



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

June 8, 2011

Mr. Fortunato G. Paredes  
Escamilla, Poneck & Cruz, L.L.P.  
For Clint Independent School District  
216 West Village Boulevard, Suite 202  
Laredo, Texas 78041

OR2011-08152

Dear Mr. Paredes:

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# 419977.

The Clint Independent School District (the "district"), which you represent, received two requests from different requestors for the first requestor's personnel file. You indicate you have released some of the requested information. You claim portions of the submitted information are 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 information.

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.<sup>1</sup> 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

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<sup>1</sup>A 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.

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 1324a of title 8 of the United States Code, which provides that an Employment Eligibility Verification Form I-9 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). Exhibit F consists of I-9 forms. The district must withhold Exhibit F under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code.

Section 552.101 of the Government Code also encompasses the Medical Practice Act (the “MPA”), chapter 159 of the Occupations Code, which governs access to medical records. Occ. Code §§ 151.001-165.160. Section 159.002 of the MPA provides in pertinent part:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient’s behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

*Id.* § 159.002(b), (c). This office has concluded the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Medical records must be released upon the governmental body’s receipt of the patient’s signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. *See* Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. *See* Open Records Decision No. 565 at 7 (1990). Exhibit G contains a medical record or information derived from a medical record. The submitted information reflects that the first requestor is the person whose medical record is

at issue. We have marked the information in Exhibit G that may only be released in accordance with the MPA.

Section 552.101 also encompasses 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 administrator. *See* 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 Third Court of Appeals 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.” *Abbot v. North East Indep. Sch. Dist.*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.).

You state Exhibit C consists of various evaluations and Exhibit D consists of a letter of reprimand, both of which are evaluations of a teacher who held the appropriate teacher’s certification and was functioning as a teacher at the time of the evaluations. Based on your representations and our review of the information at issue, we conclude Exhibits C and D consist of teacher evaluations for purposes of section 21.355, and this information is generally confidential under section 21.355 of the Education Code. Section 21.352(c) of the Education Code provides, however, that “[e]ach teacher is entitled to receive a written copy of the evaluation on its completion.” Educ. Code § 21.352(c); *see id.* § 21.352(a) (prescribing appraisal process and performance criteria each school district shall use). Therefore, to the extent this information consists of evaluations of the type that are contemplated by section 21.352, the first requestor, as the teacher to whom the evaluations relate, has a right of access under section 21.352(c), and any such information must be released to this requestor. The district must withhold Exhibits C and D under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code from the second requestor and, to the extent the first requestor does not have a right of access under section 21.352(c), from the first requestor as well.

You contend the remaining information in Exhibit G is protected under common-law privacy. Section 552.101 encompasses the common-law right of privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. 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. *Id.* at 683. This office has also 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

emotion and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Whether information is subject to a legitimate public interest and, therefore, not protected by common-law privacy, must be determined on a case-by-case basis. *See* Open Records Decision No. 373 (1983). We note that the public generally has a legitimate interest in information that relates to public employment and public employees. *See* Open Records Decisions Nos. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs, but in fact touches on matters of legitimate public concern), 542 (1990), 470 at 4 (1987) (public has legitimate interest in job qualifications and 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). After reviewing the remaining documents, we have marked the information that is highly intimate or embarrassing and not of legitimate public interest. Accordingly, the district must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. The remaining information you seek to withhold is not highly intimate or embarrassing and not of legitimate public interest. Therefore, the district may not withhold any of the remaining information under section 552.101 of the Government Code on that ground.

You claim Exhibit B is excepted from disclosure under section 552.102(b) of the Government Code. Section 552.102(b) excepts from disclosure all information from higher education transcripts of professional public school employees other than the employee's name, the courses taken, and the degree obtained. Gov't Code § 552.102(b); Open Records Decision No. 526 (1989). Upon review, we agree the transcripts submitted as Exhibit B fall within the scope of section 552.102(b). We note, however, this exception protects personal privacy. Thus, the first requestor, as the individual whose transcripts are at issue, has a right of access to the transcripts under section 552.023 of the Government Code. *See* Gov't Code § 552.023 (person or person's authorized representative has special right of access, beyond right of general public, to information held by governmental body that relates to person and is protected from disclosure by laws intended to protect person's privacy interests). Accordingly, Exhibit B may not be withheld from the first requestor under section 552.102(b) of the Government Code and must be released to the first requestor. However, the second requestor does not have a right of access to the transcripts in Exhibit B. Therefore, the district must withhold Exhibit B from the second requestor 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. *See* ORD 526 (addressing statutory predecessor).

You also claim some of the information in Exhibit G is excepted from disclosure 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). You assert the privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101, which is discussed above. *See Indus. Found.*, 540 S.W.2d at 685. In *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex.

App.—Austin 1983, writ ref'd n.r.e.), the court ruled the privacy test under section 552.102(a) is the same as the *Industrial Foundation* privacy test. However, the Texas Supreme Court recently expressly disagreed with *Hubert's* interpretation of section 552.102(a) and held its privacy standard differs from the *Industrial Foundation* test under section 552.101. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, No. 08-0172, 2010 WL 4910163, at \*5 (Tex. Dec. 3, 2010). The Texas Supreme Court then considered the applicability of section 552.102, and held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Id.* at \*10. Having carefully reviewed the responsive information, we find that none of the information at issue is excepted under section 552.102(a) and, therefore, none of it may be withheld on that basis.

We note portions of the remaining information in Exhibit G are subject to section 552.117 of the Government Code.<sup>2</sup> Section 552.117 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 that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, a governmental body must withhold information under section 552.117 on behalf of current or former officials or employees only if these individuals made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Accordingly, if the employee whose information is at issue timely elected to keep his personal information confidential pursuant to section 552.024, the district must withhold the information we have marked in Exhibit G from the second requestor. The district may not withhold this information under section 552.117 for an employee who did not make a timely election to keep the information confidential. We note the first requestor has a right of access to his own personal information and the district may not withhold it from him under section 552.117(a)(1). *See* Gov't Code § 552.023(a).

In summary, the district must withhold Exhibit F under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code. The marked medical record may only be released in accordance with the MPA. The district must withhold Exhibits C and D under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code from the second requestor and, to the extent the first requestor does not have a right of access under section 21.352(c), from the first requestor as well. The district must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. The district must withhold Exhibit B from the second requestor under section 552.102(b) of the Government Code,

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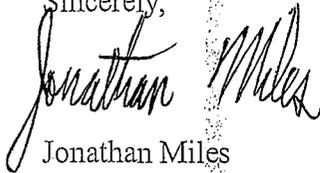
<sup>2</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

except for the information that reveals the employee's name, the degree obtained, and the courses taken. If the employee whose information is at issue timely elected to keep his personal information confidential pursuant to section 552.024 of the Government Code, the district must withhold the information we have marked in Exhibit G from the second requestor 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](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,



Jonathan Miles  
Assistant Attorney General  
Open Records Division

JM/em

Ref: ID# 419977

Enc. Submitted documents

c: Requestor  
(w/o enclosures)