



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 17, 2011

Mr. R. Kevin Rhyne
Rhyne Law Firm
2737 South Broadway Avenue, Suite 201
Tyler, Texas 75701

OR2011-11918

Dear Mr. Rhyne:

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# 427226.

The Troup Independent School District (the "district"), which you represent, received a request for twenty-three categories of information.¹ You state you have released some information to the requestor. Additionally, we understand some of the requested information does not exist.² You claim the requested information is excepted from disclosure under sections 552.101, 552.102, 552.117, 552.136, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.³

Initially, we note the requestor has excluded from his request all communications between the district's superintendent and the superintendent's attorney or the district's attorney and

¹You provide documentation showing the district sought and received clarification from the requestor regarding certain categories of the request. *See* Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used).

²We note the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

³We 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.

has agreed to the redaction of all private home addresses and private e-mail addresses. Any such information is therefore not responsive to the request. This ruling does not address the public availability of non-responsive information, and the district is not required to release non-responsive information in response to this request.

You state the district will redact some information from the responsive information pursuant to the Family Educational Rights and Privacy Act (“FERPA”), 20 U.S.C. § 1232g. The United States Department of Education Family Policy Compliance Office (the “DOE”) has informed this office 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.⁴ 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 form, that is, in a form in which “personally identifiable information” is disclosed. *See* 34 C.F.R. § 99.3 (defining “personally identifiable information”). It appears you have submitted redacted and unredacted education records for our review. Because our office is prohibited from reviewing 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. *See* 20 U.S.C. § 1232g(a)(1)(A). Such determinations must be made by the educational authority in possession of the education record. However, we will consider your arguments against disclosure of the responsive information.

Section 552.101 of the Government Code exempts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 of the Government Code encompasses information protected by other statutes. Section 1324a of title 8 of the United States Code 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 in Exhibit F 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).

Section 552.101 of the Government Code also encompasses section 6103(a) of title 26 of the United States Code. Prior decisions of this office have held section 6103(a) 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,

⁴A copy of this letter may be found on the Office of the Attorney General’s website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

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 in Exhibit F constitute tax return information that is confidential under federal law and must be withheld under section 552.101 of the Government Code.

Section 552.101 of the Government Code also encompasses section 21.048 of the Education Code, which is applicable to information relating to teacher certification examinations. Section 21.048(c-1) states:

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). You assert Exhibit D is confidential under section 21.048 of the Education Code. Upon review, we find a portion of the information in Exhibit D, which we have marked, consists of the results of a teacher certification examination. Subsections 21.048(c-1)(1) and (2) do not appear to be applicable in this instance. We therefore conclude the district must withhold the information in Exhibit D we have marked under section 552.101 of the Government Code in conjunction with section 21.048(c-1) of the Education Code. We note, however, the remaining information in Exhibit D consists of a teacher certificate and credits for development workshop attendance. You have failed to demonstrate how section 21.048 (c-1) applies to this information. Consequently, the district may not withhold any of the remaining information in Exhibit D under section 552.101 of the Government Code in conjunction with section 21.048(c-1) of the Education Code.

Section 552.101 also encompasses section 21.355 of the Education Code, which provides “[a] document evaluating the performance of a teacher or administrator is confidential.” *Id.* Educ. Code § 21.355. 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.” *N.E. Indep. Sch. Dist. v. Abbott*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.). 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). In Open Records Decision No. 643, we determined a “teacher” for purposes of section 21.355 means a person who (1) 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 (2) is engaged in the process of teaching, as that term is commonly defined, at the time of the evaluation. *See id.* at 4.

You assert Exhibits A and B relate to teachers who held the appropriate teaching certificate at the time of the evaluations. Based on your representation and our review, we conclude the information in Exhibit A and portions of the information in Exhibit B constitute evaluations as contemplated by section 21.355. Accordingly, the district must withhold Exhibit A in its entirety and the information we have marked in Exhibit B under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. However, we note the remaining information in Exhibit B consists of correspondence with the Texas Education Agency regarding employee resignations, letters placing employees on administrative leave, and reprimands relating to teachers’ or administrators’ non-classroom activities or performance as a coach. Upon review, we find you have failed to demonstrate how the remaining information in Exhibit B consists of an evaluation or written reprimand as contemplated by section 21.355 of the Education Code. *See* Educ. Code § 21.353 (teachers shall be appraised only on basis of classroom teaching performance and not in connection with extracurricular activities). Accordingly, we conclude the district may not withhold any of the remaining information in Exhibit B under section 552.101 of the Government Code on the basis of section 21.355 of the Education Code.

Section 552.101 also encompasses section 261.201(a) of the Family Code, which provides as follows:

(a) Except as provided by Section 261.203, the following information is confidential, is not subject to public release under [the Act], and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201(a). You assert Exhibit B contains information that is confidential under section 261.201 of the Family Code. We note a school district is not an agency authorized to conduct a chapter 261 investigation. *See id.* §§ 261.103 (listing agencies that may conduct child abuse investigations). You do not explain, and the records at issue do not indicate, this information was used or developed in an investigation conducted by the

district's police department or another authorized agency under chapter 261 of the Family Code. Accordingly, we find you have failed to adequately demonstrate how any of the information at issue involves a report of alleged or suspected child abuse or neglect made under chapter 261, or how this information was used or developed in an investigation under chapter 261. Accordingly, we conclude the district may not withhold any of the responsive information under section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code.

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. Gov't Code § 411.083(a); Open Records Decision No. 565 (1990). 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 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. Gov't Code § 411.087. 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). You assert Exhibit E constitutes CHRI that is confidential under chapter 411. In this instance, however, the information at issue consists of fingerprint processing applications. Accordingly, we find you have failed to establish Exhibit E constitutes CHRI generated by the National Crime Information Center or by the Texas Crime Information Center. Accordingly, the district may not withhold any portion of Exhibit E under section 552.101 in conjunction with chapter 411 of the Government Code.

You also claim Exhibit E contains a biometric identifier that is confidential under section 560.003 of the Government Code.⁵ Section 560.003 of the Government Code provides "[a] biometric identifier in the possession of a governmental body is exempt from disclosure under [the Act]." Gov't Code § 560.003; *see id.* § 560.001(1) ("biometric

⁵Although you raise section 552.101 in conjunction with section 550.002 of the Government Code, based on your arguments we understand you to raise section 552.101 in conjunction with section 560.003 of the Government Code, as this is the proper section for the substance of your arguments.

identifier” means retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry). We note, however, Exhibit E consists of educator fingerprint application forms and a fee for fingerprinting form. While these documents contain logos depicting sample fingerprints, we find none of the information in Exhibit E consists of a biometric identifier of an individual for purposes of chapter 560 of the Government Code. Accordingly, none of the information in Exhibit E may be withheld under section 552.101 of the Government Code on that basis.

Section 552.101 also encompasses the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code. Section 159.002 of the MPA provides in part the following:

(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.

Occ. Code § 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). Upon review, we find some of the information in Exhibit C constitutes medical records subject to the MPA. Thus, the district may only release these records, which we have marked, in accordance with the MPA. However, the remaining information in Exhibit C does not constitute a medical record subject to the MPA, and the district may not withhold it under section 552.101 of the Government Code on that basis.

Section 552.101 also encompasses the doctrine of common-law privacy, which protects information that (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 established. *Id.* at 681-82. This office has found that some kinds of medical information or information indicating disabilities or specific illnesses is protected by 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). Upon review, we find a portion of the information, which we have marked, is highly intimate or embarrassing and not of legitimate public interest. Thus, the district must withhold this information under section 552.101 of the Government Code in conjunction with common-law privacy. However, none of the remaining information is highly intimate or embarrassing, and the district may not withhold it under section 552.101 on that basis.

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). The Texas Supreme Court recently 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. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010). Having carefully reviewed the remaining information, we have marked the information that must be withheld under section 552.102(a) of the Government Code. However, none of the remaining information is excepted under section 552.102(a), and none of it may be withheld on that basis.

You raise section 552.102(b) of the Government Code for Exhibit G. Section 552.102(b) 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). We note, however, Exhibit G does not contain a transcript from an institution of higher education that is maintained in the personnel file of a professional public school employee. Accordingly, the district may not withhold any portion of Exhibit G under section 552.102(b) of the Government Code.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, emergency contact information, 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. Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 2 (to be codified as an amendment to Gov’t Code § 552.117(a)). Additionally, section 552.117 encompasses personal cellular telephone numbers, provided the cellular telephone service is paid for by the employee with his or her own funds. *See* Open Records Decision No. 506 at 5-6 (1988) (statutory predecessor to Gov’t Code § 552.117 not applicable to numbers for cellular mobile telephones installed in county officials’ and employees’ private vehicles and intended for official business). 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). Therefore, the district may only withhold information under section 552.117 on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. For those employees who timely elected to keep their personal information confidential, the school district must withhold the social security numbers you have redacted and the information we have marked under section 552.117 of the Government Code; however, the marked cellular telephone numbers may only be withheld under section 552.117(a)(1) if the employees paid for the cellular telephone services with their own funds.⁶ The district may

⁶Regardless of the applicability of section 552.117, section 552.147(b) of the Government Code, as you acknowledge, 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. Gov’t Code § 552.147(b).

not withhold this information under section 552.117 for those employees who did not make a timely election to keep the information confidential.

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by an agency of this state, another state, or country is excepted from public release. Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 4 (to be codified as an amendment to Gov't Code § 552.130). Accordingly, the district must withhold the information we have marked under section 552.130.

Section 552.136 of the Government Code provides "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining "access device"). Accordingly, the district must withhold the credit card numbers we have marked under section 552.136 of the Government Code. However, none of the remaining information constitutes an access device number. Therefore, the district may not withhold any of the remaining information under section 552.136 of the Government Code.

We note a portion of the remaining information is protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the district must withhold the I-9 forms and W-4 forms in Exhibit F under section 552.101 of the Government Code in conjunction with federal law. The district must withhold the information we have marked in Exhibit D under section 552.101 of the Government Code in conjunction with section 21.048(c-1) of the Education Code. The district must withhold Exhibit A in its entirety and the information we have marked in Exhibit B under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. The district may only release the medical records we have marked in Exhibit C in accordance with the MPA. The district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The district must withhold the information we have marked under section 552.102(a) of the Government Code. To the extent the employees timely elected to keep personal information confidential, the district must withhold the social security numbers you have redacted and the information we have marked under section 552.117 of the Government Code; however, the marked cellular telephone numbers may only be withheld if the employees paid for the cellular telephone services with their own funds. The district must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code. The district must withhold the credit card numbers we have

marked under section 552.136 of the Government Code.⁷ The district must release the remaining information, but any information protected by copyright may only be released in accordance with copyright law.

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,



Mack T. Harrison
Assistant Attorney General
Open Records Division

MTH/em

Ref: ID# 427226

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁷We note Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including I-9 forms and attachments under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code, 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, Texas driver's license numbers under section 552.130 of the Government Code and credit card numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.