



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 22, 2012

Mr. Orlando Juarez, Jr.  
Escamilla, Poneck & Cruz, LLP  
216 West Village Boulevard, Suite 202  
Laredo, Texas 78041

OR2012-09671

Dear Mr. Juarez:

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# 457361.

The United Independent School District (the "district"), which you represent, received a request for district employee grievances and supporting documentation, including transcripts of grievance hearings, filed during a specified time period. You state the district is withholding certain student-identifying information from the requested documents pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.<sup>1</sup> You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code.<sup>2</sup> We have considered the exception you claim and reviewed the submitted information.

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<sup>1</sup>The 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>.

<sup>2</sup>Although you also raise section 552.102 of the Government Code as an exception to disclosure, you have provided no arguments regarding the applicability of this section. We therefore assume you no longer assert this exception. See Gov't Code §§ 552.301(b), (e), .302.

Initially, we must address the district's procedural obligations under the Act. Section 552.301 of the Government Code describes the procedural obligations placed on a governmental body that receives a written request for information it wishes to withhold. Pursuant to section 552.301(b), the governmental body must request a ruling from this office and state the exceptions to disclosure that apply within ten business days after receiving the request. *See* Gov't Code § 552.301(b). Pursuant to section 552.301(e), the governmental body is required to submit to this office within fifteen business days of receiving the request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See id.* § 552.301(e). You state the district received the request for information on March 19, 2012. Thus, the ten-business-day deadline for requesting a ruling from this office was April 2, 2012, and the fifteen-business-day deadline was April 9, 2012. However, you did not request a ruling from this office, state the claimed exceptions, or submit the information required by section 552.301(e) until April 16, 2012. *See id.* § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Consequently, we find the district failed to comply with the requirements of section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of the Act results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *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, 381-82 (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); Open Records Decision No. 319 (1982). The presumption that information is public under section 552.302 can be overcome by demonstrating that the information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). You raise section 552.101 of the Government Code, which can provide a compelling reason to withhold information. We also note that a portion of the submitted information may be subject to section 552.117 of the Government Code, which also provides a compelling reason for non-disclosure.<sup>3</sup> Accordingly, we will address the applicability of these sections to the submitted information.

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<sup>3</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).

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. Additionally, the Third Court of Appeals has 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.).

You contend the information in Exhibits B, C, D, E, F, G-1, G-2, H-1, H-2, and I consists of evaluations that are confidential under section 21.355. We understand the information at issue pertains to individuals who were employed by the district as teachers when their performance was evaluated. You do not inform us, however, whether the teachers at issue held the appropriate certificates under chapter 21 of the Education Code when the information at issue was created. Therefore, we must rule conditionally. Thus, the district must withhold the information in Exhibits B, C, E, F, G-1, G-2, H-1, H-2, and I, and the information we have marked in Exhibit D, under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code to the extent the teachers at issue held the appropriate certificates under chapter 21 of the Education Code and were functioning as teachers at the time the information at issue was created. However, to the extent the teachers at issue did not hold the appropriate certificates under chapter 21 or were not functioning as teachers at the time the information at issue was created, this information at issue is not confidential under section 21.355 and may not be withheld under section 552.101 on that basis. Further, we find the remaining information in Exhibit D does not constitute an evaluation for the purposes of section 21.355. Accordingly, the district may not withhold any of the remaining information in Exhibit D under section 552.101 on the basis of section 21.355 of the Education Code.

Section 552.101 also encompasses the Medical Practices Act (the “MPA”), subtitle B of title 3 of the Occupations Code.<sup>4</sup> Section 159.002 of the MPA provides in part the following:

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<sup>4</sup>We note the former article 4495b of Vernon’s Texas Civil Statutes now is codified as the Medical Practices Act at subtitle B of title 3 of the Occupations Code, and the former section 5.08 of article 4495b is codified as chapter 159 of the Occupations Code. See Act of May 13, 1999, 76<sup>th</sup> Leg., R.S. ch. 388, § 6(b)(1), 1999 Tex. Gen. Laws 1431, 2440.

(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.

Occ. Code § 159.002(b), (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). Medical records must be released on receipt of the patient's signed, written consent, provided the consent specifies (1) the information to be covered by the release, (2) the reasons or purposes for the release, and (3) the person to whom the information is to be released. *See* Occ. Code §§ 159.004, .005. Any subsequent release of medical records must be consistent with the purposes for which the governmental body obtained the records. *See id.* § 159.002(c); Open Records Decision No. 565 at 7 (1990). Upon review, we agree the information in Exhibit J consists of medical records subject to the MPA. Accordingly, the district may only release the information in Exhibit J in accordance with the MPA.

Section 552.101 of the Government Code also encompasses information protected by section 201.402 of the Occupations Code, which provides in part the following:

(a) Communications between a chiropractor and a patient relating to or in connection with any professional services provided by a chiropractor to the patient are confidential and privileged and may not be disclosed except as provided by this subchapter.

(b) Records of the identity, diagnosis, evaluation, or treatment of a patient by a chiropractor that are created or maintained by a chiropractor are confidential and privileged and may not be disclosed except as provided by this subchapter.

(c) A person who receives information from the confidential communications or records, excluding a person listed in Section 201.404(a) 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.

Occ. Code § 201.402(a)-(c). Chiropractic records must be released on the patient's signed, written consent, provided that the consent specifies: (1) the information records covered by the release; (2) the reason or purpose for the release; and (3) the person to whom the

information is to be released. *See id.* §§ 201.404, .405. Upon review, we agree the information in Exhibit K consists of chiropractic records subject to section 201.402 of the Occupations Code. Thus, the district may only release the information in Exhibit K in accordance with chapter 201 of the Occupations Code.

Section 552.101 also encompasses chapter 411 of the Government Code. Criminal history record information (“CHRI”) maintained by the Texas Department of Public Safety (“DPS”) is deemed confidential under section 411.083 of the Government Code. Gov’t Code § 411.083. However, DPS may disseminate this information as provided by chapter 411, subchapter F of the Government Code. *See id.* Section 411.084 governs use of CHRI obtained from DPS and provides, in pertinent part:

(a) Criminal history record information obtained from [DPS] under this subchapter, including any identification information that could reveal the identity of a person about whom [CHRI] is requested and information that directly or indirectly indicates or implies involvement of a person in the criminal justice system:

(1) is for the exclusive use of the authorized recipient of the information; and

(2) may be disclosed or used by the recipient only if, and only to the extent that, disclosure or use is authorized or directed by:

(A) this subchapter;

(B) another statute;

(C) a rule adopted under a statute; or

(D) an order of a court of competent jurisdiction.

...

(b) Notwithstanding Subsection (a) or any other provision in this subchapter, [CHRI] obtained from the Federal Bureau of Investigation may be released or disclosed only to a governmental entity or as authorized by federal law and regulations, federal executive orders, and federal policy.

Gov’t Code § 411.084. Section 411.097, which is part of subchapter F of chapter 411 of the Government Code, authorizes a school district to obtain from DPS CHRI that the district is required or authorized to obtain under subchapter C of chapter 22 of the Education Code. *See Gov’t Code § 411.097; Educ. Code § 22.083.* Subsection 411.097(d) governs the release of CHRI by a school district and provides:

Criminal history record information obtained by a school district, charter school, private school, service center, commercial transportation company, or shared services arrangement under Subsection (a), (b), or (c) may not be released or disclosed to any person, other than the individual who is the subject of the information, the Texas Education Agency, the State Board for Educator Certification, or the chief personnel officer of the transportation company, if the information is obtained under Subsection (a)(2).

Gov't Code § 411.097(d). You claim the information you have marked in Exhibit L consists of confidential CHRI. However, we note the information at issue was provided to the district by a district employee as part of her grievance filed with the district. Upon review, we find no portion of the information in Exhibit L consists of CHRI for the purposes of chapter 411 of the Government Code, and the district may not withhold any of this information under section 552.101 of the Government Code on that basis.

The district has redacted some information subject to section 552.117 of the Government Code pursuant to section 552.024.<sup>5</sup> We note an additional portion of information in Exhibit L may be subject to section 552.117 of the Government Code. Section 552.117(a)(1) 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 of the Government Code. *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 information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may be withheld under section 552.117(a)(1) only 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 information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee who did not timely request under section 552.024 the information be kept confidential. Therefore, to the extent the individual whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, the district must withhold the information we have marked in Exhibit L under section 552.117(a)(1) of the Government Code. Conversely, to the extent the individual at issue did not timely request confidentiality under section 552.024, the district may not withhold the marked information in Exhibit L under section 552.117(a)(1).

In summary, the district must withhold the information in Exhibits B, C, E, F, G-1, G-2, H-1, H-2, and I, and the information we have marked in Exhibit D, under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code to the extent

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<sup>5</sup>Section 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).

the teachers at issue held the appropriate certificates under chapter 21 of the Education Code and were functioning as teachers at the time the information at issue was created. The district may only release the information in Exhibit J in accordance with the MPA and the information in Exhibit K in accordance with chapter 201 of the Occupations Code. The district must withhold the information we have marked in Exhibit L under section 552.117(a)(1) of the Government Code if the individual whose information is at issue timely requested confidentiality under section 552.024 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,



Kristi L. Wilkins  
Assistant Attorney General  
Open Records Division

KLW/ag

Ref: ID# 457361

Enc. Submitted documents

c: Requestor  
(w/o enclosures)