



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 23, 2011

Ms. Sarah Orman
Counsel for the Bay City Independent School District
Walsh, Anderson, Brown, Gallegos and Green, P.C.
P.O. Box 2156
Austin, Texas 78768

OR2011-13785

Dear Ms. Orman:

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# 431129.

The Bay City Independent School District (the "district"), which you represent, received a request for any documents pertaining to the employment of the district's superintendent. You state the district has released some of the requested information. You claim some of the submitted information is excepted from disclosure under sections 552.101 and 552.102 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, you state the district has redacted portions of the submitted information. 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), .301(e)(1)(D). You state the district has redacted social security numbers under section 552.147 of the Government Code. 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(b). You also state the district has redacted information under section 552.130 of the Government Code pursuant to Open Records Decision No. 684 (2009). We note Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing

them to withhold ten categories of information, including Texas driver's license numbers under section 552.130, without the necessity of requesting an attorney general decision. However, on September 1, 2011, the Texas legislature amended section 552.130 to allow a governmental body to redact the information described in subsections 552.130(a)(1) and (a)(3) without the necessity of seeking a decision from the attorney general. *See* Act of May 30, 2011, 82nd Leg., R.S., S.B. 602, § 22 (to be codified at Gov't Code § 552.130(c)). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See* Act of May 30, 2011, 82nd Leg., R.S., S.B. 602, § 22 (to be codified at Gov't Code § 552.130(d), (e)). Thus, the statutory amendments to section 552.130 of the Government Code supercedes Open Records Decision No. 684 on September 1, 2011. Therefore, a governmental body may only redact information subject to subsections 552.130(a)(1) and (a)(3) in accordance with section 552.130, not Open Records Decision No. 684.

We note section 552.130(a)(1) of the Government Code provides information relating to a motor vehicle operator's license or driver's license issued by a Texas agency, or an agency of another state or country, is excepted from public release. *See* 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(a)(1)). Upon review, we agree the redacted driver's license number, expiration date, class designation, and endorsements must be withheld under section 552.130(a)(1). However, the remaining information you redacted, which we are able to discern, is not subject to section 552.130. Therefore, as you have not claimed any exceptions to disclosure of this information, we have marked it for release.

We now turn to your arguments for 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. This exception encompasses information other statutes make confidential. You assert the information submitted as Exhibit 5 is confidential under 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 state Exhibit 5 consists of the superintendent's ExCET exam results. You also state subsections 21.048(c-1)(1) and (2) do not apply in this instance.

Upon review, we find portions of Exhibit 5, which we have marked, consist of the superintendent's ExCET exam results. Therefore, the district must withhold this information under section 552.101 in conjunction with section 21.048(c-1). We note, however, the remaining information in Exhibit 5 does not consist of the superintendent's exam results. Consequently, the district may not withhold any of the remaining information in Exhibit 5 under section 552.101 in conjunction with section 21.048(c-1).

You contend the information submitted as Exhibit 2 is protected under section 21.355 of the Education Code. Section 552.101 of the Government Code also encompasses section 21.355, which provides in part that "[a] document evaluating the performance of a teacher or administrator is confidential." See Act of May 25, 2011, 82nd Leg., R.S., H.B. 2971, § 1 (to be codified at Educ. Code § 21.355(a)). 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). We have determined the word "administrator" in section 21.355 means a person who is required to and does in fact hold an administrator's certificate under subchapter B of chapter 21 of the Education Code and is performing the functions of an administrator, as that term is commonly defined, at the time of the evaluation. *Id.* You state Exhibit 2 consists of evaluations of the district's superintendent. You inform us, and provide documentation showing, the superintendent holds the appropriate administrator's certification under subchapter B of chapter 21 of the Education Code. Based on your representations and our review, we find the district must withhold Exhibit 2 under section 552.101 in conjunction with section 21.355.

Section 552.101 of the Government Code also encompasses the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. See Occ. Code § 151.001. 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). You claim the information submitted as Exhibit 4 is confidential under section 159.002. This office has concluded that 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 agree Exhibit 4 consists of confidential medical records that may only be released in accordance with the MPA.

You claim portions of the transcripts submitted as Exhibit 3(B) are 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, with the exception of the employee's name, the courses taken, and the degree obtained, which must be released, the district must withhold Exhibit 3(B) under section 552.102(b) of the Government Code.¹

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy. For information to be protected from public disclosure by the common-law right of privacy, the information must meet the criteria set out by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (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. 540 S.W.2d at 685. To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *See id.* at 681-82. The types of information considered intimate and 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. *See id.* at 683. You claim Exhibit 3(A) should be withheld in its entirety on the basis of common-law privacy. Generally, only highly intimate information that implicates the privacy of an individual is withheld. However, in certain instances, where it is demonstrated that the requestor knows the identity of the individual involved, as well as the nature of certain incidents, the information must be withheld in its entirety to protect the individual's privacy. Upon review, we find that no portion of Exhibit 3(A) is highly intimate or embarrassing and of no legitimate concern to the public. Consequently, the district may not withhold any portion of Exhibit 3(A) under section 552.101 in conjunction with common-law privacy.

You claim the remaining information you have marked is excepted from disclosure under section 552.102(a) of the Government Code. This section excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwanted invasion of personal privacy." Gov't Code § 552.102(a). We understand you to 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

¹As our ruling for this information is dispositive, we need not address your remaining arguments against disclosure.

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 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. Accordingly, the district must withhold the superintendent's birth date in Exhibit 3(A), which you and we have marked, under section 552.102(a).

We note portions of the remaining information in Exhibits 3(A) and 5 may be subject to section 552.117(a)(1) of the Government Code.² This section 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 this information be kept confidential under section 552.024 of the Government Code. *See* 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)(1)). 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). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former 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. Therefore, to the extent the superintendent timely elected confidentiality under section 552.024, the district must withhold the personal information we have marked in Exhibits 3(A) and 5 under section 552.117(a)(1). If, however, the superintendent did not timely elect confidentiality, the personal information we marked in Exhibits 3(A) and 5 may not be withheld under section 552.117(a)(1).

In summary, with the exception of the information we have marked for release, the district must withhold the information you redacted under section 552.130 of the Government Code. The district must withhold the information we have marked in Exhibit 5 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 2 under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. Exhibit 4 may only be released in accordance with the MPA. With the exception of the employee's name, the courses taken, and the degree obtained, the district must withhold Exhibit 3(B) under section 552.102(b) of the Government Code. The district must withhold the marked birth date in Exhibit 3(A) under section 552.102(a) of the Government Code. Finally, to the extent the superintendent timely elected confidentiality under section 552.024, the district

²The 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).

must withhold the personal information we have marked in Exhibits 3(A) and 5 under section 552.117(a)(1) of the Government Code. If, however, the superintendent did not timely elect confidentiality, the personal information we marked in Exhibits 3(A) and 5 may not be withheld under section 552.117(a)(1) 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,



Kenneth Leland Conyer
Assistant Attorney General
Open Records Division

KLC/eb

Ref: ID# 431129

Enc. Submitted documents

c: Requestor
(w/o enclosures)