



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 28, 2010

Mr. James W. Deatherage  
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For Irving Independent School District  
Suite 518, Lock Box 6060  
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Irving, Texas 75062

ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

OR2010-06109

Dear Mr. Deatherage:

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# 377428.

The Irving Independent School District (the "district"), which you represent, received a request for complaints from September 2008 to the present against a named former district employee, the former employee's employment application, and information related to the former employee's discharge.<sup>1</sup> You state some information has been released to the requestor. You claim that portions of the submitted information are excepted from disclosure under section 552.101 of the Government Code. You also indicate the submitted information may implicate the interests of the individual named in the request, and that you have notified this individual of his right to submit arguments to this office as to why the requested information should not be released. *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 have also received and considered comments from the requestor and a representative of the former employee.

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<sup>1</sup>We note the district sought and received clarification of the information requested. *See Gov't Code § 552.222* (stating that if information requested is unclear to governmental body or if a 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).

Initially, we must address the district's obligations under the Act. Section 552.301 of the Government Code describes the procedural obligations placed on a governmental body that receives a written request for information it wishes to withhold. Pursuant to section 552.301(b) of the Government Code, the governmental body must request a ruling from this office and state the exceptions to disclosure that apply within ten business days after receiving the request. *See* Gov't Code § 552.301(b). Pursuant to section 552.301(e) of the Government Code, the governmental body is required to submit to this office within fifteen business days of receiving the request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See id.* § 552.301(e). In this instance, you state the district received the request for information on January 11, 2010, sought clarification of the request on January 15, 2010, and received clarification from the requestor on January 25, 2010. Accordingly, as we have no indication that the district acted in bad faith in seeking clarification in this case, we consider the district's ten-day period for requesting a decision under section 552.301(b) to have commenced on January 25, 2010, the date of the district's receipt of the requestor's response to the request for clarification. *See City of Dallas v. Abbott*, No. 07-0931, 2010 WL 571972, at \*3 (Tex. February 19, 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed). However, you did not request a ruling from this office until February 19, 2010, or submit a copy or representative sample of the information requested until February 23, 2010. Thus, we find the district failed to comply with the requirements of section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption the information is public and must be released. Information presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). Normally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third-party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). Because section 552.101 can provide a compelling reason to overcome the presumption of openness and third-party interests are at stake, we will address the submitted arguments.

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. 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. *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. *See id.* In addition, the Third Court of Appeals has held that 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.). The district contends that the information in Exhibits E-2, E-3, and E-4 consists of evaluative information related to a teacher that is confidential under section 21.355. Further, the former employee’s representative asserts that the information in Exhibit E-1 also constitutes an evaluation under section 21.355. Based on the submitted arguments and our review, we conclude that the information in Exhibits E-2, E-3, and E-4 constitutes teacher evaluations made confidential by section 21.355 of the Education Code. Therefore, the district must withhold this marked information from disclosure pursuant to section 552.101 of the Government Code. However, we conclude that the information in E-1 does not constitute an evaluation of the individual’s performance as a teacher for the purposes of section 21.355. Thus, the district may not withhold the information in Exhibit E-1 under section 552.101 on that basis.

We understand the former employee’s representative to claim the information in Exhibit E-5 is excepted under section 552.101 of the Government Code in conjunction with common-law privacy. 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. This section encompasses information protected by 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, 683-85 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included 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. The public, however, has a legitimate interest in information that relates to public employment and public employees. *See* Open Records Decisions Nos. 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); 542 (1990); 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees); 444 at 5-6 (1986) (public has legitimate interest in knowing reasons

for dismissal, demotion, promotion, or resignation of public employees); 423 at 2 (1984) (scope of public employee privacy is narrow). We note that the information at issue relates to a settlement agreement between the district and a former district employee that is of legitimate public interest. Further, we find that no portion of the information at issue constitutes highly intimate or embarrassing information for the purposes of common-law privacy. Therefore, we conclude none of the information in Exhibit E-5 may be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

The former employee's representative also asserts the information in Exhibit E-5 is excepted from disclosure under section 552.103 of the Government Code. Section 552.103 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions that are intended to protect the interests of third parties. *See* Open Records Decision Nos. 542 (statutory predecessor to section 552.103 does not implicate the rights of a third party), 522 (1989) (discretionary exceptions in general). The district does not raise section 552.103 against the disclosure of the information in Exhibit E-5. Thus, we do not address the former employee's argument under section 552.103 of the Government Code.

In summary, the district must withhold the information in Exhibits E-2, E-3, and E-4 under section 552.101 of the Government Code in conjunction with section 21.355 of the Education 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](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,



Jennifer Burnett  
Assistant Attorney General  
Open Records Division

JB/dls

Ref: ID# 377428

Enc: Submitted documents

c: Requestor  
(w/o enclosures)

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