



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 17, 2013

Ms. Valerie A. Carrillo
Counsel for the Fort Worth Independent School District
Escamilla, Poneck & Cruz, L.L.P.
100 Crescent Court, Suite 700
Dallas, Texas 75201

OR2013-01031

Dear Ms. Carrillo:

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# 476322.

The Fort Worth Independent School District (the "district"), which you represent, received a request for all information created during a specified period of time and involving a named teacher. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.107, 552.108, 552.111, 552.116, and 552.135 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note Exhibit E is not responsive to the instant request because it was created after the request was received by the district. This ruling does not address the public availability of the information that is not responsive to the request, and the district is not required to release this information in response to this request. As such, we need not address your argument under section 552.107 of the Government Code.

Next, we note the district has redacted some 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.¹ 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”). However, we note FERPA is not applicable to law enforcement records maintained by the district’s police department for law enforcement purposes. See 20 U.S.C. § 1232g(a)(4)(B)(ii); 34 C.F.R. §§ 99.3, .8. The submitted information contains records from the district’s Office of Professional Standards, a division of the district’s police department, with FERPA redactions. These records constitute law enforcement records created and maintained by the district for law enforcement purposes. Thus, these records are not subject to FERPA, and no portion of these records may be withheld on that basis. However, we will address the district’s arguments for this 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. Section 552.101 encompasses section 21.355 of the Education Code, which provides, “[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 administrator. See Open Records Decision No. 643 at 3 (1996). Additionally, the Third Court of Appeals has concluded 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.” *Abbott v. North East Indep. Sch. Dist.*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.). We have also determined a “teacher” for purposes of section 21.355 means a person who is required to and does in fact hold a certificate or permit under chapter 21 of the Education Code and is teaching at the time of the evaluation. See ORD 643 at 4. Upon review, we agree Exhibit B constitutes an evaluation of a teacher. Therefore, if the teacher was required to hold and did hold the appropriate certificate and was engaged in the process of teaching at the time of the evaluation at issue, Exhibit B is confidential and must be withheld under section 552.101 in conjunction with section 21.355 of the Education Code. If the teacher was not required to hold or did not hold the appropriate certificate or was not engaged in the process of teaching at the time of the evaluation at issue, Exhibit B may not be withheld under section 552.101 on that basis.

Section 552.101 of the Government Code also encompasses section 261.201 of the Family Code, which provides, in part:

(a) [T]he following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for

¹A 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>.

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 [chapter 261 of the Family Code] 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 [chapter 261 of the Family Code] or in providing services as a result of an investigation.

Fam. Code § 261.201(a). You contend some of the responsive information is confidential under section 261.201. 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). You explain, however, Exhibits C and D consist of investigative documents from the district's Office of Professional Standards relating to alleged criminal violations by the named teacher. You inform us the Office of Professional Standards is comprised of licensed peace officers who are assigned to investigate employee misconduct. Based on your representations and our review, we find Exhibits C and D were used or developed in an investigation of alleged or suspected child abuse under chapter 261 of the Family Code, so as to fall within the scope of section 261.201(a). *See id.* § 261.001(1)(E) (defining "abuse" for purposes of chapter 261 of the Family Code as including offense of sexual assault under section 22.011 of the Penal Code); *see also* Penal Code § 22.011 (defining "child" for purposes of sexual assault of a child as person under 17 years of age). You have not indicated the Office of Professional Standards has adopted a rule that governs the release of this type of information. Therefore, we assume no such regulation exists. Given that assumption, Exhibits C and D are confidential under section 261.201 of the Family Code and must be withheld under section 552.101 of the Government Code.²

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 type 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. You claim Exhibit A is excepted from disclosure under section 552.101 in conjunction with common-law privacy. However,

²As our ruling is dispositive, we need not address your remaining arguments against disclosure for this information.

upon review, we find you have failed to demonstrate Exhibit A is highly intimate or embarrassing and a matter of no legitimate public interest. Therefore, Exhibit A may not be withheld under section 552.101 in conjunction with common-law privacy.

You also raise section 552.102 of the Government Code for a portion of the remaining information and assert the privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101, 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 ruled the privacy test under section 552.102(a) is the same as the *Industrial Foundation* privacy test. However, the Texas Supreme Court disagreed with *Hubert's* interpretation of section 552.102(a) and held its privacy standard differs from the *Industrial Foundation* test under section 552.101. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). The supreme court then considered the applicability of section 552.102 and 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. *See id.* at 347-48. Upon review, we find no portion of the information at issue is subject to section 552.102(a) of the Government Code and none of it may be withheld on that basis.

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 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.³ *See Gov't Code* §§ 552.024, .117. 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. Therefore, to the extent the teacher whose information is at issue made a timely election under section 552.024, the district must withhold the information we have marked under section 552.117(a)(1) of the Government Code. Conversely, to the extent the individual 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.⁴

³The 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)*.

⁴Regardless 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).

In summary, provided the named teacher was required to hold and did hold the appropriate certificate and was engaged in the process of teaching at the time of the evaluation at issue, the district must withhold Exhibit B under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. The district must withhold Exhibits C and D under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. To the extent the teacher whose information is at issue made a timely election under section 552.024, the district must withhold the information we have marked under section 552.117(a)(1) of the Government Code. 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,



Michelle R. Garza
Assistant Attorney General
Open Records Division

MRG/som

Ref: ID# 476322

Enc. Submitted documents

c: Requestor
(w/o enclosures)