



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 19, 2011

Mr. Fernando Saéñz
For Weslaco Independent School District
Law Office of Fernando Saéñz
200 East Pike Boulevard
Weslaco, Texas 78596

OR2011-12016

Dear Mr. Saéñz:

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# 427448.

The Weslaco Independent School District (the "district"), which you represent, received a request for (1) student records, including any correspondence with the requestor, regarding the requestor's named child; and (2) personnel records of employees assigned to have direct contact with the requestor's named child.¹ You state the district will provide some of the requested information to the requestor. You indicate the requested student records will be provided pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code. *See* 20 U.S.C. § 1232g(a)(1)(A) (providing parents have right of access to own child's education records); *see also* 34 C.F.R. § 99.3 (defining "parents" and "education records"). It also appears the district has redacted, pursuant to FERPA, student-identifying information not pertaining to the requestor's child

¹You state the district sought and received clarification from the requestor regarding parts 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).

from a portion of the information submitted to this office.² You have also redacted employee social security numbers and other personal information from the information submitted to this office.³ You claim some of the submitted information is not subject to the Act. You claim the remaining requested information is excepted from disclosure under sections 552.101 and 552.102 of the Government Code. We have considered your arguments and reviewed the submitted information, part of which is a representative sample.⁴

Initially, you contend a portion of the submitted information, which consists of a district teacher's personal notes regarding her daily interactions with students and parents, is not subject to the Act because the notes are maintained exclusively by the teacher for her own personal use. The Act applies to "public information," which is defined in section 552.002(a) of the Government Code as:

information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body; or
- (2) for a governmental body and the governmental body owns the information or has a right of access to it.

²The 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. The DOE has determined FERPA determinations must be made by the educational authority in possession of the education records. We have posted a copy of the letter from the DOE to this office on the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

³Section 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. Gov't Code § 552.147(b). Furthermore, section 552.024 of the Government Code authorizes a governmental body to redact from public release a current or former official's or employee's home address, home telephone number, emergency contact information, social security number, and information that reveals whether the person has family members without the necessity of requesting a decision from this office under the Act, if the employee or official timely elected to withhold such information. Act of May 24, 2011, 82nd Leg., R.S., S.B. 1638, § 1 (to be codified as an amendment to Gov't Code § 552.024(a)); Gov't Code § 552.024(c)(2). Because you have redacted an employee's personal information covered by section 552.024, we presume that employee timely elected to withhold his personal information. We further note section 552.024(c-2) requires a governmental body that redacts information under section 552.024(c)(2) to provide certain notice to the requestor regarding the redactions. Gov't Code § 552.024(c-2). We presume you have provided such notice to the requestor; if not, you must do so at this time.

⁴We 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.

Gov't Code § 552.002(a). Information is generally within the scope of the Act when it relates to the official business of a governmental body or is maintained by a public official or employee in the performance of official duties, even though it may be in the possession of one person. *See* Open Records Decision No. 635 at 3 (1995). In this instance, the teacher's notes pertain to her interactions with students and parents during the course of her employment with the district. As such, we find the notes are maintained by a district employee in the performance of official duties and pertain to the transaction of official district business. Thus, the teacher's notes are subject to the Act. *See* Gov't Code § 552.002(a). As you have not claimed any exceptions to disclosure for the submitted teacher's notes, the district must release the notes.

Next, we must address the district's obligations under the Act. Section 552.301 of the Government Code describes the procedural obligations placed on a governmental body that receives a written request for information it wishes to withhold. Pursuant to section 552.301(b) of the Government Code, the governmental body must request a ruling from this office and state the exceptions to disclosure that apply within ten business days after receiving the request. *See* Gov't Code § 552.301(b). Pursuant to section 552.301(e) of the Government Code, the governmental body is required to submit to this office within fifteen business days of receiving the request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See id.* § 552.301(e). In this instance, you state the district received the request for information on June 1, 2011. Thus, the district's ten- and fifteen-business-day deadlines were June 15, 2011, and June 22, 2011. You did not, however, request a ruling from this office until June 16, 2011. Furthermore, you did not submit comments explaining why your stated exceptions apply or a copy of the information requested until June 27, 2011. Thus, we find the district failed to comply with the requirements of section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption the requested information is public and must be released unless a compelling reason exists to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *see also* Open Records Decision No. 630 (1994). Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Because sections 552.101 and 552.102 of the Government

Code can provide compelling reasons to withhold information, we will consider the applicability of these exceptions to the information at issue.

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 section encompasses information that other statutes make confidential. You claim some of the remaining information is protected under the federal Health Insurance Portability and Accountability Act of 1996 (“HIPAA”), 42 U.S.C. §§ 1320d-1320d-9. At the direction of Congress, the Secretary of Health and Human Services (“HHS”) promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. *See* Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. Pts. 160, 164 (“Privacy Rule”); *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, except as provided by parts 160 and 164 of the Code of Federal Regulations. *See id.* § 164.502(a).

This office has addressed the interplay of the Privacy Rule and the Act. In Open Records Decision No. 681 (2004), we noted section 164.512 of title 45 of the Code of Federal Regulations provides a covered entity may use or disclose protected health information to the extent such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. *See* 45 C.F.R. § 164.512(a)(1). We further noted the Act “is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public.” *See* ORD 681 at 8; *see also* Gov’t Code §§ 552.002, .003, .021. We, therefore, held the disclosures under the Act come within section 164.512(a). Consequently, the Privacy Rule does not make information confidential for the purpose of section 552.101 of the Government Code. *See Abbott v. Tex. Dep’t of Mental Health & Mental Retardation*, 212 S.W.3d 648 (Tex. App.—Austin 2006, no pet.); ORD 681 at 9; *see also* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Thus, because the Privacy Rule does not make information that is subject to disclosure under the Act confidential, the district may withhold protected health information from the public only if the information is confidential under other law or an exception in subchapter C of the Act applies.

Section 552.101 also encompasses the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code, which governs medical records. *See* Occ. Code §§ 151.001-167.202. Section 159.002 of the MPA provides, in part:

- (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is

confidential and privileged and may not be disclosed except as provided by this chapter.

(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(a)-(c). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004; Open Records Decision No. 598 (1991). 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 patient's signed, written consent, provided 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. Occ. Code §§ 159.004, .005. The requested information contains district employees' confidential medical records, which we have marked. The district may release the marked medical records only in accordance with the MPA. ORD 598.

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." 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 an administrator. *See* Open Records Decision No. 643 (1996). In Open Records Decision No. 643, we determined for purposes of section 21.355, the word "teacher" means a person who 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 who is engaged in the process of teaching, as that term is commonly defined, at the time of the evaluation. *See* ORD 643 at 4. We further determined "teacher interns, teacher trainees, librarians, educational aids and counselors cannot be teachers or administrators for purposes of section 21.355." *See id.* at 5.

You assert the completed security guard and special education teacher aide evaluations in the remaining information are confidential under section 21.355. You have not, however, informed us the individuals to whom the evaluations pertain held the requisite teaching certificates at the times of their evaluations. Furthermore, the security guard evaluations pertain to the individual's performance as a security guard and not as a teacher engaged in

the process of teaching. Finally, as previously noted, this office does not consider teacher aides to be teachers for purposes of section 21.355. *See id.* Thus, you have failed to demonstrate how the security guard and special education teacher aide evaluations pertain to certified teachers engaged in the process of teaching. Consequently, the district may not withhold the security guard and special education teacher aide evaluations at issue under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.

Section 552.101 also encompasses the doctrine of common-law 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 established. *Id.* at 681-82. This office has found the public has a legitimate interest in information relating to employees of governmental bodies and their employment qualifications and job performance. *See* Open Records Decision Nos. 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees), 405 at 2-3 (1983) (public has interest in manner in which public employee performs job). Although you generally assert the remaining information is protected by common-law privacy, we find the information is of legitimate public interest because it pertains to district employees' employment qualifications and job performances. *See* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). Consequently, the district may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy.

The remaining information contains an employee's date of birth. 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). 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). The district must withhold the date of birth we have marked in the remaining information under section 552.102(a) of the Government Code.

In summary, the district may release the marked medical records only in accordance with the MPA. The district must withhold the date of birth we have marked under section 552.102(a) of the Government Code. 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,



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/dls

Ref: ID# 427448

Enc. Submitted documents

c: Requestor
(w/o enclosures)