



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 7, 2011

Ms. Sandi P. Tarsky
Walsh, Anderson, Brown, Gallegos & Green, P.C.
P.O. Box 168046
Irving, Texas 75016

OR2011-16299

Dear Ms. Tarsky:

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# 435405.

The Coppell Independent School District (the "district"), which you represent, received a request for records relating to the requestor's clients and their children; records relating to the professional qualifications of two named district employees; all complaints against the two named employees for a specified time period; the names, titles, work e-mail addresses, work telephone numbers, and resumes of all staff with educator certification at a specified school for a specified time period; and all telephone billing records for the school for a specified time period.¹ You state the district will release some information to the requestor. We note you have redacted student-identifying information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United

¹You provide documentation showing the district sought and received clarification from the requestor regarding his 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).

States Code.² You claim 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.

You assert Attachment E is a student education record subject to FERPA. *See* 34 C.F.R. § 99.3 (defining “education records”). You also acknowledge the parents of the child whose education record is at issue generally have a right of access under FERPA to their own child’s education records. *See* 20 U.S.C. § 1232g(a)(1)(A); *see also* 34 C.F.R. § 99.3 (defining “parent”). You contend, however, the submitted information is confidential under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code and the federal Child Abuse Prevention and Treatment Act (“CAPTA”). Thus, you assert section 261.201 and CAPTA prevail over the requestor’s right of access under FERPA.

CAPTA conditions federal grant funding for state child abuse prevention and treatment programs on the fulfillment of certain eligibility criteria and requires states to adopt methods to preserve the confidentiality of information concerning child abuse and neglect. *See* 42 U.S.C. §§ 5106a(b)(1)(A), 5106a(b)(2)(B)(viii). Chapter 261 of the Family Code was enacted in accordance with CAPTA. Information pertaining to reports or investigations of alleged or suspected child abuse or neglect is generally confidential under section 261.201 of the Family Code. *See* Fam. Code § 261.201(a).

The Family Compliance Office (the “compliance office”) of the DOE, which is responsible for interpreting and construing FERPA, has addressed the interplay between a parent’s right of access under FERPA and the confidentiality provisions of section 261.201. The compliance office found section 261.201 was promulgated pursuant to CAPTA, so that any statutory conflict would thus be between the two federal statutes, FERPA and CAPTA, rather than FERPA and the state statute, section 261.201. *See* Letter from Leroy S. Rooker, Director, Family Policy Compliance Office, U.S. Department of Education, to Stacy Ferguson, Attorney, Schulman, Walheim & Heidelberg (Oct. 10, 1997). After reviewing FERPA and CAPTA, the compliance office concluded CAPTA, being the later enacted statute, governs, and thus the CAPTA-compliant Texas Family Code provision concerning reports and investigations of alleged or suspected child abuse or neglect prevails over FERPA. *Id.* Based on the compliance office’s determination that CAPTA prevails over FERPA, we will address your claim that Attachment E is confidential under section 261.201 of the Family Code.

²The Family Policy Compliance Office of the United States Department of Education (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.state.tx.us/open/20060725usdoe.pdf>.

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 that other statutes make confidential, such as section 261.201 of the Family Code, which provides in part:

(a) [T]he 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); *see id.* §§ 261.001(1), (4) (defining “abuse” and “neglect” for purposes of Fam. Code ch. 261), 101.003 (defining child for purposes of Family Code title 5). You contend Attachment E was used or developed in an investigation under chapter 261 of the Family Code. Although the district is not an agency authorized to conduct an investigation under chapter 261, section 261.406 of the Family Code authorizes the Texas Department of Family and Protective Services and law enforcement agencies to conduct investigations involving public schools under chapter 261. *See id.* §§ 261.103 (listing agencies that may conduct investigations under Fam. Code ch. 261), .406 (investigations in schools). Based on your representations and our review of the information at issue, we agree Attachment E is confidential under section 261.201(a) of the Family Code. We therefore conclude the district must withhold Attachment E under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. *See* Open Records Decision No. 440 at 2 (1986) (predecessor statute).

You claim Attachment F is confidential under section 21.355 of the Education Code. Section 552.101 of the Government Code 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. In Open Records Decision No. 643 (1996), this office 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* ORD 643 at 3. 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.* We note the Third Court of Appeals has concluded that a written reprimand constitutes an evaluation for the 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.” *North East Indep. Sch. Dist. v. Abbott*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.).

You assert Attachment F constitutes confidential evaluations of a certified educator for the purposes of section 21.355. Upon review, we agree a portion of the information at issue, which we have marked, constitutes evaluations of a certified educator. Therefore, the district must withhold the information we have marked under section 552.101 in conjunction with section 21.355 of the Education Code. However, we note the remaining information in Attachment F pertains to a grievance decision written by a district principal and the supporting documentation for that decision. Upon review, we find you have failed to demonstrate how this information constitutes an evaluation for the purposes of section 21.355 of the Education Code. Accordingly, the district may not withhold any of the remaining information in Attachment F under section 552.101 on that basis.

You also raise sections 552.101 and 552.102 of the Government Code for Attachment F. Section 552.101 also encompasses common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) 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 elements of the test must be established. *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. However, information pertaining to the work conduct and job performance of public employees is subject to a legitimate public interest and, therefore, generally not protected from disclosure under common-law privacy. *See* Open Records Decision Nos. 562 at 10 (1990) (personnel information does not involve most intimate aspects of human affairs, but in fact touches on matters of legitimate public concern), 470 at 4 (job performance does not generally constitute public employee’s private affairs), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of government employees), 423 at 2 (1984) (scope of public employee privacy is narrow), 405 at 2-3 (1983) (public has interest in manner in which public employee performs job), 329 at 2 (1982) (information relating to complaints against public employees and discipline resulting therefrom is not protected under former section 552.101), 208 at 2 (1978) (information relating to complaint against public employee and disposition of the complaint is not protected under common-law right of privacy). *In Morales v. Ellen*, 840 S. W.2d 519 (Tex. App.—El Paso 1992, writ denied), the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. In this decision, the court held that the identity of witnesses to and victims of sexual harassment was highly intimate or embarrassing information and the public did not have a legitimate interest in such information. *Ellen*, 840 S.W.2d 519. However, Attachment F consists of an employee grievance regarding her unfavorable evaluation by her supervisor, not sexual harassment.

Because the allegation does not concern sexual harassment, we find *Ellen* is not applicable in this instance. Consequently, the district may not withhold any portion of Attachment F under section 552.101 in conjunction with common-law privacy on the basis of *Ellen*. Furthermore, upon review, we find none of Attachment F is highly intimate or embarrassing. Therefore, the district may not withhold any portion of Attachment F under section 552.101 of the Government Code in conjunction with 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). 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 has 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 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. Upon review, we find no portion of Attachment F is excepted under section 552.102(a). Accordingly, the district may not withhold any of Attachment F under section 552.102(a) of the Government Code.

You claim portions of Attachment G are excepted from disclosure under section 552.102(b) of the Government Code. Section 552.102(b) excepts from disclosure all information from 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). You argue an employee’s grade point averages contained in a resume in Attachment G are excepted under section 552.102(b). However, section 552.102(b) applies only to transcripts. Accordingly, section 552.102(b) does not apply to the employee’s grade point average contained in documents other than transcripts, and the district may not withhold the information you have marked in Attachment G on that basis. See Open Records Decision Nos. 649 at 3 (1996) (language of a confidentiality provision controls the scope of its protection), 478 at 2 (1987) (statutory confidentiality requires express language making certain information confidential or stating that information shall not be released to the public).

We note a portion of the information in Attachment F may be subject to section 552.117 of the Government Code.³ Section 552.117(a)(1) 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. 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)). 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 if the employee whose information is at issue made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. If the employee whose information is at issue timely elected to keep her personal information confidential, the district must withhold the information we have marked under section 552.117 of the Government Code. The district may not withhold this information under section 552.117 if the employee did not make a timely election to keep her information confidential.

We note the remaining information contains an e-mail address subject to section 552.137 of the Government Code. Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body,” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). The e-mail address we have marked does not appear to be specifically excluded by section 552.137(c). *See id.* § 552.137(c). Therefore, the district must withhold the e-mail address in Attachment G we have marked under section 552.137 of the Government Code, unless its owner consents to its release.⁴

In summary, the district must withhold Attachment E under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. The district must withhold the evaluations of a certified educator in Attachment F we have marked under section 552.101 in conjunction with section 21.355 of the Education Code. The district must withhold the information in Attachment F we have marked under section 552.117 of the Government Code, if the employee whose information is at issue timely elected to keep her personal information confidential. The district must withhold the e-mail address in

³The 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).

⁴We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

Attachment G we have marked under section 552.137 of the Government Code, unless its owner consents to its release. 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,



Mack T. Harrison
Assistant Attorney General
Open Records Division

MTH/em

Ref: ID# 435405

Enc. Submitted documents

c: Requestor
(w/o enclosures)