



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 3, 2010

Ms. J. LeAnne Bram Lundy
Rogers, Morris & Grover, L.L.P.
5718 Westheimer Road, Suite 1200
Houston, Texas 77057

OR2010-11647

Dear Ms. Lundy:

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# 389088.

The Fort Bend Independent School District (the "district"), which you represent, received a request for five named district employees' personnel files. You state most of the responsive information will be provided to the requestor. You claim 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 submitted representative sample of information.¹

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, including 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 this section to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. Open

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 those records contain substantially different types of information than that submitted to this office.

Records Decision No. 643 at 3 (1996). In Open Records Decision No. 643, we determined the word "administrator" in section 21.355 means a person who is required to and does in fact hold an administrator's certificate under subchapter B of chapter 21 of the Education Code and is performing the functions of an administrator, as that term is commonly defined, at the time of the evaluation. *Id.* Additionally, this office has determined a teacher is someone who is required to hold and does hold a certificate or permit required under chapter 21 of the Education Code and is serving as a teacher at the time of the evaluation. *Id.* at 4.

You represent the named district employees were teaching or performing the functions of an administrator at the time of the submitted evaluations, and that they each held the appropriate certifications at the time of the evaluations. Thus, based on your representations and our review, we agree most of the records you marked under section 21.355 are teacher or administrator evaluations for purposes of that section. Thus, most of this information must be withheld under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. However, the remaining records you marked under section 21.355 are a career ladder level assignment waiver form and summative conference waiver forms. You have not provided an explanation for how these documents evaluate, as the term is commonly understood, a teacher or administrator. Therefore, we conclude you failed to demonstrate the applicability of section 21.355 to these waiver forms and they may not be withheld under section 552.101. As you raise no other exceptions to disclosure of these forms, they must be released to the requestor.

Section 552.101 also encompasses criminal history record information ("CHRI") generated by the National Crime Information Center ("NCIC") or by the Texas Crime Information Center ("TCIC"). Section 411.083 of the Government Code deems confidential CHRI the Department of Public Safety ("DPS") maintains, except DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See id.* § 411.083. Any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. We understand you to claim portions of the submitted information contain CHRI made confidential by chapter 411. However, you do not state, and the information does not reflect, that any part of the submitted information was generated by the NCIC or TCIC. Accordingly, we conclude you failed to show how the information at issue contains confidential CHRI, and none of this information may be withheld under section 552.101 of the Government Code on that basis.

Section 552.101 of the Government Code also encompasses the Americans with Disabilities Act (the "ADA"), which provides for the confidentiality of certain medical records of employees and employment applicants. 42 U.S.C. § 12112(d)(3), (4). Specifically, the ADA provides that information about the medical conditions and medical histories of applicants for employment or employees must be (1) collected and maintained on separate forms, (2) kept in separate medical files, and (3) treated as a confidential medical record. *Id.*; 29

C.F.R. § 1630.14(b)(1), (c)(1), (d)(1). The Equal Employment Opportunity Commission ("EEOC") determined medical information for the purposes of the ADA includes "specific information about an individual's disability and related functional limitations, as well as general statements that an individual has a disability or that an ADA reasonable accommodation has been provided for a particular individual." *See* Letter from Ellen J. Vargyas, Legal Counsel, EEOC, to Barry Kearney, Associate General Counsel, National Labor Relations Board, 3 (Oct. 1, 1997).

Federal regulations define "disability" for the purposes of the ADA as "(1) a physical or mental impairment that substantially limits one or more of the major life activities of the individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment." 29 C.F.R. § 1630.2(g). The regulations further provide that physical or mental impairment means: (1) any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or (2) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. *See id.* § 1630.2(h). You have marked the records you claim are confidential under the ADA. However, you do not explain, and the records you marked do not reveal, how this information pertains to any individual with a disability for purposes of the ADA. Accordingly, we find that you have failed to establish that any portion of the submitted information is confidential under the ADA, and the district may not withhold any information under section 552.101 of the Government Code in conjunction with the ADA.

Section 552.101 of the Government Code also encompasses section 21.048 of the Education Code, which addresses teacher certification examinations. Section 21.048(c-1) provides the following:

The results of an examination administered under this section are confidential and are not subject to disclosure under Chapter 552, Government Code, unless:

- (1) the disclosure is regarding notification to a parent of the assignment of an uncertified teacher to a classroom as required by Section 21.057; or
- (2) the educator has failed the examination more than five times.

Educ. Code § 21.048(c-1). We note a portion of the remaining information contains ExCET exam results. We note subsection 21.048(c-1)(1) is not applicable in this instance. Furthermore, the information reflects the educator has not failed the examinations more than

five times. Thus, the information we have marked is confidential under section 21.048(c-1) of the Education Code and must be withheld under section 552.101 of the Government Code.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy. Section 552.102(a) of the Government Code 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). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101. See *Indus. Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976). In *Industrial Foundation*, the Texas Supreme Court stated information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts, the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Id.* at 685. To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Determinations under common-law privacy must be made on a case-by-case basis. See Open Records Decision No. 373 at 4 (1983); 540 S.W.2d at 685 (whether matter is of legitimate interest to public can be considered only in context of each particular case).

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) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). However, the information you claim is protected by common-law privacy as personal medical information merely reveals the district employees at issue took extended periods of leave. We find this information directly relates to the work conduct of these employees and is therefore of legitimate public interest. See, e.g., Open Records Decision Nos. 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees), 455 (1987) (public employee's job performance generally not protected by privacy), 423 at 2 (1984) (scope of public employee privacy is narrow), 405 at 2 (1983) (manner in which public employee's job is performed cannot be said to be of minimal public interest). Further, you have not explained how any of this information reveals highly intimate or embarrassing medical details about any individuals. Accordingly, none of the information you marked as personal medical information is confidential under common-law privacy, and it may not be withheld on that basis.

This office has also found a compilation of an individual's criminal history is highly embarrassing information, the publication of which would be highly objectionable to a reasonable person. Cf. *U.S. 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). However, the criminal history information you marked in the remaining information was supplied by the district employee in his employment application, and therefore is not a criminal history compilation compiled by the district. Moreover, we find a potential district employee's criminal history is generally of legitimate concern to the public in the context of an employment application. *See* ORD 470 at 4, 423 at 2. Thus, the information you marked as criminal history information may not be withheld under section 552.101 in conjunction with common-law privacy or section 552.102(a).

This office has also found an employee's voluntary insurance choices are personal financial decisions that are highly intimate and embarrassing for purposes of common-law privacy. *See* Open Records Decision Nos. 600 (1992) (personal financial information protected by common-law privacy includes designation of beneficiary of employee's retirement benefits and optional insurance coverage; choice of particular insurance carrier; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, health care, or dependent care), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). Furthermore, we find there is no legitimate public interest in these types of information. Likewise, an employee's allocation of his salary toward membership dues in a union is confidential. However, because there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body, financial information related to such transactions is generally not excepted from disclosure. *Open Records Decision Nos. 600 (1992)* (information revealing that employee participates in group insurance plan funded partly or wholly by governmental body is not excepted from disclosure), 545 (1990) (financial information pertaining to receipt of funds from governmental body or debts owed to governmental body not protected by common-law privacy), 373 (1983), 342 (1982). Upon review, we have marked information that reflects personal financial decisions of the employees at issue that we find to be intimate and embarrassing information of no legitimate public interest. The district must withhold this marked information under section 552.101 of the Government Code in conjunction with common-law privacy and section 552.102(a) of the Government Code. However, the remaining financial information pertains to the employees' transactions with the district, and thus is of legitimate public interest. Accordingly, the district may not withhold any remaining information on the basis of section 552.102(a) or section 552.101 in conjunction with common-law privacy.

Next, you assert the grade and credit information you have marked is excepted from disclosure under section 552.102(b) of the Government Code. This section excepts from disclosure higher education transcripts of professional public school employees, but does not except the employee's name, the courses taken, and the degree obtained from disclosure. Gov't Code § 552.102(b); *Open Records Decision No. 526 (1989)*. Most of the grade and credit information you marked is contained in transcripts from institutions of higher

education. However, you marked the degree obtained on four of these transcripts. This information is expressly not confidential under section 552.102(b) and may not be withheld on that basis. Thus, with the exception of the degrees obtained we have marked for release, the district must withhold the information you marked on the submitted higher education transcripts. However, you also marked grade and credit information under section 552.102(b) on a grade change request letter, a degree plan worksheet, and two examinee score reports. Because these documents are not transcripts from an institution of higher education, we conclude section 552.102(b) is inapplicable to them, and no portion of these documents, which we have marked, may be withheld under section 552.102(b) of the Government Code.

However, the submitted score reports pertain to teachers' certification examinations. Section 21.048 of the Education Code provides for the confidentiality of certification examination results. Section 21.048(c-1) provides the following:

The results of an examination administered under this section are confidential and are not subject to disclosure under Chapter 552, Government Code, unless:

- (1) the disclosure is regarding notification to a parent of the assignment of an uncertified teacher to a classroom as required by Section 21.057; or
- (2) the educator has failed the examination more than five times.

Educ. Code § 21.048(c-1). We have marked the submitted ExCET examination results. We find subsections 21.048(c-1)(1) and (2) are not applicable. Thus, the district must withhold the examination results we have marked under section 552.101 of the Government Code in conjunction with section 21.048(c-1) of the Education Code.

Portions of the remaining information may be subject to section 552.117(a)(1) of the Government Code.² This section excepts from public disclosure the present 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 timely request that such information be kept confidential under section 552.024 of the Government Code. 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 current or former employees who made a request for confidentiality under section 552.024

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

prior to the date on which the request for this information was made. We note you have redacted most of the information subject to section 552.117(a)(1) pursuant to section 552.024(c). *See* Gov't Code § 552.024(c) (authorizing a governmental body to redact, without the necessity of requesting a decision from this office, the home address, home telephone number, social security number, and family member information of a current or former employee who properly elected to keep this information confidential, provided the governmental body provides the requestor with notice as required by section 552.024(c-2)). Thus, we assume the individuals whose information you redacted timely elected to keep their personal information confidential pursuant to section 552.024. Given this assumption, we have marked additional information that must be withheld under section 552.117(a)(1) of the Government Code. However, we caution that to the extent the individuals whose information is at issue did not timely elect to keep the information you redacted and we marked confidential, such information may not be withheld under section 552.117(a)(1) of the Government Code.³

In summary, with the exception of the documents we have marked for release, the district must withhold the evaluations you marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. The district must also withhold the personal financial information we marked under section 552.101 in conjunction with common-law privacy and section 552.102(a) of the Government Code. With the exception of the documents we marked for release that are not higher education transcripts and the degrees obtained we marked for release on the submitted transcripts, the district must withhold the information you marked under section 552.102(b) of the Government Code. The district must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 21.048(c-1) of the Education Code. The district must withhold the information we marked under section 552.117(a)(1) of the Government Code. The remaining information must be released.

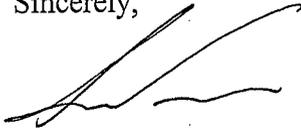
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

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, 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

³Regardless of the applicability of section 552.117, 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. *See* Gov't Code § 552.147(b). Thus, the redacted and marked social security numbers may be withheld pursuant to section 552.147 of the Government Code even if the individuals did not elect to keep this information confidential under section 552.024.

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 'Ana Carolina Vieira', with a stylized flourish at the end.

Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/eeg

Ref: ID# 389088

Enc. Submitted documents

cc: Requestor
(w/o enclosures)