



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 8, 2012

Mr. Scott McDonald  
For Point Isabel Independent School District  
O'Hanlon, McCollom & Demerath  
808 West Avenue  
Austin, Texas 78701

OR2012-01949

Dear Mr. McDonald:

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# 444873.

The Point Isabel Independent School District (the "district"), which you represent, received a request for information related to three named district employees, and information related to a specified event. You state you have released most of the requested information. You state you will redact driver's license numbers and photocopies of driver's licenses pursuant to pursuant to Open Records Decision No. 684 (2009).<sup>1</sup> Additionally, you state you will redact I-9 forms and personal e-mail addresses under Open Records Decision No. 684.<sup>2</sup> You

---

<sup>1</sup>Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including a Texas driver's license number under section 552.130(a)(1) of the Government Code and a photocopy of a driver's license of the Government Code, 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* 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* Gov't Code § 552.130(d), (e). Thus, the statutory amendments to section 552.130 of the Government Code superceded Open Records Decision No. 684 on September 1, 2011.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.

<sup>2</sup>As noted above, Open Records Decision No. 684 authorizes governmental bodies to withhold ten categories of information, including a Form I-9 under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code and 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.

further state you will redact social security numbers pursuant to section 552.147 of the Government Code.<sup>3</sup> You claim portions of the submitted information are excepted from disclosure under sections 552.101, 552.102, 552.108, and 552.117 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the district did not fully comply with section 552.301 of the Government Code. Subsection (b) of section 552.301 requires a governmental body requesting an open records ruling from this office to “ask for the attorney general’s decision and state the exceptions that apply within a reasonable time but not later than the tenth business-day after the date of receiving the written request.” Gov’t Code § 552.301(b). While you raised sections 552.101, 552.102, and 552.117 within the ten-business-day time period required by subsection 552.301(b), you did not raise section 552.108 until after the ten-business-day deadline had passed. Generally, if a governmental body fails to timely raise an exception, that exception is waived. *See generally id.* § 552.302; Open Records Decision No. 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions). Section 552.108 is a discretionary exception to disclosure which protects a governmental body’s interests and may be waived. *See Gov’t Code* § 552.007; Open Records Decision No. 177 (1977) (statutory predecessor to section 552.108 subject to waiver); 665 at 2 n.5 (2000) (discretionary exceptions generally). Consequently, by failing to comply with section 552.301(b) with respect to its claim under section 552.108, the district has waived its claim under this exception. Accordingly, the district may not withhold any of the submitted information under section 552.108 of the Government Code. However, we will address your timely raised exceptions.

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 information made confidential by other statutes. Section 552.101 encompasses the Family Medical Leave Act (the “FMLA”), section 2654 of title 29 of the United States Code. Section 825.500 of chapter V of title 29 of the Code of Federal Regulations identifies the record-keeping requirements for employers that are subject to the FMLA. Subsection (g) of section 825.500 states that

[r]ecords and documents relating to medical certifications, recertifications or medical histories of employees or employees’ family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files, and if the ADA, as amended, is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements . . . , except that:

---

<sup>3</sup>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 under the Act. Gov’t Code § 552.147(b).

- (1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;
- (2) First aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatment; and
- (3) Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

29 C.F.R. § 825.500(g). The documents in Exhibit 7 include FMLA certification documents and related records. Accordingly, Exhibit 7 is confidential under section 825.500 of title 29 of the Code of Federal Regulations. Further, we find that none of the release provisions of the FMLA applies to the information. Thus, we conclude that the district must withhold Exhibit 7 under section 552.101 of the Government Code in conjunction with the FMLA.

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 chapter 552, Government Code, 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.
- (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 also id.* § 261.001(1), (4) (defining “abuse” and “neglect” for purposes of Fam. Code ch. 261). We note the district is not an agency authorized to conduct an investigation under chapter 261. *See id.* § 261.103 (listing agencies that may conduct child abuse investigations). However, you state that the information in Exhibit 9 pertains to an investigation of alleged or suspected child abuse by the district's police department, which is an agency authorized to conduct investigations under chapter 261. Accordingly, you seek to withhold Exhibit 9 under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. Upon review, we find Exhibit 9 is within the scope of

section 261.201 of the Government Code. You do not indicate that the district's police department has adopted a rule that governs the release of this type of information. Therefore, the district must withhold Exhibit 9 under section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code.<sup>4</sup>

Section 552.101 also encompasses articles 55.01 through 55.05 of the Code of Criminal Procedure, which provide for the expunction of criminal records in certain limited circumstances. Article 55.03 prescribes the effect of an expunction order and provides:

When the order of expunction is final:

- (1) the release, maintenance, dissemination, or use of the expunged records and files for any purpose is prohibited;
- (2) except as provided in Subdivision (3) of this article, the person arrested may deny the occurrence of the arrest and the existence of the expunction order; and
- (3) the person arrested or any other person, when questioned under oath in a criminal proceeding about an arrest for which the records have been expunged, may state only that the matter in question has been expunged.

Crim. Proc. Code art. 55.03. Article 55.04 imposes sanctions for violations of an expunction order and provides in relevant part:

Sec. 1. A person who acquires knowledge of an arrest while an officer or employee of the state or of any agency or other entity of the state . . . and who knows of an order expunging the records and files relating to that arrest commits an offense if he knowingly releases, disseminates, or otherwise uses the records or files.

*Id.* art. 55.04, § 1. This office has previously determined the expunction statute prevails over the Act. *See* Open Records Decision No. 457 at 2 (1987) (governmental body prohibited from releasing or disseminating arrest records subject to expunction order, as “those records are not subject to public disclosure under the [Act]”). You inform us Exhibit 4 is subject to an expunction order. Based on your representation and our review, we conclude Exhibit 4 is confidential under article 55.03 of the Code of Criminal Procedure and must be withheld from the requestor on that basis under section 552.101 of the Government Code.

---

<sup>4</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

Section 552.101 also encompasses the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code. *See* Occ. Code § 151.001-165.160. Section 159.002 of the MPA provides:

(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. Information subject to the MPA includes both medical records and information obtained from those medical records. *See* Open Records Decision No. 598 (1991). Medical records may be released only as provided under the MPA. *Id.* We have marked the medical records in Exhibits 2.2, 5.1, 5.2, and 5.3 that are subject to the MPA. The district may only disclose this information in accordance with the MPA. Upon review, however, we find that you have failed to demonstrate how any of the remaining information constitutes a medical record for purposes of the MPA. Therefore, none of the remaining information is confidential under the MPA, and no portion of it may be withheld under section 552.101 of the Government Code on this basis.

Section 552.101 also encompasses section 21.048 of the Education Code, which addresses teacher certification examinations. Section 21.048(c-1) provides the following:

(c-1) 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 have marked portions of the submitted information that you state reflect the results of examinations administered under section 21.048. You further state subsections 21.048(c-1)(1) and (2) are not applicable to the information at issue. Based on your representations and our review, we find the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 21.048(c-1) of the Education Code. However, we find no portion of the remaining information at issue constitutes the results of examinations administered under section 21.048. Accordingly, no portion of the remaining information at issue may be withheld under section 552.101 of the Government Code in conjunction with section 21.048 of the Education Code.

Section 552.101 also encompasses section 21.355 of the Education Code, which provides in part that “[a] document evaluating the performance of a teacher or administrator is confidential.” *See* 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 that for purposes of section 21.355, “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 also have determined “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.* 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.” *See North East Indep. Sch. Dist. v. Abbott*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.).

You contend some of the submitted information is confidential under section 21.355. You state the information at issue consists of evaluations of administrators and teachers employed by the district who were functioning as administrators or teachers and were required to and did hold the appropriate certifications under subchapter B of the Education Code when they were evaluated. Upon review, we find the information we have marked in Exhibits 1.1, 1.2, and 1.3 consist of evaluations of the district teachers and administrators for purposes of section 21.355. 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, no portion of the remaining information consists of evaluations for purposes of section 21.355. Thus, the district may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.

Section 552.101 also encompasses the common-law right of privacy, which protects information that is (1) highly intimate or embarrassing, such that its release would be highly

objectionable to a reasonable person, and (2) not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this 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. *See id.* at 683. This office has found that 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. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Upon review, we find that portions of the information at issue are highly intimate or embarrassing and not of legitimate public concern. Thus, the district must withhold the information we have marked pursuant to section 552.101 of the Government Code in conjunction with common-law privacy. However, we find no portion of the remaining information at issue is highly intimate or embarrassing and not of legitimate public interest.

You assert portions of the submitted information are protected by section 552.102 in conjunction with the ruling in *Texas Comptroller of Public Accounts v. Attorney General of Texas*, No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010). 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). 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 was discussed above. 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*, 2010 WL 4910163, at \*5. The supreme court then considered the applicability of section 552.102, not *Industrial Foundation*, 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. Having carefully reviewed the information at issue, agree the date of birth information you have marked must be withheld under section 552.102(a) of the Government Code. However, we find the remaining information is not excepted under section 552.102(a) and may not be withheld on that basis.

You claim the information you have marked in Exhibits 3.1 through 3.5 is subject to section 552.102(b), which excepts from disclosure higher education transcripts of professional public school employees, but does not except the employee’s name, the courses taken, and the degree obtained from disclosure. Gov’t Code § 552.102(b); *see also* Open Records Decision No. 526 (1989). Upon review, we find the district must withhold the

information you have marked in Exhibits 3.1, 3.2, and 3.5 under section 552.102(b) of the Government Code. However, Exhibits 3.3 and 3.4 do not consist of higher education transcripts. Therefore, the district may not withhold this information under section 552.102(b).

Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security number, and family member information of a current or former employee or official of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). We note an individual's personal post office box number is not a "home address" and, therefore, may not be withheld under section 552.117. *See* Gov't Code § 552.117; Open Records Decision No. 622 at 6 (1994) (legislative history makes clear that purpose of section 552.117 is to protect public employees from being harassed *at home*) (citing House Committee on State Affairs, Bill Analysis, H.B. 1979, 69th Leg. (1985)). 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 information. *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 or official who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who did not timely request under section 552.024 that the information be kept confidential. You state the employees at issue timely requested confidentiality under section 552.024. Therefore, with the exception of the information we have marked for release, the district must withhold the information you have marked under section 552.117(a)(1) of the Government Code.

In summary, the district must withhold Exhibit 7 under section 552.101 of the Government Code in conjunction with the FMLA. The district must withhold Exhibit 9 under section 552.101 of the Government Code in conjunction with section 261.201(a) of the Family Code. The district must withhold Exhibit 4 under section 552.101 of the Government Code in conjunction under article 55.03 of the Code of Criminal Procedure. The medical records we have marked in Exhibits 2.2, 5.1, 5.2, and 5.3 may only be released 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 section 21.048(c-1) of the Education Code. The district must withhold the information we have marked in Exhibits 1.1, 1.2, and 1.3 under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. The district must withhold the information you have marked pursuant to section 552.101 of the Government Code in conjunction with common-law privacy. The district must withhold the date of birth information we have marked under section 552.102(a) of the Government Code. The district must withhold the information you have marked in Exhibits 3.1, 3.2, and 3.5 under section 552.102(b) of the Government Code. With the exception of the information we have marked for release, the

district must withhold the information you have marked under section 552.117(a)(1) of the Government Code. 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.

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](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,



Vanessa Burgess  
Assistant Attorney General  
Open Records Division

VB/dls

Ref: ID# 444873

Enc. Submitted documents

c: Requestor  
(w/o enclosures)