



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 27, 2010

Ms. Amanda M. Bigbee
General Counsel
Keller Independent School District
350 Keller Parkway
Keller, Texas 76248

OR2010-11285

Dear Ms. Bigbee:

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# 388276.

The Keller Independent School District (the "district") received a request for (1) a named employee's personnel file and (2) copies of any insurance policies that could cover injuries to students. You state that some of the requested information either has been or will be released. You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.102 of the Government Code. We have considered the exceptions you claim and reviewed the information you submitted.

We first note that 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 ruling process under the Act.¹ 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

¹A copy of this letter is posted on the attorney general's website at <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

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 submitted information includes redacted education records. 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.² 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. You raise section 552.101 in conjunction with section 21.355 of the Education Code, which 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). We have 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. Additionally, a court has concluded that a written reprimand constitutes an evaluation for the 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.” *See North East Indep. Sch. Dist. v. Abbott*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.).

You contend that some of the submitted information consists of confidential evaluations of the named employee. You do not inform us, however, whether the employee held a teaching certificate or permit under chapter 21 of the Education Code and was engaged in teaching at the time of the evaluations. *See* ORD 643 at 4. Accordingly, we must rule conditionally. Thus, we conclude that 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 that the employee concerned held a teaching certificate or permit under chapter 21 of the Education Code and was engaged in the process of teaching when the marked information was created. But to the extent that the employee either did not hold a teaching certificate or permit under chapter 21 or was not engaged in teaching when the information was created, we conclude that the marked information is not confidential under section 21.355 and may not be withheld on that basis under section 552.101. Although you also seek to withhold other information under section 21.355, we find that you

²In 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.

have not demonstrated that the rest of the information at issue evaluates a teacher for purposes of section 21.355. We therefore conclude that the district may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.

Next, we address your claim under section 552.102 of the Government Code. Section 552.102(a) excepts from 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(a) protects information relating to public officials and employees. The privacy analysis under section 552.102(a) is the same as the two-part test for common-law privacy under section 552.101 and *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976). 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 to Gov't Code § 552.102). Therefore, we will address your privacy claim under section 552.101.

Common-law privacy protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. See *Indus. Found.*, 540 S.W.2d at 685. To demonstrate the applicability of common-law privacy, both elements of the test must be established. See *id.* at 681-82. This office has concluded that a compilation of an individual's criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person, and is generally not of legitimate concern to the public. Cf. *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989) (when considering prong regarding individual's privacy interest, court recognized distinction between public records found in courthouse files and local police stations and compiled summary of information and noted that individual has significant privacy interest in compilation of one's criminal history).

You contend that the information submitted as Exhibit C is protected by common-law privacy. You state that the information in question consists of criminal history check sheets concerning the named employee. Although a compilation of a private citizen's criminal history is generally not of legitimate public concern, this office has determined that the public has a legitimate interest in information relating to employees of governmental bodies and their employment qualifications and job performance. See Open Records Decision Nos. 562 at 10 (1990), 542 at 5 (1990); see also Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). In this instance, the criminal history information that you seek to withhold pertains to a public school teacher rather than a private citizen. Because the information in question appears to have been compiled in the course of an employment decision concerning the teacher, we find that the public has a legitimate interest in the information. We therefore conclude that the district may not withhold any of the information in Exhibit C under section 552.101 of the Government Code in conjunction with common-law privacy.

Lastly, 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). This exception further provides, however, that “the degree obtained or the curriculum on a transcript in the personnel file of the employee” are not excepted from disclosure. *Id.* We therefore agree that the district must withhold the transcripts submitted as Exhibit A under section 552.102(b), except for the information that reveals the employee’s name, the degree obtained, and the courses taken. *See* Open Records Decision No. 526 (1989) (addressing statutory predecessor).

In summary: (1) 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 that the employee concerned held a teaching certificate or permit under chapter 21 of the Education Code and was engaged in the process of teaching when the information was created; and (2) the district must withhold the transcripts in Exhibit A under section 552.102(b) of the Government Code, except for the information that reveals the employee’s name, the degree obtained, and the courses taken. The rest of the submitted information must be released. 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 "J.W. Morris, III", with a long horizontal line extending to the right.

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

JWM/em

Ref: ID# 388276

Enc: Submitted documents

c: Requestor
(w/o enclosures)