



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 23, 2010

Ms. Betsy Hall Bender  
Attorney at Law  
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P.O. Box 26715  
Austin, Texas 78755-0715

ATTORNEY GENERAL OF TEXAS

OR2010-09261

Dear Ms. Bender:

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# 384608.

The Schertz-Cibolo-Universal City Independent School District (the "district"), which you represent, received a request for records created by the district showing employees who have been detected to have criminal records through fingerprint related criminal checks.<sup>1</sup> You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

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 "[a] document evaluating the performance of a teacher or administrator is confidential." Educ. Code § 21.355. In addition, the court 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.*

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<sup>1</sup>We note the district received clarification of the request from the requestor. See Gov't Code § 552.222(b) (stating that if information requested is unclear, governmental body may ask requestor to clarify or narrow request).

*Abbott*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.). 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 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.*

You represent the named district employee in Exhibit B is a certified teacher. You have provided documentation showing the employee at issue held a teaching certificate under subchapter B of chapter 21 of the Education Code at the time of the evaluation. Upon review, we agree some of the submitted information, which we have marked, constitutes a teacher evaluation for purposes of section 21.355. Thus, this information must be withheld under section 552.101 in conjunction with section 21.355. However, you have failed to demonstrate how the remaining information in Exhibit B constitutes an evaluation as contemplated by section 21.355. Accordingly, the district may not withhold any of the remaining information in Exhibit B under section 552.101 in conjunction with section 21.355.

You also raise section 552.101 in conjunction with confidentiality provisions found in chapter 55 of the Code of Criminal Procedure. Articles 55.01 through 55.05 of the Code of Criminal Procedure provide for the expunction of criminal records in certain limited circumstances. Article 55.03 prescribes the effect of an expunction order and provides:

When the order of expunction is final:

- (1) the release, maintenance, dissemination, or use of the expunged records and files for any purpose is prohibited;
- (2) except as provided in Subdivision (3) of this article, the person arrested may deny the occurrence of the arrest and the existence of the expunction order; and
- (3) the person arrested or any other person, when questioned under oath in a criminal proceeding about an arrest for which the records have been expunged, may state only that the matter in question has been expunged.

Crim. Proc. Code art. 55.03. Article 55.04 imposes sanctions for violations of an expunction order and provides in part:

Sec. 1. A person who acquires knowledge of an arrest while an officer or employee of the state or of any agency or other entity of the state or any political subdivision of the state and who knows of an order expunging the

records and files relating to that arrest commits an offense if he knowingly releases, disseminates, or otherwise uses the records or files.

*Id.* art. 55.04, § 1. This office has determined that the expunction statute prevails over the Act. *See* Open Records Decision No. 457 at 2 (1987) (governmental body prohibited from releasing or disseminating arrest records subject to expunction order, as “those records are not subject to public disclosure under the [Act]”). You contend that the records submitted as Exhibit B may contain information that is the subject of an expunction order. You seek to withhold that information under article 55.03 of the Code of Criminal Procedure. The submitted information includes a letter from the attorney for the employee at issue stating that he may apply for an expunction on behalf of his client in the future. However, you do not inform this office that an expunction order was ever granted on behalf of the employee at issue. Furthermore, you have not provided this office with a copy of an expunction order, nor did you mark specific information that you contend is subject to the expunction order. Therefore, the district may not withhold any portion of the submitted information under section 552.101 in conjunction with article 55.03 of the Code of Criminal Procedure.

Section 552.101 of the Government Code also encompasses chapter 411 of the Government Code. Chapter 411 authorizes the Texas Department of Public Safety (“DPS”) to compile and maintain criminal history record information (“CHRI”) from law enforcement agencies throughout the state and to maintain access for authorized persons to federal criminal history records. *See* Gov’t Code §§ 411.082, .087. CHRI is defined as “information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions.” *Id.* § 411.082(2).

Section 411.0845 of the Government Code, recently amended by the 81<sup>st</sup> Legislature, provides in pertinent part as follows:

(a) [DPS] shall establish an electronic clearinghouse and subscription service to provide criminal history record information to a particular person entitled to receive criminal history record information and updates to a particular record to which the person has subscribed under this subchapter.

(b) On receiving a request for criminal history record information from a person entitled to such information under this subchapter, [DPS] shall provide through the electronic clearinghouse:

(1) the criminal history record information reported to [DPS] or the Federal Bureau of Investigation relating to the individual who is the subject of the request; or

(2) a statement that the individual who is the subject of the request does not have any criminal history record information reported to [DPS] or the Federal Bureau of Investigation.

...

(d) [DPS] shall ensure that the information described by Subsection (b) is provided only to a person otherwise entitled to obtain criminal history record information under this subchapter. Information collected under this section is confidential and is not subject to disclosure under [the Act].

(e) A person entitled to receive criminal history record information under this section must provide [DPS] with the following information regarding the person who is the subject of the criminal history record information requested:

(1) the person's full name, date of birth, sex, and social security number, and the number assigned to any form of unexpired identification card issued by this state or another state, the District of Columbia, or a territory of the United States that includes the person's photograph;

(2) a recent electronic digital image photograph of the person and a complete set of the person's fingerprints as required by [DPS]; and

(3) any other information required by [DPS].

*Id.* § 411.0845(a), (b), (d), (e). Pursuant to section 22.083(a-1) of the Education Code, a school district is authorized to obtain this CHRI from DPS. Educ. Code § 22.083(a-1)(1); *see also* Gov't Code § 411.097.

You claim Exhibit C is excepted from disclosure under section 411.0845(d). However, we find the district has failed to demonstrate how Exhibit C constitutes CHRI DPS provided to the district through its electronic clearinghouse. Consequently, Exhibit C is not confidential under section 411.0845(d) and may not be withheld under section 552.101 on such basis.

Next, you claim Exhibit C is excepted from disclosure pursuant to section 552.102 of the Government Code. Section 552.102(a) excepts from public 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). Section 552.102 is applicable to information that relates to public officials and employees. *See* Open Records Decision No. 327 at 2 (1982) (anything relating to employee's employment and its terms constitutes information relevant to person's employment relationship and is part of employee's personnel file). The

privacy analysis under section 552.102(a) is the same as the common-law privacy standard under section 552.101. *See Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.) (addressing statutory predecessor).

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. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 683 (Tex.1976). However, there is a legitimate public interest in the qualifications of a public employee and how that employee performs as a public servant and satisfies employment conditions. *See generally* Open Records Decision Nos. 470 at 4 (1987) (public has legitimate interest in job 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). Upon review, we find that the information in Exhibit C is not highly intimate or embarrassing or is of legitimate public concern. Accordingly, the district may not withhold any of the information in Exhibit C under section 552.102(a) of the Government Code.

Section 552.117(a)(1) 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 this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code §§ 552.117(a)(1), .024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). The district may only withhold information under section 552.117(a)(1) on behalf of a former or current employee who made a request for confidentiality under section 552.024 prior to the date on which the request for information was made. We have marked information that may be subject to section 552.117. You do not indicate whether the employee at issue elected to keep her personal information confidential prior to the district's receiving the instant request for information. We must therefore rule conditionally. If the employee whose personal information is at issue in Exhibit C timely elected to withhold such information under section 552.024, the district must withhold the marked information under section 552.117(a)(1) of the Government Code. If the employee did not timely elect confidentiality, the district may not withhold the marked information under section 552.117(a)(1), and this information must be released.

We note that 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[.]”<sup>2</sup> Gov’t Code § 552.130(a)(1). Accordingly, the district must withhold the Texas driver’s license number we have marked in Exhibit C pursuant to section 552.130.<sup>3</sup>

In summary, the district must withhold the information we marked in Exhibit B under section 552.101 in conjunction with section 21.355. If the employee whose personal information is at issue in Exhibit C timely elected to withhold such information under section 552.024, the district must withhold the marked information under section 552.117(a)(1) of the Government Code. The district must withhold the Texas driver’s license number we have marked in Exhibit C pursuant to section 552.130. 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,



Tamara Wilcox  
Assistant Attorney General  
Open Records Division

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<sup>2</sup>The Office of the Attorney General will raise a mandatory exception, such as section 552.130, on behalf of a governmental body, but ordinarily will not raise other exceptions. See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

<sup>3</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 a Texas driver’s license number under section 552.130 of the Government Code, without the necessity of requesting an attorney general decision.

Ref: ID# 384608

Enc. Submitted documents

c: Requestor  
(w/o enclosures)