performance or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employee), 423 at 2 (1984) (scope of public employee privacy is narrow).

Upon review, we find that some of the remaining responsive information, which we have marked, is highly intimate or embarrassing and of no legitimate public interest. Accordingly, the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, the remaining responsive information is either not highly intimate or embarrassing or is a matter of legitimate public interest. Therefore, the district may not withhold any of the remaining responsive information under either section 552.101 or 552.102 on the basis of common-law privacy.

You raise sections 552.108(a)(1) and 552.108(a)(2) for some of the remaining responsive information. Section 552.108(a)(1) of the Government Code excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor 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." Gov't Code § 552.108(a)(1). A governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.*

§§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). Section 552.108(a)(2) of the Government Code excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication [.]" Gov't Code § 552.108(a)(2). A governmental body claiming section 552.108(a)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. By its terms, section 552.108 applies only to a law enforcement agency or a prosecutor. You acknowledge that the records at issue are personnel documents maintained by the district for administrative purposes. Further, you have not provided a representation from a law enforcement entity that it asserts an interest in the information at issue and wants it to be withheld under section 552.108. Accordingly, you have failed to demonstrate that section 552.108 applies. *But see* Open Records Decision No. 474 (1987) (predecessor statute to section 552.108(a)(1) may be invoked by a proper custodian when a criminal incident is still under active investigation or prosecution and law enforcement entity represents that release of records will interfere with investigation or prosecution). Thus, the district may not withhold the remaining responsive information you have marked under section 552.108(a)(1). Further, the district may not withhold the remaining responsive information you have marked under section 552.108(a)(2) of the Government Code.

Section 552.130 of the Government Code excepts from disclosure information that relates to a motor vehicle operator's or driver's license or permit issued by an agency of this state or a motor vehicle title or registration issued by an agency of this state.[4] Gov't Code § 552.130(a)(1)-(2). Accordingly, the district must withhold the Texas license plate numbers we have marked under section 552.130.

You contend that a portion of the remaining responsive information is excepted from disclosure under section 552.136 of the Government Code. This section states that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." *Id.* § 552.136(b). An access device number is one that may be used to (1) obtain money, goods, services, or another thing of value; or (2) initiate a transfer of funds other than a transfer originated solely by paper instrument. *Id.* § 552.136(a). Thus, the district must withhold the information you have marked under section 552.136 of the Government Code.

In summary, with regard to the information that was previously requested and ruled on by this office, we conclude that the district must continue to withhold or release that information in accordance with Open Records Letter No. 2009-12418. The district must withhold the

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

information we have marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. The information taken from medical records, which we have marked, may be released only in accordance with the MPA. The district must withhold the information we have marked pursuant to section 552.101 in conjunction with section 261.201 of the Family Code. The district must withhold the Texas license plate numbers we have marked under section 552.130 of the Government Code. The district must withhold the information you have marked under section 552.136 of the Government Code. The remaining 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, toll free, at (888) 672-6787.

Sincerely,

Christina Alvarado
Assistant Attorney General
Open Records Division

CA/rl

Ref: ID# 362435

Enc. Submitted documents

cc: Requestor
(w/o enclosures)