



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 20, 2012

Ms. Mari McGowan  
For Argyle Independent School District  
Abernathy, Roeder, Boyd & Joplin, P.C.  
P.O. Box 1210  
McKinney, Texas 75070-1210

OR2012-20599

Dear Ms. McGowan:

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# 474615.

The Argyle Independent School District (the "district"), which you represent, received a request for information in an named individual's personnel file, including a letter written by the requestor's daughter.<sup>1</sup> You state the district has released some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.117, 552.137, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by an interested third party. *See* Gov't Code § 552.304 (interested party may submit comments to this office stating why the information at issue should or should not be released).

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<sup>1</sup>We note the district sought and received clarification of the request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information). *See also* *City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

Initially, we note the district states it has redacted certain student-identifying information pursuant to the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code. The United States Department of Education Family Policy Compliance Office has informed this office that FERPA does not permit state and local educational authorities to disclose to this office, without parental or an adult student's consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act.<sup>2</sup> 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"). Because our office is prohibited from reviewing these education records to determine whether appropriate redactions under FERPA have been made, we will not address the applicability of FERPA to any of the submitted records, except to note the requestor has a right of access under FERPA to her children's education records. See 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.3. Such determinations under FERPA must be made by the educational authority in possession of the education records.

Section 552.101 of the Government Code exempts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses section 21.048 of the Education Code, which addresses teacher certification examinations. Section 21.048(c-1) provides the following:

The results of an examination administered under this section are confidential and are not subject to disclosure under [the Act], 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). Upon review, we find a portion of the submitted information reflects the results of an examination administered under section 21.048. We have no indication subsection 21.048(c-1)(1) or subsection (2) are applicable in this instance. Accordingly, the district must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 21.048 of the Education Code.

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<sup>2</sup>A copy of this letter may be found on the Office of the Attorney General's website at <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

Section 552.101 of the Government Code also encompasses section 21.355 of the Education Code, which provides, “[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 for purposes of section 21.355, the term “teacher” means a person who is required to and does in fact hold a teaching certificate or permit 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. This office also has concluded an “administrator” is someone who is required to hold and does hold a certificate required under chapter 21 of the Education Code and is administering at the time of the evaluation. See *id.* 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.” See *North East Indep. Sch. Dist. v. Abbott*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.). You raise section 21.355 and state the submitted evaluation pertains to a “[c]hapter 21 employee.” Thus, we understand the individual at issue held a proper certificate under chapter 21 of the Education Code. However, you do not state or provide documentation showing the employee who was the subject of the evaluation was performing the functions of a teacher or administrator at the time of the evaluation. We note section 21.355 does not apply to evaluations relating to an individual’s duties as a coach. Thus, we are unable to conclude section 21.355 is applicable in this instance and must rule conditionally. If the employee was performing the functions of a teacher or administrator at the time of the evaluation, the evaluation we marked is confidential under section 21.355, and the district must withhold it under section 552.101 of the Government Code. If the employee was not performing the functions of a teacher or administrator at the time of the evaluation, the evaluation we marked is not confidential under section 21.355 and may not be withheld under section 552.101 on that basis.

Section 552.101 of the Government Code 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 established. *Id.* at 681–82. The types of information considered highly 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 also has found personal financial information not relating to a financial transaction between an individual and a governmental body is generally excepted from required public disclosure under common-law privacy. See Open Records Decision Nos. 600 (1992) (finding personal

financial information to include designation of beneficiary of employee's retirement benefits and optional insurance coverage; choice of particular insurance carrier; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, health care, or dependent care), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). This office has found a legitimate public interest in information relating to employees of governmental bodies and their employment qualifications and job performance. *See* Open Records Decision Nos. 542 at 5 (1990), 470 at 4 (1987) (public has legitimate interest in job qualifications and performance of public employees); *see also* Open Records Decision No. 423 at 2 (1984) (scope of public employee privacy is narrow). In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the court addressed the applicability of the common-law privacy doctrine to the files of a sexual harassment investigation. Although you raise *Ellen*, we note none of the submitted information pertains to a sexual harassment investigation. Accordingly, none of the information may be withheld under section 552.101 on that basis. However, we note the information we marked is highly intimate or embarrassing and not of legitimate public interest. Accordingly, the district must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. The remaining information is not highly intimate or embarrassing or it is of legitimate public interest. Accordingly, the district may not withhold the remaining information under section 552.101 of the Government Code on that basis.

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). We understand you to assert the privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101 of the Government Code, which is discussed above. *See Indus. Found.*, 540 S.W.2d at 685. In *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 549–51 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court of appeals ruled the privacy test under section 552.102(a) is the same as the *Industrial Foundation* privacy test. However, the Texas Supreme Court has expressly disagreed with *Hubert's* interpretation of section 552.102(a) and held the privacy standard under section 552.102(a) differs from the *Industrial Foundation* test under section 552.101. *See Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). The Supreme Court also considered the applicability of section 552.102(a) and held it excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *See id.* at 348. Accordingly, the district must withhold the date of birth we marked under section 552.102(a) of the Government Code. However, we find no portion of the remaining information is subject to section 552.102(a) of the Government Code, and the district may not withhold any of the remaining responsive information on that basis.

Section 552.102(b) of the Government Code excepts from disclosure “a transcript from an institution of higher education maintained in the personnel file of a professional public school employee[.]” Gov’t Code § 552.102(b). This exception further provides, however, “the degree obtained or the curriculum on a transcript in the personnel file of the employee” are not excepted from disclosure. *Id.* Upon review, we agree the district must withhold the educational transcript we marked under section 552.102(b) of the Government Code, except for the information that reveals the employee’s name, the degree obtained, and the courses taken. *See* Open Records Decision No. 526 (1989) (addressing statutory predecessor).<sup>3</sup>

Section 552.117 of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government Code. Gov’t Code § 552.117(a). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *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 the 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. You provide documentation showing the individual whose information is at issue elected to make his personal information confidential. We note, however, this election does not cover emergency contact information. Accordingly, the district must withhold the information we marked under section 552.117(a)(1) of the Government Code.<sup>4</sup> None of the remaining information is covered by section 552.117, and the district may not withhold it on that basis.

Section 552.130 of the Government Code excepts from disclosure information relating to a motor vehicle operator’s or driver’s license or permit, a motor vehicle title or registration, or a personal identification document issued by an agency of this state or another state or

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<sup>3</sup>As our ruling is dispositive, we do not address the information you marked under section 552.117 of the Government Code.

<sup>4</sup>As our ruling is dispositive, we do not address your assertion of section 552.147 of the Government Code.

country.<sup>5</sup> Gov't Code § 552.130(a). Accordingly, the district must withhold the information we marked under section 552.130 of the Government Code.<sup>6</sup>

Section 552.137 of the Government Code provides, "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its release or the e-mail address is specifically excluded by subsection (c). *Id.* § 552.137(a)–(c). Accordingly, the district must withhold the e-mail addresses we marked under section 552.137 of the Government Code, unless the owners consent to their release.

In summary, the district must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 21.048 of the Education Code. The district must withhold the evaluation we marked under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code only if the employee held a teacher's certificate or permit or an administrator's certificate and was performing the functions of a teacher or administrator at the time of the evaluation. The district must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. The district must withhold the date of birth we marked under section 552.102(a) of the Government Code and the transcript we marked under section 552.102(b) of the Government Code, except for the individual's name and the courses taken. The district must withhold the information we marked under section 552.117(a)(1) of the Government Code and section 552.130 of the Government Code. The district must withhold the e-mail addresses we marked under section 552.137 of the Government Code, unless the owners of the addresses consent to their release.<sup>7</sup> 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.

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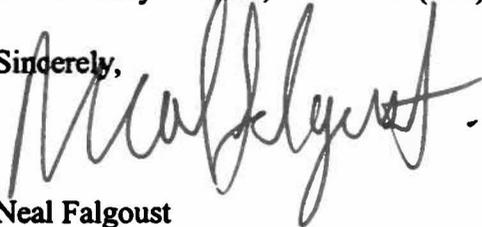
<sup>5</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

<sup>6</sup>Section 552.130 of the Government Code permits a governmental body to redact certain motor vehicle record information without requesting a decision from this office, and requires the governmental body to provide notice to the requestor. *See* Gov't Code § 552.130(c)–(e).

<sup>7</sup>Open Records Decision No. 684 (2009) serves as a previous determination to all governmental bodies permitting them to withhold certain categories of information, including a direct deposit authorization under section 552.101 of the Government Code in conjunction with common-law privacy and an e-mail address under section 552.137 of the Government Code, without requesting a decision from this office.

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,



Neal Falgoust  
Assistant Attorney General  
Open Records Division

NF/ag

Ref: ID# 474615

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Mr. Daniel Ortiz  
Law Office of Daniel A. Ortiz  
1304 West Abram  
Arlington, Texas 76013  
(w/o enclosures)