



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 26, 2012

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

OR2012-15355

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# 466447.

The United Independent School District (the "district"), which you represent, received a request for all documents sent to or received by four named individuals regarding an investigation into a former coach from November 1, 2011 to the date of the request; all documents sent to or received by the former coach, parents, or students regarding concerns or questions about the class/coaching behavior from August 1, 2010 to the date of the request; all documents sent to or received by district Crimestoppers, including tips, regarding an investigation into the coach from August 1, 2010 to the date of the request; and all documents from parents inquiring about the former coach from August 1, 2010 to the date of the request.¹ You claim that the submitted information is excepted from disclosure under sections 552.101, 552.114, 552.117, 552.135, and 552.136 of the Government Code.² We

¹You state, and provide documentation showing, the requestor narrowed her original request for information. See Gov't Code § 552.222(b) (stating that if information requested is unclear to governmental body or if a large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used).

²Although you also raise section 552.206 of the Government Code, we note this section does not exist. Thus, we understand you to raise section 552.026 of the Government Code. However, 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 exceptions you claim and reviewed the submitted representative sample of information.³

Initially, 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"). You state that portions of the submitted information consist of student identifying education records that are protected under FERPA. 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 your remaining arguments against disclosure of 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 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

³We 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.

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>.

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 G 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 also encompasses 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). 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 id.* at 4. 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.).

You seek to withhold the information contained in Exhibit F under section 21.355. Upon review, we find the information in Exhibit F pertains to the named individual in his capacity as a coach. Therefore, we find you have failed to demonstrate how any of the submitted information constitutes an evaluation of the performance of a teacher or an administrator for the purposes of section 21.355 of the Education Code. *See* Educ. Code § 21.353 (teachers shall be appraised only on basis of classroom teaching performance and not in connection with extracurricular activities). Accordingly, the district may not withhold any of the submitted information under section 552.101 of the Government Code on this 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:

(d) [CHRI] obtained by a school district, charter school, private school, service center, commercial transportation company, or shared services arrangement in the original form or any subsequent form:

(1) may not be released to any person except:

(A) the individual who is the subject of the information;

(B) the Texas Education Agency;

(C) the State Board for Educator Certification;

(D) the chief personnel officer of the transportation company, if the information is obtained under Subsection (a)(2); or

(E) by court order[.]

Gov't Code § 411.097(d). You claim the documents in Exhibit H contain confidential CHRI. Upon review, we find no portion of the information in Exhibit H 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.

We note some of the submitted information is protected under common-law privacy.⁵ Section 552.101 also encompasses the doctrine of common-law 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 met. *Id.* at 681-82. The types 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. *See id.* at 683. In addition, this office has found 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

⁵The 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 (1987).

physical handicaps). Upon review, we find some of the submitted information is highly intimate or embarrassing and not of legitimate public concern. Accordingly, the district must withhold the information we have marked under section 552.101 in conjunction with common-law privacy.

The district has redacted portions of the submitted information under section 552.117(a)(1) of the Government Code, as permitted by section 552.024(c) of the Government Code.⁶ We note the submitted information contains additional information subject to section 552.117. Section 552.117(a)(1) of the Government Code 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. Gov't Code § 552.117(a)(1). Section 552.117(a)(1) also applies to the personal cellular telephone number of a current or former official or employee of a governmental body, provided the cellular telephone service is not paid by a governmental body. *See Open Records Decision No. 506 at 5-6 (1988)* (statutory predecessor to section 552.117 of the Government Code not applicable to cellular telephone numbers provided and 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 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 and the cellular telephone service is not paid for by a governmental body, 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 or if the cellular telephone service is paid for by a governmental body, the district may not withhold the information we have marked under section 552.117(a)(1) of the Government Code.⁷ Furthermore, we find none of the remaining information is subject to section 552.117. Therefore, the district may not withhold any of the remaining information under section 552.117 of the Government Code.

Section 552.135 provides as follows:

⁶Section 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)*.

⁷Regardless of the applicability of section 552.117 of the Government Code, we note section 552.147(b) of the Government Code permits a governmental body to redact a living person's social security number without the necessity of requesting a decision from this office. *See Gov't Code § 552.147(b)*.

(a) "Informer" means a student or former student or an employee or former employee of a school district who has furnished a report of another person's possible violation of criminal, civil, or regulatory law to the school district or the proper regulatory enforcement authority.

(b) An informer's name or information that would substantially reveal the identity of an informer is excepted from [required public disclosure].

(c) Subsection (b) does not apply:

(1) if the informer is a student or former student, and the student or former student, or the legal guardian, or spouse of the student or former student consents to disclosure of the student's or former student's name; or

(2) if the informer is an employee or former employee who consents to disclosure of the employee's or former employee's name; or

(3) if the informer planned, initiated, or participated in the possible violation.

(d) Information excepted under Subsection (b) may be made available to a law enforcement agency or prosecutor for official purposes of the agency or prosecutor upon proper request made in compliance with applicable law and procedure.

(e) This section does not infringe on or impair the confidentiality of information considered to be confidential by law, whether it be constitutional, statutory, or by judicial decision, including information excepted from the requirements of Section 552.021.

Gov't Code § 552.135. Because the legislature limited the protection of section 552.135 to the identity of a person who reports a possible violation of "law," a school district that seeks to withhold information under that exception must clearly identify to this office the specific civil, criminal, or regulatory law that is alleged to have been violated. *See id.* § 552.301(e)(1)(A). You contend portions of the information contained in Exhibits D and E identify students of the district who reported alleged violations of school policy. We note individuals who provide information in the course of an investigation, but do not make the initial report are not informants for the purposes of section 552.135 of the Government Code. Upon review, we find the district has failed to demonstrate how any of the information at issue reveals the identity of an informer for the purposes of section 552.135 of the Government Code. Therefore, none of the submitted information may be withheld under section 552.135 of the Government Code.

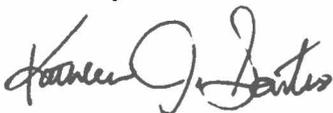
Section 552.136 provides in part that “[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” *Id.* § 552.136(b); *see id.* § 552.136(a) (defining “access device”). Upon review, we find the district must withhold the information we have marked under section 552.136 of the Government Code.

In summary, the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. If the individual whose information we have marked timely requested confidentiality under section 552.024 of the Government Code and the cellular telephone service is not paid for by a governmental body, the district must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The district must withhold the information we have marked under section 552.136 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, 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,



Kathleen J. Santos
Assistant Attorney General
Open Records Division

KJS/eb

Ref: ID# 466447

Enc. Submitted documents

c: Requestor
(w/o enclosures)