



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 10, 2012

Ms. Cheryl T. Mehl  
Counsel for the Brackett Independent School District  
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4201 West Parmer Lane, Suite A-100  
Austin, Texas 78727

OR2012-12626

Dear Ms. Mehl:

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# 461552.

The Brackett Independent School District (the "district"), which you represent, received a request for the personnel records of a named individual. You state you have released some of the requested documents to the requestor. You state the district has withheld some information pursuant to Open Records Decision No. 684 (2009).<sup>1</sup> You claim 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.

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<sup>1</sup>Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including a W-4 form under section 552.101 of the Government Code in conjunction with section 6103 of title 26 of the United States Code and a copy of a Texas driver's license under section 552.130 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. 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). *Id.* § 552.130(d), (e). Thus, the statutory amendments to section 552.130 of the Government Code supercede 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.

We first note, and you acknowledge, the district did not fully comply with section 552.301 of the Government Code in requesting this decision. *See* Gov't Code § 552.301(e). Pursuant to section 552.302 of the Government Code, the submitted information is therefore presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold any of the information. *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); *see also* Open Records Decision No. 630 (1994). This statutory presumption can generally be overcome when information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3, 325 at 2 (1982). Because your claims under sections 552.101 and 552.102 of the Government Code can provide compelling reasons for non-disclosure, we will address your arguments under these 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. This section encompasses information made confidential by other statutes, such as the Medical Practice Act (the “MPA”). The MPA, subtitle B of title 3 of the Occupations Code, governs access to medical records. *See* Occ. Code §§ 151.001-165.160. Section 159.002 of the MPA provides, in 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). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004; Open Records Decision No. 598 (1991). 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). Any subsequent release of medical records must be consistent with the purposes for which the governmental body obtained the records. *See* Occ. Code § 159.002(c); Open Records Decision No. 565 at 7 (1990). Upon review, we find the information we have

marked in Exhibit 6 consists of a record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that was created by a physician. Therefore, the information we have marked constitutes a confidential medical record and may be released only in accordance with the MPA. However, we find none of the remaining information in Exhibit 6 constitutes a medical record for purposes of the MPA, and the district may not withhold the remaining information at issue under section 552.101 of the Government Code on that basis.

Section 552.101 of the Government Code also encompasses section 21.048 of the Education Code, which is applicable to information relating to teacher certification examinations. Section 21.048(c-1) states:

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 state Exhibit 1 consists of the results of teacher certification examinations. Subsections 21.048(c-1)(1) and (2) do not appear to be applicable in this instance. We therefore conclude the district must withhold Exhibit 1 under section 552.101 of the Government Code in conjunction with section 21.048(c-1) of the Education Code.

Section 552.101 also encompasses section 21.355 of the Education Code, which provides that “[a] document evaluating the performance of a teacher or administrator is confidential.” *Id.* § 21.355. In Open Records Decision No. 643 (1996), this office 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* ORD 643 at 3. In that opinion, this office also concluded a teacher is someone who is required to hold and does hold a certificate or permit required under chapter 21 of the Education Code and is teaching at the time of his or her evaluation. *Id.* We note the Third Court of Appeals has concluded that 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. N. E. Indep. Sch. Dist.*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.).

You contend Exhibit 4 consists of evaluations made confidential by section 21.355 of the Education Code. You have provided documentation reflecting the named individual held a teacher’s certificate under chapter 21 of the Education Code and the information at issue

reflects the individual was functioning as a teacher when the information was created. Thus, we conclude the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. However, we find you have not established how the remaining information at issue in Exhibit 4 constitutes evaluations of a teacher's performance as contemplated by section 21.355. Accordingly, the district may not withhold the remaining information at issue under section 552.101 on that basis.

Section 552.101 also encompasses chapter 411 of the Government Code. Criminal history record information ("CHRI") generated by the National Crime Information Center or by the Texas Crime Information Center is confidential under federal and state law. *See* Gov't Code § 411.083(a). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. ORD 565. The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI the Department of Public Safety ("DPS") maintains, except DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov't Code § 411.083. A school district may obtain CHRI from DPS as authorized by section 411.097 of the Government Code and subchapter C of chapter 22 of the Education Code; however, a school district may not release CHRI except as provided by section 411.097(d). *See id.* § 411.097(d); Educ. Code § 22.083(c)(1) (authorizing school district to obtain from any law enforcement or criminal justice agency all CHRI relating to school district employee); *see also* Gov't Code § 411.087. Section 411.087 authorizes a school district to obtain CHRI from the Federal Bureau of Investigation or any other criminal justice agency in this state. *Id.* Thus, any CHRI the district obtained from DPS or any other criminal justice agency in this state must be withheld under section 552.101 of the Government Code in conjunction with section 411.097(d) of the Government Code. *See* Educ. Code § 22.083(c)(1). The district must withhold the CHRI we have marked in Exhibit 2 under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code.

Section 552.101 also encompasses the doctrine of common-law privacy. Common-law privacy protects information that (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). 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 personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 600 (1992), 545 (1990). Upon review, we find the information in Exhibit 3 is highly

intimate or embarrassing and not of legitimate public concern. Therefore, the district must withhold Exhibit 3 pursuant to section 552.101 of the Government Code in conjunction with common-law privacy.<sup>2</sup>

Section 552.102(b) of the Government Code excepts from disclosure all information from higher education transcripts of professional public school employees 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). Upon review, we agree the district must withhold the information you have indicated in Exhibit 5 under section 552.102(b) of the Government Code.<sup>3</sup>

We note portions of the submitted information may be subject to section 552.117(a)(1) of the Government Code.<sup>4</sup> Section 552.117(a)(1) 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. *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 at issue under section 552.117(a)(1) of the Government Code.

In summary, the information we have marked in Exhibit 6 may be released only in accordance with the MPA. The district must withhold Exhibit 1 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 Exhibit 4 under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. The district must withhold the CHRI we have marked in Exhibit 2 under section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code. The district

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<sup>2</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

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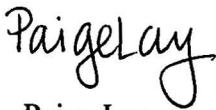
<sup>4</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470.

must withhold Exhibit 3 pursuant to section 552.101 of the Government Code in conjunction with common-law privacy. The district must withhold the information you have indicated in Exhibit 5 under section 552.102(b) of the Government Code. If the individual whose information we have marked timely requested confidentiality under section 552.024 of the Government Code, the district must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The remaining information must be released to the requestor.

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,



Paige Lay  
Assistant Attorney General  
Open Records Division

PL/tch

Ref: ID# 461552

Enc. Submitted documents

c: Requestor  
(w/o enclosures)