



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 9, 2012

Mr. Miles J. LeBlanc  
Assistant General Counsel  
Houston Independent School District  
4400 West 18<sup>th</sup> Street  
Houston, Texas 77092-8501

OR2012-06855

Dear Mr. LeBlanc:

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# 453501.

The Houston Independent School District (the "district") received a request for information pertaining to a named district employee, including any resignation letters or letters of reprimand, all e-mails between the named employee and another named individual for a specified time period, the work history of the named employee, and any investigations into the named employee or investigative-type reports. You claim that 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, we note you have not submitted any e-mails or work history for our review. Thus, to the extent such information existed and was maintained by the district on the date the district received the request for information, we presume the district has released it. If not, the district must do so at this time. *See* Gov't Code §§ 552.301, .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to the requested information, it must release the 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. This section encompasses information protected by other statutes, such as section 21.355 of the Education Code, which provides that "[a] document evaluating the performance of a teacher or administrator is confidential." Educ. Code § 21.355(a).

Additionally, the courts have concluded that a written reprimand constitutes an evaluation for purposes of section 21.355 as 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.). 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, this office also concluded that an administrator is someone who is required to hold and does hold a certificate required under chapter 21 of the Education Code and is administering at the time of his or her evaluation. *Id.* at 4.

Upon review, we find Attachment 1, which consists of a memorandum providing notice of a conference, does not constitute an evaluation for the purposes of section 21.355. Accordingly, the district may not withhold Attachment 1 under section 552.101 of the Government Code on this basis. We agree Attachment 2 consists of an evaluation of the named employee. You state the employee was an administrator at the time of the evaluation, however, you do not state or provide documentation showing that the employee held the requisite certificate under chapter 21 of the Education Code. Thus, we rule conditionally. If the employee at issue held the requisite certificate at the time of the evaluation at issue, the district must withhold Attachment 2 under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. If the employee at issue did not hold the requisite certificate at the time of the evaluation at issue, Attachment 2 is not confidential under section 21.355 and may not be withheld under section 552.101 of the Government Code on this basis.

Section 552.101 of the Government Code also encompasses the common-law right of 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. The type 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. 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). We note the public generally has a legitimate interest in information relating to the resignation or termination of a public employee. See Open Records Decision Nos. 444 at 5 (1986) (public has legitimate interest in knowing reasons for public employee’s dismissal, demotion, or promotion), 329 (reasons for employee’s resignation ordinarily not private). In this instance, we find that the information we have marked in Attachment 3 is highly intimate or embarrassing and not of legitimate public concern. Therefore, 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 you have failed to demonstrate that any of the remaining information in Attachment 3 is highly intimate or embarrassing and not of legitimate public concern. Therefore, the district may not withhold any of the remaining information in Attachment 3 under section 552.101 of the Government Code in conjunction with common-law privacy.

You claim the remaining information in Attachment 3 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). 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. See *Texas Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). The supreme court considered the applicability of section 552.102, and has 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 347. Having carefully reviewed the information at issue, we find none of the remaining information in Attachment 3 is excepted under section 552.102(a) of the Government Code. Accordingly, the district may not withhold any of the remaining information on that basis.

In the event that Attachment 2 may not be withheld under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code, we note that portions of Attachment 2 may be subject to section 552.117 of the Government Code.<sup>1</sup> Section 552.117 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 that this information be kept confidential under section 552.024 of the Government Code. Gov’t Code § 552.117(a)(1). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. See Open Records Decision No. 530 at 5 (1989). Therefore, a governmental body must withhold information under section 552.117 on behalf of current or former officials or employees only if these individuals made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Accordingly, if the employee whose information is at issue timely elected to keep his personal information confidential pursuant to section 552.024, the district must withhold the information we have marked under section 552.117(a)(1). The district

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<sup>1</sup>The 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).

may not withhold this information under section 552.117 if the employee did not make a timely election to keep the information confidential.

In summary, if the employee at issue held the requisite certificate at the time of the evaluation at issue, the district must withhold Attachment 2 under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. The district must withhold the information we have marked in Attachment 3 under section 552.101 of the Government Code in conjunction with common-law privacy. In the event that Attachment 2 may not be withheld under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code, if the employee whose information is at issue timely elected to keep his personal information confidential pursuant to section 552.024, the district must withhold the information we have marked in Attachment 2 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](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,



Lindsay E. Hale  
Assistant Attorney General  
Open Records Division

LEH/ag

Ref: ID# 453501

Enc. Submitted documents

c: Requestor  
(w/o enclosures)