



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 25, 2010

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

OR2010-12964

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# 391831.

The Alvin Independent School District (the "district"), which you represent, received a request for complete personnel files of two named former district teachers, the district employee handbook, and the district's insurance policy. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.117, 552.130, 552.136, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, you state the district is redacting some information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code. We note the United States Department of Education Family Policy Compliance Office has informed this office 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 of the public under the Act must not submit education records to this office in unredacted

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.

²A copy of this letter may be found on the Office of 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”). We note you have submitted both redacted and unredacted education records for our review. Because our office is prohibited from reviewing these education records to determine whether appropriate redactions under FERPA should be made, we will not address the applicability of FERPA to any of the submitted records. Such determinations under FERPA must be made by the educational authority in possession of the education records. However, we will consider your arguments against disclosure of the submitted information.

Next, we note you have redacted social security numbers, a former district employee’s home address, and an employee identification number. Pursuant to section 552.301 of the Government Code, a governmental body that seeks to withhold requested information must submit to this office a copy of the information, labeled to indicate which exceptions apply to which parts of the copy, unless the governmental body has received a previous determination for the information at issue. Gov’t Code § 552.301(a), (e)(1)(D). 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. *See id.* § 552.147. Additionally, section 552.024 of the Government Code authorizes a governmental body to redact 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 without the necessity of requesting a decision from this office. *See id.* § 552.024(c)(2). However, you do not assert, nor does our review indicate, that you have been otherwise authorized to withhold the employee identification number you redacted without seeking a ruling from this office. *See id.* § 552.301(a); Open Records Decision No. 673 (2000). In this instance, we can discern the nature of the redacted information; thus, being deprived of that information does not inhibit our ability to make a ruling. In the future, however, the district should refrain from redacting any information it is not authorized to withhold in seeking an open records ruling. Failure to do so may result in the presumption the redacted information is public. *See* Gov’t Code § 552.302.

Next, we note a portion of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Id. § 552.022(a)(3). We marked the submitted insurance policy documents that consist of information in a contract related to the receipt or expenditure of funds by the district. Thus, pursuant to section 552.022(a)(3), the district may only withhold this marked information if it is confidential under “other law.” You claim these documents are excepted from disclosure under section 552.103 of the Government Code. However, section 552.103 is a discretionary exception to disclosure that protects the governmental body’s interests and is therefore not “other law” that makes information expressly confidential for purposes of section 552.022(a). *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103). Consequently, the district may not withhold the information subject to section 552.022 under section 552.103. The Texas Supreme Court has determined the discovery privileges found in the Texas Rules of Civil Procedure and the Texas Rules of Evidence “are ‘other law’ within the meaning of section 552.022.” *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). Section 101.104 of the Civil Practice and Remedies Code is a civil discovery privilege under the Civil Practice and Remedies Code; it is not a discovery privilege found in either the Texas Rules of Civil Procedure or the Texas Rules of Evidence and therefore is not “other law” for purposes of section 552.022. You also raise section 101.104 in conjunction with section 552.101 of the Government Code, which 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 is “other law” for purposes of section 552.022. Section 101.104, however, is a civil discovery privilege and does not make insurance information expressly confidential for purposes of section 552.101. *See Open Records Decision No. 551 at 3* (1990) (provisions of section 101.104 “are not relevant to the availability of the information to the public”); *see also* Attorney General Opinion JM-1048 (1989); *Open Records Decision No. 647 at 2* (1996) (information that may be privileged in the civil discovery context may not be withheld from disclosure pursuant to section 552.101 of the Government Code). Accordingly, we determine information subject to section 552.022 may not be withheld from disclosure on the basis of section 101.104 of the Civil Practice and Remedies Code. As you raise no further exceptions to disclosure of this information, the submitted insurance policy documents must be released in their entirety.

We next turn to the information not subject to section 552.022, all of which you claim is excepted by section 552.103 of the Government Code. Section 552.103 provides in relevant part as follows:

- (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person’s office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body claiming this exception bears the burden of providing relevant facts and documents to demonstrate the applicability of the exception. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. Open Records Decision No. 331 (1982). Further, the fact a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

You assert the district reasonably anticipates litigation involving the requestor's client. You state the requestor is an attorney who represents a district student who has alleged the named teachers engaged in sexual misconduct. You have not, however, informed us the requestor or her client has taken any concrete steps toward the initiation of litigation. *See* Open Records Decision Nos. 452, 555. Additionally, we note a request for information by a potential opposing party or that party's attorney is not by itself enough to establish reasonably anticipated litigation. *See* ORD 361. Therefore, after reviewing your arguments, we find you have not established the district reasonably anticipated litigation when it received the request for information. Consequently, the district may not withhold the remaining information under section 552.103.

Next, we address whether any portion of the remaining information is excepted under the Act. Section 552.101 of the Government Code also encompasses information protected by

other statutes. Prior decisions of this office have held section 6103(a) of title 26 of the United States Code renders tax return information confidential. See Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision No. 600 (1992) (W-4 forms). Section 6103(b) defines the term "return information" as "a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments . . . or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Internal Revenue Service] with respect to a return or with respect to the determination of the existence, or possible existence, of liability . . . for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense[.]" See 26 U.S.C. § 6103(b)(2)(A). Federal courts have construed the term "return information" expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. See *Mallas v. Kolak*, 721 F. Supp 748, 754 (M.D.N.C. 1989), *aff'd in part*, 993 F.2d1111 (4th Cir. 1993). Thus, the submitted W-4 forms, which we marked, constitute tax return information that are confidential under federal law and must be withheld under section 552.101.³

Section 552.101 of the Government Code also encompasses section 1324a of title 8 of the United States Code. Section 1324a governs I-9 forms and their related documents. This section provides an I-9 form and "any information contained in or appended to such form, may not be used for purposes other than for enforcement of this chapter" and for enforcement of other federal statutes governing crime and criminal investigations. See 8 U.S.C. § 1324a(b)(5); see also 8 C.F.R. § 274a.2(b)(4). Accordingly, we conclude the submitted I-9 forms are confidential for purposes of section 552.101 and may only be released in compliance with the federal laws and regulations governing the employment verification system. See 8 U.S.C. § 1324a(b)(1)(B)-(D); 8 C.F.R. § 274a.2(b)(1)(v)(A)-(C).⁴

You argue portions of the remaining information, which you marked, are excepted under section 21.355 of the Education Code, which is also encompassed by section 552.101 of the Government Code. Section 21.355 provides "[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 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.* 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

³As our ruling is dispositive for the submitted W-4 forms, we need not address your argument against release of a portion of these documents.

⁴As our ruling is dispositive for the submitted I-9 forms, we need not address your argument against release of a portion of these documents.

review.” *North East Indep. Sch. Dist. v. Abbott*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.).

You state the documents you marked relate to teachers who held the appropriate teaching certificates and were teaching at the time of the evaluations. Based on your representations and our review, we agree the information we have marked consists of teacher evaluations subject to section 21.355. However, we conclude the remaining information you marked does not evaluate the teachers for purposes of section 21.355. Accordingly, the district must withhold only the information we marked under section 552.101 in conjunction with section 21.355.

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 the remaining information contains teacher certification exam results. We further note subsections 21.048(c-1)(1) and (2) are not applicable in this instance. Accordingly, the district must withhold the information we marked under section 552.101 in conjunction with section 21.048(c-1).⁵

Section 552.101 also encompasses chapter 411 of the Government Code. Criminal history record information (“CHRI”) generated by the National Crime Information Center or by the Texas Crime Information Center is confidential under federal and state law. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 at 7 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* 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* Gov’t Code § 411.083. A school district may obtain CHRI from DPS as authorized by section 411.097 and subchapter C of

⁵As our ruling is dispositive for this information, we need not address your argument against disclosure of a portion of this information.

chapter 22 of the Education Code; however, a school district may not release CHRI except as provided by section 411.097(d). *See id.* § 411.097(d); Educ. Code § 22.083(c)(1) (authorizing school district to obtain from any law enforcement or criminal justice agency all CHRI relating to school district employee); *see also* Gov't Code § 411.087. Section 411.087 authorizes a school district to obtain CHRI from the Federal Bureau of Investigation or any other criminal justice agency in this state. *Id.* Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. *See* ORD 565. Furthermore, any CHRI the district obtained from DPS or any other criminal justice agency in this state must be withheld under section 552.101 of the Government Code in conjunction with section 411.097(d) of the Government Code. *See* Educ. Code § 22.083(c)(1). The information you seek to withhold does not constitute criminal history record information for the purposes of chapter 411 of the Government Code. Accordingly, the district may not withhold any of the remaining information on that basis.

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); *Indus. Found.*, 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 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, a district employee's criminal history is generally of legitimate concern to the public in the context of an employment application. *See* Open Records Decision Nos. 470 at 4 (1987), 423 at 2 (1984). 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 (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 (information revealing that employee participates in group insurance plan funded partly or wholly by governmental body is not excepted from disclosure), 545 (financial information pertaining to receipt of funds from governmental body or debts owed to governmental body not protected by common-law privacy), 373, 342 (1982). Upon review, we 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.⁶ 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 marked are 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). Accordingly, the district must withhold the grade and credit information you marked under section 552.102(b).

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code. Gov't

⁶As our ruling is dispositive for this information, we need not address your remaining arguments against disclosure of portions of this information.

Code § 552.117(a)(1). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. You provide documentation showing the employees whose information you have marked elected to keep their information confidential prior to the date the district received the instant request. Accordingly, the district must withhold the information you marked, as well as the additional information we marked, under section 552.117(a)(1).

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[.]" Gov't Code § 552.130. Accordingly, the district must withhold the marked Texas driver's license numbers and copy of a driver's license under section 552.130.

Section 552.137 of the Government Code provides "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its public disclosure. *Id.* § 552.137(a)-(b). The types of e-mail addresses listed in section 552.137(c) may not be withheld under this exception. *See id.* § 552.137(c). The marked e-mail addresses are not of the type specifically excluded by section 552.137(c). Accordingly, the district must withhold the marked e-mail addresses under section 552.137, unless their owners consent to their disclosure.

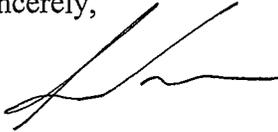
In summary, this ruling does not address the applicability of FERPA to the submitted information. Should the district determine portions of the information consist of "education records" subject to FERPA, the district must dispose of the information in accordance with FERPA, rather than the Act. The district must withhold the marked W-4 forms under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code. The marked I-9 forms may only be released in compliance with the federal laws and regulations governing the employment verification system. The district must also withhold (1) the teacher evaluations we marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code; (2) the teacher certification exam results we marked under section 552.101 of the Government Code in conjunction with section 21.048(c-1) of the Education Code; (3) the personal financial information we marked under section 552.101 of the Government Code in conjunction with common-law privacy; (4) the grade and credit information you marked under section 552.102(b) of the Government Code; (5) the marked information under section 552.117(a)(1) of the Government Code; (6) the Texas driver's license numbers and copy of a driver's license under section 552.130 of the Government Code; and (7) the marked

e-mail addresses under section 552.137 of the Government Code, unless their owners consent to their release.⁷ The district must release the remaining information.

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,



Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/eeg

Ref: ID# 391831

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁷We 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 direct deposit authorization form under section 552.101 of the Government Code in conjunction with the common-law right to privacy; a Form I-9 and attachments under section 552.101 in conjunction with section 1324a of title 8 of the United States Code; W-4 forms under section 552.101 in conjunction with section 6103(a) of title 26 of the United States Code; a Texas driver's license number and a copy of a Texas driver's license under section 552.130 of the Government Code; and 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.