



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 11, 2010

Mr. Fortunato G. Paredes
Escamilla & Poneck, Inc.
216 West Village Boulevard Suite 202
Laredo, Texas 78041

OR2010-03539

Dear Mr. Paredes:

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# 372747.

The Clint Independent School District (the "district"), which you represent, received a request for three categories of information relating to an employee of the district. You state that some of the requested information has been released. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.108, 552.117, and 552.130 of the Government Code.¹ We have considered the exceptions you claim and reviewed the information you submitted.

We first note that the submitted information includes education records. The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code, 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

¹Although you initially raised section 552.117, you have submitted no arguments in support of the applicability of this exception. *See* Gov't Code §§ 552.301(e)(1)(A) (governmental body must submit written comments stating why claimed exceptions apply to information at issue), .302. Nevertheless, we will address section 552.117, which is a mandatory exception that a governmental body may not waive. *See id.* §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

ruling process under the Act.² 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”). In this instance, the information submitted as Exhibit E includes education records in both redacted and unredacted form. Additionally, the information submitted as Exhibit B includes a transcript that the district appears to have obtained directly from the educational institution that issued it. Because our office is prohibited from reviewing education records to determine the applicability of FERPA, we will not address FERPA with respect to the submitted education records. Such determinations under FERPA must be made by the educational authority in possession of the education records.³ We will consider your exceptions to disclosure of the submitted information under the Act.

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 exception encompasses information that other statutes make confidential. Medical records are confidential under the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides in 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 determined that in governing access to a specific subset of information, the MPA prevails over the more general provisions of the Act. *See* Open Records Decision No. 598 (1991). You contend that the information submitted as Exhibit F is confidential under the MPA. We agree that Exhibit F consists of medical records concerning a child. A minor’s medical records may only be released on the parent’s or legal guardian’s signed, written consent, provided that the consent specifies (1) the

²A copy of this letter may be found on the attorney general’s website, <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

³In the future, if the district does obtain parental consent to submit unredacted education records and seeks a ruling from this office on the proper redaction of those education records in compliance with FERPA, we will rule accordingly.

information to be covered by the release, (2) the reasons or purposes for the release, and (3) the person to whom the information is to be released. *See* Occ. Code §§ 159.004, 159.005. 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). Therefore, Exhibit F must be withheld under section 159.002 of the MPA, unless the district receives the required consent for release under sections 159.004 and 159.005.

Section 552.101 of the Government Code also encompasses 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 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 determined that for the purposes of section 21.355, the word “teacher” means a person who is required to and does in fact hold a teaching certificate under subchapter B of chapter 21 of the Education Code or a school district teaching permit under section 21.055 and who is engaged in the process of teaching, as that term is commonly defined, at the time of the evaluation. *See* ORD 643 at 4. You state that the employee to whom the information submitted as Exhibit C pertains is a teacher who holds a teaching certificate under chapter 21 of the Education Code. Based on your representation and our review of the information at issue, we conclude that the information in Exhibit C is generally confidential under section 21.355 of the Education Code. Section 21.352(c) of the Education Code provides, however, that “[e]ach teacher is entitled to receive a written copy of the evaluation on its completion.” Educ. Code § 21.352(c); *see id.* § 21.352(a) (prescribing appraisal process and performance criteria each school district shall use). In this instance, the requestor is an attorney for the teacher to whom the information in Exhibit C pertains. Therefore, to the extent the information in Exhibit C consists of evaluations of the type that are contemplated by section 21.352, the requestor has a right of access under section 21.352(c), and any such information in Exhibit C must be released. To the extent the requestor does not have a right of access under section 21.352(c), the district must withhold the information in Exhibit C under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.

You also claim section 552.101 in conjunction with section 261.201 of the Family Code, which provides in part:

- (a) [T]he following information is confidential, is not subject to public release under [the Act] 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 [chapter 261 of the Family Code] 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 [chapter 261 of the Family Code] or in providing services as a result of an investigation.

Fam. Code § 261.201(a); *see id.* § 261.001(1), (4) (defining “abuse” and “neglect” for purposes of Fam. Code ch. 261). You contend that the information submitted as Exhibit E is confidential under section 261.201. You state that the information in question pertains to alleged misconduct involving the employee who is the subject of this request for information and a student of the district. We note that a school district is not an agency that is authorized to conduct an investigation under chapter 261 of the Family Code. *See id.* § 261.103. Pursuant to section 552.303 of the Act, we requested further explanation of the district’s claim under section 261.201.⁴ You inform us that some of the information in Exhibit E was reported to the Child Protective Services Division (“CPS”) of the Texas Department of Family and Protective Services. *See id.* § 261.201(a)(1). You state that CPS conducted an investigation of the alleged misconduct. *See id.* § 261.406(a). You also inform us that the Horizon City Police Department (the “department”) conducted an investigation of the alleged misconduct. *See id.* § 261.406(c). Additionally, you have provided a copy of a subpoena in which the district attorney for the 34th Judicial District requests investigation records maintained by the district that pertain to the employee accused of the alleged misconduct. Based on your representations, the subpoena, and our review of the information at issue, we conclude that the information in Exhibit E was used or developed in investigations under chapter 261 of the Family Code, so as to fall within the scope of section 261.201(a).⁵ We therefore conclude that the district must withhold Exhibit E under section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code. *See Open Records Decision No. 440 at 2 (1986) (addressing predecessor statute).*

Section 552.102(b) of the Government Code excepts from 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). We agree that the transcripts submitted as Exhibit B fall within the scope of section 552.102(b). We note, however, that this exception

⁴*See* Gov’t Code § 552.303(c)-(d) (if attorney general determines that information in addition to that required by Gov’t Code § 552.301 is necessary to render decision, written notice of that fact shall be given to governmental body and requestor, and governmental body shall submit necessary additional information to attorney general not later than seventh calendar day after date of receipt of notice).

⁵As we are able to make this determination, we need not address your claim for Exhibit E under section 552.108 of the Government Code.

protects personal privacy. Thus, the requestor, as an attorney for the employee whose transcripts are at issue, has a right of access to the transcripts under section 552.023 of the Government Code.⁶ *See id.* § 552.023. Therefore, Exhibit B may not be withheld from this requestor under section 552.102(b) of the Government Code and must be released. *See* Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself).

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code §§ 552.117, .024. This exception also protects personal privacy. Thus, the requestor also has a right of access to his client's social security number, which appears in Exhibit D, under section 552.023. Therefore, the social security number may not be withheld from this requestor under section 552.117 of the Government Code and must be released. *See id.* § 552.023; ORD 481 at 4.⁷

Section 552.130 of the Government Code excepts from disclosure information relating to a motor vehicle operator's or driver's license or permit issued by an agency of this state. *See* Gov't Code § 552.130(a)(1). Because this exception also protects personal privacy, the requestor has a right of access to his client's Texas driver's license information under section 552.023. Therefore, the copy of a Texas driver's license in Exhibit D may not be withheld from this requestor under section 552.130 of the Government Code and must be released. *See id.* § 552.023; ORD 481 at 4.

In summary: (1) Exhibit F must be withheld under section 159.002 of the MPA, unless the district receives the required consent for release under sections 159.004 and 159.005; (2) except to the extent the requestor has a right of access under section 21.352(c) of the Education Code, Exhibit C must be withheld under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code; and (3) Exhibit E must be withheld under section 552.101 in conjunction with section 261.201(a) of the Family Code.

⁶Section 552.023 provides in part that "[a] person or a person's authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person's privacy interests." Gov't Code § 552.023(a).

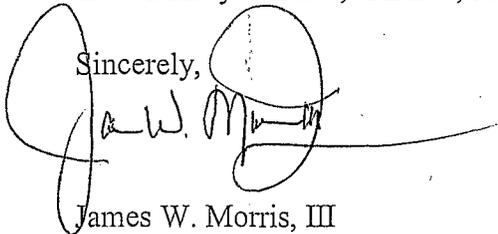
⁷We also note that, although section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act, the requestor has a right to his client's social security number. *See generally* Gov't Code § 552.023(b) (governmental body may not deny access to person to whom information relates, or that person's representative, solely on grounds that information is considered confidential by privacy principles).

The rest of the submitted information must be released.⁸ This ruling does not address the applicability of FERPA to the submitted information. Should the district determine that all or portions of the submitted information consist of "education records" that must be withheld under FERPA, the district must dispose of that information in accordance with FERPA, rather than the Act.

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,

A handwritten signature in black ink, appearing to read "James W. Morris, III". The signature is written in a cursive style with a large initial "J" and "M".

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/cc

Ref: ID# 372747

Enc: Submitted documents

c: Requestor
(w/o enclosures)

⁸Although the district would ordinarily be required to withhold some of the remaining information to protect the privacy of the employee to whom the information pertains, this requestor has a right of access to that information as the employee's attorney. Should the district receive another request for this same information from a person who would not have a right of access to the employee's private information, the district should resubmit this information and request another ruling. *See* Gov't Code §§ 552.301(a), .302.