



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 1, 2011

Ms. Marianna M. McGowan
For the McKinney Independent School District
Abernathy Roeder Boyd & Joplin, P.C.
P.O. Box 1210
McKinney, Texas 75070-1210

OR2011-17732

Dear Ms. McGowan:

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# 437546.

The McKinney Independent School District (the "district"), which you represent, received a request for hallway and classroom surveillance video of named individuals and specified events; all e-mail correspondence for five named individuals during a specified time period; agendas pertaining to sexual harassment training; job duties and responsibilities of two specified individuals; and district and campus handbooks. We note you have redacted student-identifying information from the submitted documents pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.117, and 552.137 of the Government Code. Additionally, you provide documentation showing you have notified the two individuals of their rights to submit comments to this office why some of the submitted information should not be

¹The 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 or student 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. A 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>.

released.² *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note you have not submitted information responsive to the request for surveillance video, agendas, job duties and responsibilities of the two specified individuals, or district and campus handbooks. To the extent any information responsive to these portions of the request existed on the date the district received the request, we assume the district has released it. If the district has not released any such information, it must do so at this time. *See id.* §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes no exceptions apply to requested information, it must release information as soon as possible).

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 section 21.355 of the Education Code, which provides, “[a] document evaluating the performance of a teacher or administrator is confidential.” Act of May 25, 2011, 82nd Leg., R.S., H.B. 2971, § 1 (to be codified at Educ. Code § 21.355). This section applies 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 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 and who is in the process of teaching, as that term is commonly defined, at the time of the evaluation. *See id.* at 4. We note a court has concluded 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.” *Abbott v. North East Indep. Sch. Dist.*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.).

You state some of the submitted information consists of performance evaluations and interventions, assessment information, reprimands, personnel decisions, and reassignments, which constitute evaluative documentation pertaining to the performance of teachers. You state the teachers at issue held the appropriate teaching certificates at the time the information at issue was created. Upon review of the information at issue, we find you have failed to show how any of the information at issue consists of the evaluation of a teacher for purposes of section 21.355. Therefore, the district may not withhold any portion of the information at issue under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.

²As of the date of this letter, this office has not received comments from any third party explaining why any of the submitted information should not be released.

Section 552.101 of the Government Code also encompasses the Medical Practice Act (“MPA”), subtitle B of title 3 of the Occupations Code, which governs release of medical records. *See* Occ. Code §§ 151.001-165.160. Section 159.002 of the MPA provides, in relevant 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). 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). Information subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code §§ 159.002, .004; Open Records Decision No. 598 (1991).

Upon review, we find a portion of the submitted information constitutes records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that were created or are maintained by a physician or information obtained from a patient’s medical records. The district must withhold this information, which we have marked, under section 552.101 in conjunction with the MPA. However, we find you have not demonstrated how any portion of the remaining information constitutes records of the identity, diagnosis, evaluation, or treatment of a patient by a physician that were created or are maintained by a physician or information obtained from a patient’s medical records. Accordingly, none of the remaining information may be withheld under section 552.101 in conjunction with the MPA.

Section 552.101 of the Government Code 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 prongs of this test must be demonstrated. *See id.* at 681-82. You argue some of the submitted information is protected

by common-law privacy under *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied). In *Ellen*, the court applied common-law privacy to an investigation of alleged sexual harassment in an employment context. Although the district generally contends *Ellen* is applicable to the submitted information, we find no portion of the submitted information consists of an investigation of alleged sexual harassment. We therefore conclude the district may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with common-law privacy under *Ellen*.

You also assert portions of the submitted information are confidential pursuant to common-law privacy. The type 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. *Indus. Found.*, 540 S.W. 2d at 683. This office has 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. 455 (1987) (information pertaining to prescription drugs, specific illnesses, operations and procedures, and physical disabilities protected from disclosure), 422 (1984) (concluding that details of self-inflicted injuries are presumed protected by common-law privacy), 343 (1982) (references in emergency medical records to drug overdoses, acute alcohol intoxication, obstetrical or gynecological illnesses, convulsions or seizures, and emotional or mental distress). Upon review, we find the information we have marked is highly intimate or embarrassing and not of legitimate public concern. Therefore, the district must withhold the marked information under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find you have not demonstrated how any portion of the remaining information is highly intimate or embarrassing and not of legitimate public concern. Thus, none of the remaining information may be withheld under section 552.101 in conjunction with common-law privacy.

You claim some of the remaining submitted information 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 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. Upon review, we find no portion of the remaining information is excepted under section 552.102(a). Accordingly, the district may not withhold any of the remaining information under section 552.102(a).

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee of a governmental body who requests 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 item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). You state the individuals whose personal information is at issue timely requested confidentiality under section 552.024. Accordingly, the district must withhold the information we have marked under section 552.117(a)(1) of the Government Code.

Section 552.137 of the Government Code 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 at issue is not excluded by subsection (c). Therefore, the district must withhold the personal e-mail address we have marked under section 552.137 of the Government Code, unless the owner has affirmatively consented to its public disclosure.³

In summary, the district must withhold the information we marked under section 552.101 of the Government Code in conjunction with the MPA and common-law privacy. The district must also withhold the information we marked under section 552.117(a)(1) of the Government Code. The district must withhold the personal e-mail address we have marked under section 552.137 of the Government Code, unless the owner has affirmatively consented to its public disclosure. 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.

³We note Open Records Decision No. 684 (2009) is 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.

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,



Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/agn

Ref: ID# 437546

Enc. Submitted documents

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(w/o enclosures)

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