



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 27, 2012

Mr. Orlando Juarez
Counsel for United Independent School District
Escamilla, Poneck & Cruz, LLP
216 West Village Boulevard, Suite 202
Laredo, Texas 78041

OR2012-13326A

Dear Mr. Juarez:

This office issued Open Records Letter No. 2012-13326 (2012) on August 22, 2012. We have examined this ruling and determined an error was made. Where this office determines that an error was made in the decision process under sections 552.301 and 552.306, and that error resulted in an incorrect decision, we will correct the previously issued ruling. Consequently, this decision serves as the correct ruling and is a substitute for Open Records Letter No. 2012-13326. *See generally* Gov't Code § 552.011 (providing that Office of the Attorney General may issue a decision to maintain uniformity in application, operation, and interpretation of the Public Information Act (the "Act")). Your request was assigned ID# 463205.

The United Independent School District (the "district"), which you represent, received a request for information pertaining to all cases in the district of improper relationships between an educator and a student during the current and last five school years, including a specified case. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.114, 552.117, 552.136, and 552.137 of the Government Code, as well as privileged under rule 503 of the Texas Rules of Evidence.¹ We

¹Although you also claim section 552.026 of the Government Code, we note section 552.026 is not an exception to disclosure. Rather, section 552.026 provides the Act does not require the release of information contained in education records except in conformity with the Family Educational Rights and Privacy Act of 1974. Gov't Code § 552.026.

have considered the submitted arguments and reviewed the submitted representative sample of information.²

Initially, we note some of the submitted information, which we have marked, is not responsive to the instant request for information because it was created after the district received the request for information. This ruling does not address the public availability of any information that is not responsive to the request and the district is not required to release such information in response to this request.³

Next, we note the United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code, does not permit state and local educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act.⁴ Consequently, state and local educational authorities that receive a request for education records from a member of the public under the Act must not submit education records to this office in unredacted form, that is, in a form in which "personally identifiable information" is disclosed. *See* 34 C.F.R. § 99.3 (defining "personally identifiable information"). Based on your comments, we understand you to indicate the requested information contains personally identifiable information of students, which you have submitted to this office for our review. Because our office is prohibited from reviewing these records to determine whether appropriate redactions under FERPA have been made, we will not address the applicability of FERPA to the submitted documents. *See* 20 U.S.C. § 1232g(a)(1)(A). Such determinations under FERPA must be made by the educational authority in possession of such records. Likewise, we do not address your arguments under section 552.114 of the Government Code. *See* Gov't Code §§ 552.026 (incorporating FERPA into the Act), .114 (excepting from disclosure "student records"); Open Records Decision No. 539 (1990) (determining the same analysis applies under section 552.114 and FERPA). However, we will consider the applicability of your remaining claimed exceptions to disclosure of the responsive information.

Next, we note, and you acknowledge, the district has not complied with the time periods prescribed by section 552.301 of the Government Code in seeking an open records decision from this office. Gov't Code § 552.301. When a governmental body fails to comply with

²We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

³As our ruling is dispositive, we do not address your argument under section 552.103 for Exhibit B.

⁴A 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>.

the procedural requirements of section 552.301, the information at issue is presumed public and must be released unless there is a compelling reason to withhold it. *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); *see also* Open Records Decision No. 630 (1994). Generally, a governmental body may demonstrate a compelling reason to withhold information by a showing the information is made confidential by another source of law or affects third party interests. *See* Open Records Decision No. 150 at 2 (1977). You assert some of the responsive information is excepted from disclosure under section 552.107 of the Government Code and privileged under rule 503 of the Texas Rules of Evidence. However, this exception and rule are discretionary in nature and may be waived, and, thus, do not provide compelling reasons to withhold information under section 552.302. *See* Gov't Code § 552.007; Open Records Decision Nos. 676 at 11-12 (2002) (attorney-client privilege under Gov't Code § 552.107 or Texas Rule of Evidence 503 constitutes compelling reason to withhold information under section 552.302 only if information's release would harm third party), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions). Accordingly, the district may not withhold any of the responsive information under section 552.107 of the Government Code or rule 503 of the Texas Rules of Evidence. However, because sections 552.101, 552.102, 552.117, 552.136, and 552.137 of the Government Code can provide compelling reasons to overcome this presumption, we will address the applicability of these exceptions to the responsive information.⁵

We first address your arguments for withholding the cellular telephone records submitted as Exhibit F. 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 federal law. Section 1039 of title 18 of the United States Code addresses fraud and related activity in connection with obtaining confidential phone records information, and provides in pertinent part:

(b) Prohibition on sale or transfer of confidential phone records information.

(1) Except as otherwise permitted by applicable law, whoever, in interstate or foreign commerce, knowingly and intentionally sells or transfers, or attempts to sell or transfer, confidential phone records information of a covered entity, without prior authorization from the customer to whom such confidential phone records information

⁵The 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).

relates, or knowing or having reason to know such information was obtained fraudulently, shall be fined under this title, imprisoned not more than 10 years, or both.

...

(c) Prohibition on purchase or receipt of confidential phone records information.

(1) Except as otherwise permitted by applicable law, whoever, in interstate or foreign commerce, knowingly and intentionally purchases or receives, or attempts to purchase or receive, confidential phone records information of a covered entity, without prior authorization from the customer to whom such confidential phone records information relates, or knowing or having reason to know such information was obtained fraudulently, shall be fined under this title, imprisoned not more than 10 years, or both.

18 U.S.C. § 1039(b)(1), (c)(1). For purposes of section 1039, confidential phone records information includes information that “is contained in any bill, itemization, or account statement provided to a customer by or on behalf of a covered entity solely by virtue of the relationship between that covered entity and the customer.” *Id.* § 1039(h)(1)(C). We understand you to claim the cellular telephone records submitted as Exhibit F constitute “confidential phone records information” and are therefore made confidential by section 1039. However, section 1039 applies to phone record information held by a covered entity. Section 1039(h)(2) defines covered entities as telecommunications carriers or providers of IP-enabled voice service. *Id.* § 1039(h)(2). Because the district is not a covered entity for purposes of section 1039, information it holds is not subject to section 1039 of title 18 of the United States Code, and no portion of the information at issue may be withheld under section 552.101 of the Government Code on that basis.

Section 552.101 of the Government Code also encompasses information protected by section 21.355 of the Education Code, which provides, in relevant part, “[a] document evaluating the performance of a teacher or administrator is confidential.” Educ. Code § 21.355(a). 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.” *Abbott v. North East Indep. Sch. Dist.*, 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 administrator. *See* Open Records Decision No. 643 (1996). In Open Records Decision No. 643, we determined 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 in the process of teaching, as that term is commonly defined, at the time of the evaluation. *See id.* at 4.

You contend the information in Exhibit C consists of confidential evaluations of teachers by the district. However, you do not indicate whether the teachers at issue were certified as teachers by the State Board of Educator Certification at the time of the evaluations and were engaged in the process of teaching at the time of the evaluations. *See* ORD 643 at 4. Accordingly, we must rule conditionally. To the extent the information we have marked pertains to employees who held teaching certificates or permits under chapter 21 of the Education Code and were engaged in the process of teaching when the information was created, the district must withhold the marked information under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. To the extent the employees did not hold teaching certificates or permits under chapter 21 of the Education Code or were not engaged in teaching when the information was created, the marked information is not confidential under section 21.355 of the Education Code and may not be withheld on that basis under section 552.101 of the Government Code. Upon review, however, we find some of the remaining information at issue consists of a performance improvement plan that does not evaluate a teacher for purposes of section 21.355. Further, some of the remaining information at issue consists of self-evaluation forms that were completed by the individuals at issue. Thus, we find you have failed to demonstrate how any of the remaining information at issue consists of documents evaluating the performance of a teacher or administrator for purposes of section 21.355 of the Education Code. Therefore, the district may not withhold any of the remaining responsive information at issue under section 552.101 in conjunction with section 21.355 of the Education Code.

Section 552.101 of the Government Code also encompasses information made confidential by section 261.201 of the Family Code, which provides, in relevant part, as follows:

(a) [T]he 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; and
- (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). You assert some of the remaining information is confidential under section 261.201 of the Family Code. *See id.* § 261.001(1) (defining “abuse” for purposes of

chapter 261 of the Family Code); *see also id.* § 101.003(a) (defining “child” for purposes of this section as person under 18 years of age who is not and has not been married or who has not had the disabilities of minority removed for general purposes). We note the district is not an agency authorized to conduct an investigation under chapter 261 of the Family Code. *See id.* § 261.103 (listing agencies that may conduct child abuse investigations). However, upon review, we find portions of the information at issue, which we have marked, consist of reports of possible child abuse made to the Laredo Police Department and to the Child Protective Services Division of the Texas Department of Family and Protective Services, and the identity of a person making such a report. Therefore, the information we have marked is confidential pursuant to section 261.201(a)(1) of the Family Code and the district must withhold the marked information under section 552.101 of the Government Code. *See Open Records Decision No. 440 at 2 (1986) (predecessor statute).* However, the remaining information at issue does not contain a report of alleged or suspected abuse or neglect made under this chapter, or the identity of the person making such a report. Further, you do not explain, and the remaining information does not reflect, how the remaining information relates to files, reports, records, communications, or working papers used or developed in an investigation under chapter 261 or in providing services as a result of such an investigation. Therefore, none of the remaining information at issue is confidential under section 261.201, and the district may not withhold any of the remaining information under section 552.101 on that basis.

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.

Id. § 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 id.* § 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 submitted as Exhibit G consists of confidential CHRI. Upon review, we find no portion of the information in Exhibit G 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.

Section 552.101 also encompasses common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person and (2) 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 demonstrated. *See id.* at 681-82. The type of information considered intimate and 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 also held common-law privacy protects the identifying information of juvenile victims of abuse or neglect. *See Open Records Decision No. 394* (1983); *cf.* Fam. Code § 261.201. Upon review, we find the information we have marked is highly intimate

or embarrassing and not of legitimate public concern. Therefore, the district must withhold the marked information under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.102(a) of the Government Code 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). The Texas Supreme Court 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. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). Having carefully reviewed the information at issue, we have marked information that must be withheld under section 552.102(a) of the Government Code.

Section 552.117(a)(1) of the Government Code 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 or official 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). We note section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). 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 be withheld under section 552.117(a)(1) only 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 the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former employee or official who did not timely request under section 552.024 the information be kept confidential. Therefore, to the extent the individuals 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 under section 552.117(a)(1) of the Government Code; however, the marked cellular telephone numbers may be withheld only if a governmental body does not pay for the cellular telephone service. Conversely, to the extent the individuals at issue did not timely request confidentiality under section 552.024, the district may not withhold the marked information under section 552.117(a)(1).⁶ Upon review, however, we find the remaining information you marked does not consist of the home address, telephone number, emergency contact information, social security number, or family

⁶Regardless of the applicability of section 552.117 of the Government Code, we note 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. *See* Gov't Code § 552.147(b).

member information of a current or former employee of the district, and the remaining information you marked may not be withheld under section 552.117(a)(1).

Section 552.136 of the Government Code provides, “[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). Upon review, we find you have not demonstrated how some of the information you marked consists of an access device number. This information, which we have marked for release, may not be withheld under section 552.136. Accordingly, with the exception of the information we have marked for release, the district must withhold the cellular telephone account numbers you have marked under section 552.136 of the Government Code.

You argue the remaining information contains e-mail addresses that are subject to section 552.137 of the Government Code. Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See id.* § 552.137(a)-(c). Section 552.137 is not applicable to an e-mail address maintained by a governmental entity for one of its officials or employees. Further, section 552.137 does not apply to an e-mail address of a person who has a contractual relationship with a governmental body or an e-mail address provided to a governmental body on a letterhead. *See id.* § 552.137(c). We have marked an e-mail address that is not excluded by subsection (c). Therefore, the district must withhold the personal e-mail address we have marked under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure. The remaining e-mail addresses within the submitted documents consist of district e-mail addresses, e-mail addresses of individuals who have a contractual relationship with the district, or e-mail addresses that were provided to the district on letterhead, and, thus, are not subject to section 552.137. Therefore, the district may not withhold the remaining e-mail addresses under section 552.137 of the Government Code.

In summary, the district must withhold (1) the information we have marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code, to the extent the marked information pertains to employees who held teaching certificates or permits under chapter 21 of the Education Code and were engaged in the process of teaching when the information was created; (2) the information we have marked under section 552.101 of the Government Code in conjunction with section 261.201(a)(1) of the Family Code; (3) the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy; (4) the date of birth we marked under section 552.102(a) of the Government Code; (5) the information we have marked under section 552.117(a)(1) of the Government Code, to the extent the individuals whose information is at issue timely requested confidentiality under section 552.024 of the Government Code, but may withhold the marked cellular telephone

numbers only if a governmental body does not pay for the cellular telephone service; (6) with the exception of the information we have marked for release, the cellular telephone account numbers you have marked under section 552.136 of the Government Code; and (7) the personal e-mail address we have marked under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure. The remaining responsive 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, 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,



Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/som

Ref: ID# 463205

Enc. Submitted documents

c: Requestor
(w/o enclosures)