



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 2, 2010

Ms. Elizabeth A. Donley
Attorneys for Carrollton-Farmers Branch Independent School District
Law Offices of Robert E. Luna, P.C.
4411 North Central Expressway
Dallas, Texas 75205

OR2010-07986

Dear Ms. Donley:

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# 381400.

The Carrollton-Farmers Branch Independent School District (the "district"), which you represent, received a request for all e-mails to or from a named district employee during a specified time period. You state you will release some information to the requestor. You claim a portion of the requested information is not subject to the Act. In the alternative, and for e-mails which you agree are subject to the Act, you claim portions of this information are excepted from disclosure under sections 552.101, 552.117, and 552.137 of the Government Code. We have considered your arguments and reviewed the submitted representative sample of information.¹ We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, you assert some of the submitted e-mails are not subject to the Act. The Act applies to "public information," which is defined in section 552.002 of the Government Code as:

information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

(1) by a governmental body; or

¹We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

- (2) for a governmental body and the governmental body owns the information or has a right of access to it.

Id. § 552.002. Thus, virtually all of the information in a governmental body's physical possession constitutes public information and, thus, is subject to the Act. *Id.* § 552.002(a)(1); *see* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). The Act also encompasses information that a governmental body does not physically possess, if the information is collected, assembled, or maintained for the governmental body, and the governmental body owns the information or has a right of access to it. Gov't Code § 552.002(a)(2); *see* Open Records Decision No. 462 at 4 (1987).

You inform us a portion of the submitted information consists of personal e-mails that do not relate to the transaction of official district business. You state these e-mails represent the employee's personal use of his district e-mail account under the district's electronic communications policy. Based on your representations and our review, we agree most of the submitted information does not constitute "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business" by or for the district. *See* Gov't Code § 552.021; *see also* Open Records Decision No. 635 (1995) (statutory predecessor not applicable to personal information unrelated to official business and created or maintained by state employee involving *de minimis* use of state resources). Therefore, this information is not subject to the Act and need not be released in response to this request. However, upon review, we find some of the e-mails you assert are not subject to the Act were collected or assembled or are maintained in connection with the transaction of official district business; thus, these e-mails constitute "public information" as defined by section 552.002(a). Accordingly, these e-mails, which we have marked, are subject to the Act, and we will therefore consider your arguments against disclosure of this information.

We note a portion of the submitted information, which we have marked, is not responsive to the instant request for information because it relates to information created after the date the request was received. This ruling does not address the public availability of any information that is not responsive to the request, and the district is not required to release that information in response to this request.

Next, we note you have redacted student-identifying information in the submitted information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g. 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 or an adult student's consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act.² Consequently, state and local educational authorities that receive a request for education records from a member

² 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>.

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

Next, you acknowledge, and we agree, the district failed to submit some of the responsive information within the statutory time period prescribed by section 552.301(e) of the Government Code. *See* Gov’t Code § 552.301(e). Pursuant to section 552.302 of the Government Code, a governmental body’s failure to comply with the requirements of section 552.301 results in the legal presumption the requested information is public and must be released, unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *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, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *see also* Open Records Decision No. 630 (1994). A compelling reason exists when third-party interests are at stake or when information is confidential by law. Open Records Decision No. 150 (1977). Because sections 552.101, 552.117, and 552.137 can provide compelling reasons to withhold information, we will consider your arguments under these exceptions.

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 that other statutes make confidential, such as section 825.507 of the Government Code, which provides in relevant part:

- (a) Records of a participant that are in the custody of the retirement system or of an administrator, carrier, attorney, consultant, or governmental agency acting in cooperation with or on behalf of the retirement system are confidential and not subject to public disclosure in a form that would identify an individual and are exempt from the public access provisions of Chapter 552, except as otherwise provided by this section[.]

(c) The records of a participant remain confidential after release to a person as authorized by this section. This section does not prevent the disclosure or confirmation, on an individual basis, of the status or identity of a participant as a member, former member, retiree, deceased member or retiree, beneficiary, or alternate payee of the retirement system.

...

(g) In this section, "participant" means a member, former member, retiree, annuitant, beneficiary, or alternate payee of the retirement system.

Gov't Code § 825.507(a), (c), (g). You state portions of the remaining responsive information, which you have marked, identify a participant of the retirement system and discuss records related to the retirement system. We note section 825.507(c) does not prevent disclosure of the identity of a participant of the retirement system. *See id.* § 825.507(c). Upon review, we find you have failed to demonstrate the information you have marked consists of records of participants in the retirement system that are in the custody of the district in cooperation with the retirement system. Accordingly, we have no basis to conclude the information at issue is confidential under section 825.507 of the Government Code, and the district may not withhold it on that basis under section 552.101 of the Government Code.

Section 552.101 also incorporates 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. *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. The types of information considered intimate or 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. Additionally, this office has found 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) (information pertaining to illness from severe emotional and job-related stress protected by common-law privacy), 455 (1987) (information pertaining to prescription drugs, specific illnesses, operations and procedures, and physical disabilities protected from disclosure). You assert portions of the remaining information are subject to common-law privacy. Upon review, we find a portion of the remaining information, which we have marked, is highly intimate or 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, we find none of the remaining information is highly intimate or embarrassing and not of legitimate public interest, and the district may not withhold any portion of the remaining information on that basis.

Section 552.117(a)(1) of the Government Code excepts from disclosure the 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 that this information be kept confidential under section 552.024. Gov't Code § 552.117. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is received. *See* Open Records Decision No. 530 at 5 (1989). We note section 552.117 also encompasses personal cellular telephone numbers, provided that 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 mobile telephone numbers paid for by governmental body and intended for official use). You provide a copy of the employee's election of privacy form in which the employee timely requested confidentiality of his home address and home telephone number under section 552.024. We note the information being released contains the cellular telephone number of another district employee. You do not indicate whether the other employee elected to keep his personal information confidential prior to the district receiving the instant request for information. We must therefore rule conditionally. If the employee whose personal information is at issue timely elected to withhold such information under section 552.024, the district must withhold the cellular telephone number you have highlighted in pink under section 552.117(a)(1) of the Government Code; however, the district may only withhold the cellular telephone number if the cellular service was paid for with the employee's own funds. If the employee did not timely elect confidentiality, the district may not withhold this information under section 552.117(a)(1). We further note, and you acknowledge, the election of privacy form does not provide for the withholding of information that reveals whether an employee has family members. Therefore, the district may not withhold any remaining information under section 552.117(a)(1).

You raise section 552.137 of the Government Code for the e-mail addresses you have highlighted in yellow. Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). Gov't Code § 552.137(a)-(c). Subsection 552.137(c)(1) states that subsection 552.137(a) does not apply to an e-mail address "provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent[.]" *Id.* § 552.137(c)(1). Some of the e-mail addresses you have highlighted were provided to the district by a person who has a contractual relationship with the district, and we have marked these addresses for release. The district must withhold the remaining e-mail addresses you have highlighted in yellow, under section 552.137 of the Government Code, unless the owners consent to their release.³

³ We note, and you acknowledge, 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 e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

In summary, a portion of the submitted information consists of e-mails that are not subject to the Act, and the district need not release this information. The district must release the e-mails we have marked. The district must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. The department must withhold the cellular telephone number you have highlighted in pink under section 552.117(a)(1) of the Government Code if the employee whose personal information is at issue timely elected to withhold such information under section 552.024 and if the cellular service was paid for with the employee's own funds. Except for those e-mail addresses we have marked for release, the district must withhold the e-mail addresses you have highlighted in yellow under section 552.137 of the Government Code, unless the owners consent to their release.

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,



Mack T. Harrison
Assistant Attorney General
Open Records Division

MTH/rl

Ref: ID# 381400

Enc. Submitted documents

c: Requestor
(w/o enclosures)