



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 21, 2012

Mr. Humberto Aguilera
For Eagle Pass Independent School District
Escamilla, Poneck & Cruz, L.L.P.
P.O. Box 200
San Antonio, Texas 78291-0200

OR2012-09580

Dear Mr. Aguilera:

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# 456801.

The Eagle Pass Independent School District (the "district"), which you represent, received a request for the human resource director's personnel file. You state the district has or will make the majority of the information available to the requestor, with home addresses, home telephone numbers, and social security numbers redacted pursuant to section 552.024 of the Government Code¹ and motor vehicle record information redacted pursuant to Open Records Decision No. 684 (2009).² You claim the submitted information is excepted from disclosure

¹Section 552.024(c)(2) of the Government Code authorizes a governmental body to redact information protected by section 552.117(a)(1) of the Government Code without the necessity of requesting a decision under the Act if the current or former employee or official to whom the information pertains timely chooses not to allow public access to the information. *See* Gov't Code § 552.024(c)(2).

²Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold ten categories of information 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 id.* § 552.130(d), (e). Thus, the statutory amendment to section 552.130 of the Government Code superceded Open Records Decision No. 684 on September 1, 2011.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.

under sections 552.101 and 552.102 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we must address the requestor's assertion that the district failed to comply with the procedural time lines of the Act because the district misrepresented to this office that the requestor withdrew his initial request for this information. Section 552.301 prescribes procedures a governmental body must follow in asking this office to determine whether requested information is excepted from public disclosure. *See id.* § 552.301(a). Section 552.301(b) requires the governmental body to ask for the attorney general's decision and state the exceptions to disclosure that it claims not later than the tenth business day after the date of its receipt of the written request for information. *See id.* § 552.301(b). Section 552.301(e) requires the governmental body to submit to this office, no later than the fifteenth business day after the date of its receipt of the request, (1) written comments stating why the governmental body's claimed exceptions apply to the information at issue; (2) a copy of the request for information; (3) a signed statement of the date of the date of the governmental body's receipt of the request or evidence sufficient to establish the date of receipt; and (4) the specific information the governmental body seeks to withhold or representative samples if the information is voluminous. *See id.* § 552.301(e)(1)(A)-(D).

You explain, and provide documentation showing, the district received a request for the information at issue on March 1, 2012. You state on March 21, 2012 the requestor withdrew his request for information through a letter addressed to the district's superintendent and delivered to the president of the district's board of trustees. On March 29, 2012, the requestor sent a letter to this office, and copied the district's attorneys, claiming that the letter dated March 21, 2012 did not constitute a withdrawal of his request because it was not delivered to the district's superintendent. This office cannot resolve factual disputes in the opinion process. *See* Open Records Decision Nos. 592 at 2 (1991), 552 at 4 (1990), 435 at 4 (1986). Where fact issues are not resolvable as a matter of law, we must rely on the facts alleged to us by the governmental body requesting our decision, or upon those facts that are discernible from the documents submitted for our inspection. *See* ORD 552 at 4. You state the requestor's March 29, 2012 letter constitutes a new request for information. However, the district did not submit a request for a ruling from this office until April 16, 2012. Thus, assuming *arguendo* the requestor's March 1, 2012 request was withdrawn and the March 29, 2012 request is a new request, the district still did not comply with the procedural requirements of section 552.301 of the Government Code in requesting a ruling from this office.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption the information is public and must be released. Information presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information

to overcome this presumption. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *see also* Open Records Decision No. 630 (1994). Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third-party interests are at stake. Open Records Decision No. 150 at 2 (1977). You claim the submitted information is confidential under sections 552.101 and 552.102. Because sections 552.101 and 552.102 can provide compelling reasons to withhold information, we will address the applicability of these sections to 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 section encompasses information protected by other statutes, such as 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, 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 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 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.* We have further determined that “teacher interns, teacher trainees, librarians, educational aids and counselors cannot be teachers or administrators for purposes of section 21.355.” *Id.* at 5.

You state the information you have marked as Exhibit A contains a memorandum from a supervising administrator to the named employee regarding his performance. However, you further state the named employee was assigned as a counselor at the time the memorandum at issue was written. Based on your representations, we find you have failed to show the information in Exhibit A evaluates the performance of a teacher for purposes of section 21.355. Accordingly, the district may not withhold Exhibit A under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.

We note Exhibit A contains information subject to section 552.117 of the Government Code, which excepts from disclosure the home address and telephone number, social security number, emergency contact information, 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 of the Government Code.³ See Gov't Code § 552.117(a)(1). 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). 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, if the individual whose information we have marked timely requested confidentiality under section 552.024, the district must withhold the marked information under section 552.117(a)(1) of the Government Code. If the individual whose information is at issue did not make a timely election under section 552.024, the district may not withhold the information we have marked under section 552.117(a)(1) of the Government Code.

You claim the submitted information you have marked as Exhibit B contains transcripts from an institution of higher education that are subject to section 552.102(b) of the Government Code. Section 552.102(b) excepts from disclosure all information in transcripts from an institution of higher education maintained in the personnel file of a professional public school employee 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). Thus, with the exception of the employee's name, courses taken, and degree obtained, the district must withhold the transcripts in Exhibit B under section 552.102(b) of the Government Code.

In summary, if the individual whose information we have marked in Exhibit A timely requested confidentiality under section 552.024, the district must withhold the marked information under section 552.117(a)(1) of the Government Code. If the individual whose information is at issue did not make a timely election under section 552.024, the district may not withhold the information we have marked under section 552.117(a)(1) of the Government Code. With the exception of the employee's name, courses taken, and degree obtained, the district must withhold the transcripts in Exhibit B under section 552.102(b) 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, or call the Office of the Attorney General's Open Government Hotline, toll free,

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).

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,

A handwritten signature in black ink, appearing to read 'Ben Bellomy', with a long horizontal stroke extending to the right.

Benjamin A. Bellomy
Assistant Attorney General
Open Records Division

BAB/dls

Ref: ID# 456801

Enc. Submitted documents

c: Requestor
(w/o enclosures)