



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 19, 2010

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

OR2010-12624

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# 390958 (Request Nos. 2092 and 2094).

The Eanes Independent School District (the "district"), which you represent, received requests from two requestors for a named employee's personnel file and certain e-mails involving the employee. You inform us that the responsive e-mails have been or will be released to the first requestor, subject to redaction of student information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.¹ You also inform us that the second requestor has withdrawn her request for the employee's e-mails. You state that some of the information in the employee's personnel file has been released to both requestors. You indicate that other information has been redacted from the employee's personnel records pursuant to section 552.024(c) of the

¹We note that the United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that FERPA 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. The DOE has determined that FERPA determinations must be made by the educational authority in possession of the education records. A copy of the DOE's letter to this office is posted on the Attorney General's website at: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

Government Code.² 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.

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 claim section 552.101 in conjunction with the Americans with Disabilities Act of 1990 (the "ADA"). See 42 U.S.C. §§ 12101 *et seq.* Title I of the ADA provides that information about the medical conditions and medical histories of applicants 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. Information obtained in the course of a "fitness for duty examination," conducted to determine whether an employee is still able to perform the essential functions of his or her job, is to be treated as a confidential medical record as well. See 29 C.F.R. § 1630.14(c); *see also* Open Records Decision No. 641 (1996). The federal Equal Employment Opportunity Commission (the "EEOC") has determined that 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).

You contend that the submitted documents contain medical history information that falls within the scope of the ADA. Having considered your arguments and reviewed the information at issue, we agree that the information we have marked is confidential under the ADA and must be withheld on that basis under section 552.101 of the Government Code. Although you also contend that the ADA is applicable to the submitted medical history questionnaire that was completed by the named employee, we find that you have not demonstrated that the questionnaire constitutes medical history information for purposes of the federal law. See *Ballard v. Healthsouth Corp.*, 147 F. Supp. 2d 529, 534 (N.D. Tex. 2001) (information not confidential under ADA when not obtained by an employer as a result of job-related medical examination); *Wiggins v. DaVita Tidewater, LLC*, 451 F. Supp.2d 789, 801-02 (E.D. Va. 2006) (information not confidential as medical information under ADA if not obtained as part of employee health program or from medical examinations conducted at employer's direction). We therefore conclude that the district may not withhold any of the information in the questionnaire under section 552.101 in conjunction with the ADA.

²Section 552.024(c) authorizes a governmental body to redact the home address and telephone number, social security number, and family member information of a current or former official or employee who chooses not to allow public access to that information. See Gov't Code § 552.024(c), (c-1), (c-2).

Section 552.101 of the Government Code also encompasses common-law privacy, which 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. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Common-law privacy encompasses the specific types of information that are held to be intimate or embarrassing in *Industrial Foundation*. *See id.* at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has determined that other types of information also are private under section 552.101. *See generally* Open Records Decision No. 659 at 4-5 (1999) (summarizing information attorney general has held to be private).

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). 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*. *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 determine whether any of the submitted information is protected by common-law privacy under sections 552.101 and 552.102(a).

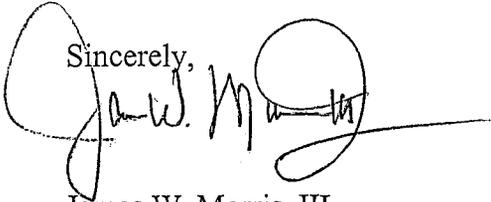
You also claim that the information in the questionnaire is protected by common-law privacy. Having reviewed the information at issue, we have marked information in the questionnaire that is highly intimate or embarrassing and not a matter of legitimate public interest. The district must withhold the marked information under sections 552.101 and 552.102(a) of the Government Code in conjunction with common-law privacy. We find that the remaining information in the questionnaire is not highly intimate or embarrassing and a matter of no legitimate public interest. We therefore conclude that the district may not withhold any of the remaining information in the questionnaire on privacy grounds under section 552.101 or section 552.102(a).

In summary: (1) the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the ADA; and (2) the marked information in the questionnaire must be withheld under sections 552.101 and 552.102(a) of the Government Code in conjunction with common-law privacy. The rest of the submitted 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 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 "James W. Morris, III". The signature is written in a cursive style with a long horizontal line extending to the right.

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

JWM/em

Ref: ID# 390958

Enc: Submitted documents

c: Requestors
(w/o enclosures)