



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 23, 2010

Mr. John A. Kazen  
Kazen, Meurer & Pérez, L.L.P.  
P.O. Box 6237  
Laredo, Texas 78042-6237

OR2010-05844

Dear Mr. Kazen:

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# 376896.

The Laredo Independent School District (the "district"), which you represent, received a request for all Level I, II, or III grievance pending with the district and any attached documents submitted by the complaining party. You claim that the submitted information is excepted from disclosure under section 552.101 of the Government Code. You also state that the submitted information may implicate the privacy interests of third parties. Accordingly, you state that you informed the third parties of the request and of their right to submit arguments to this office as to why the submitted information should not be released.<sup>1</sup> See Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the exception you claim and reviewed the submitted information.

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 federal 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 ruling process under the Act.<sup>2</sup> Consequently, state and local educational authorities that

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<sup>1</sup>We note that, as of the date of this letter, we have not received any comments from any of the third parties.

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

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"). You have submitted, among other things, unredacted education records for our review. Because our office is prohibited from reviewing the submitted education records to determine the applicability of FERPA, we will not address FERPA with respect to those records. See 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.3. Such determinations under FERPA must be made by the educational authority in possession of the education record.<sup>3</sup>

Section 552.101 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 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 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* include 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. In addition, this office has found that some kinds of medical information or information indicating disabilities or specific illnesses is protected by 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). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. 540 S.W.2d at 681-82. We note that this office has stated, in numerous decisions, that information pertaining to the work conduct, job performance, and qualifications 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 (public employee's job performance does not generally constitute employee's private affairs), 455 (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 conclude that a portion of the submitted information, which we have marked, is both intimate and embarrassing and of no legitimate public interest. Therefore, the district must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. However, because the remaining information pertains to the work conduct of district employees, we find that

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<sup>3</sup>In the future, if the district does obtain 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.

it is of legitimate public interest and may not be withheld under section 552.101 based on common-law privacy.

Next, we note that some of the submitted documents may be confidential pursuant to section 21.355 of the Education Code. Section 552.101 of the Government Code also encompasses information made confidential by other statutes, such as section 21.355 of the Education Code, which provides that “[a] document evaluating the performance of a teacher or administrator is confidential.” Additionally, the court has concluded that 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 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 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. *Id.*

You do not indicate whether the individuals whose evaluations are at issue held teacher’s certificates or permits under chapter 21 of the Education Code and were performing the functions of teachers at the time of their respective evaluations. Therefore we must rule conditionally. To the extent the individuals in question did hold teacher’s certificates or permits and were functioning as teachers at the time of their respective evaluations, then the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. To the extent any individual in question did not hold a teacher’s certificate or permit or was not functioning as a teacher at the time of the evaluation, then the information pertaining to that individual is not confidential under section 21.355 of the Education Code and may not be withheld under section 552.101 of the Government Code.

We note that the remaining information includes the cellular telephone number of a district police officer.<sup>4</sup> 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). We note section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). Section 552.117(a)(2) applies to peace officers as defined by

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<sup>4</sup>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).

article 2.12 of the Code of Criminal Procedure. Thus, if the cellular telephone service of the district police officer was paid for with his own funds, the district must withhold the cellular telephone number we have marked under section 552.117(a)(2) of the Government Code.

We note that the remaining information contains information that may be subject to section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) excepts from disclosure the current and former 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 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. 530 at 5 (1989). Pursuant to section 552.117(a)(1), the district must withhold the home address, telephone number, and social security number of a current or former employee of the district who elected, prior to the district's receipt of the request for information, to keep such information confidential. You have not informed us whether or not the employees whose information is at issue elected to withhold their personal information prior to the district's receipt of the request for information. Therefore, if the employees at issue timely elected to withhold their personal information, the district must withhold the information we have marked in the remaining information pursuant to section 552.117(a)(1) of the Government Code.<sup>5</sup> If any of the employees did not timely elect to withhold their personal information, then the district may not withhold their marked information under section 552.117(a)(1) of the Government Code.

Section 552.137 of the Government Code provides that "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). The e-mail addresses we have marked are not of the type specifically excluded by section 552.137(c). Accordingly, the marked e-mail addresses must be withheld under section 552.137 of the Government Code, unless the owners of the e-mail addresses consent to their disclosure.<sup>6</sup>

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<sup>5</sup>We note that, regardless of the applicability of section 552.117 of the Government Code, 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. Gov't Code § 552.147.

<sup>6</sup>We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including the e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

In summary, the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. To the extent the individuals in question did hold teacher's certificates or permits and were functioning as teachers at the time of their respective evaluations, then the district must withhold the documents we have marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. If the cellular telephone service of the district police officer was paid for with his own funds, the district must withhold the cellular telephone number we have marked under section 552.117(a)(2) of the Government Code. If the employees at issue timely elected to withhold their personal information, the district must withhold the information we have marked in the remaining information pursuant to section 552.117(a)(1) of the Government Code. The marked e-mail addresses must be withheld under section 552.137 of the Government Code, unless the owners of the e-mail addresses consent to their disclosure. 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, toll free, at (888) 672-6787.

Sincerely,



Laura Ream Lemus  
Assistant Attorney General  
Open Records Division

LRL/jb

Ref: ID# 376896

Enc. Submitted documents

c: Requestor  
(w/o enclosures)