



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 4, 2013

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

OR2013-09168

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# 488988.

The United Independent School District (the "district"), which you represent, received a request for all documents relating to a named employee, including his teacher service record. You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.108, and 552.137 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information, a portion of which constitutes a representative sample.²

Initially, we note the requestor specifically excluded from his request the employee's home address, social security number, and driver's license number. Thus, these types of information are not responsive to the present request. The district need not release non-responsive information in response to this request, and this ruling will not address that information.

¹We note the district did not timely raise section 552.137 of the Government Code. *See* Gov't Code §§ 552.301(b), .302. However, as section 552.137 of the Government Code is a mandatory exception, we address your arguments. *See id.* § 552.302.

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 that those records contain substantially different types of information than that submitted to this office.

We note you have redacted a date of birth from the submitted documents. Pursuant to section 552.301 of the Government Code, a governmental body that seeks to withhold requested information must submit to this office a copy of the information, labeled to indicate which exceptions apply to which parts of the copy, unless the governmental body has received a previous determination for the information at issue or statutory authority permits the information to be withheld without requesting a decision. Gov't Code § 552.301(a), (e)(1)(D). You do not assert, nor does our review of our records indicate, the district has been authorized to withhold the date of birth without seeking a ruling from this office. *See id.* § 552.301(a). In this instance, we can discern the nature of the information; thus, being deprived of that information does not inhibit our ability to make a ruling. However, in the future, the district must not redact information from the information it submits to this office in seeking an open records ruling, unless the information is the subject of a previous determination under section 552.301 of the Government Code or may be withheld pursuant to statutory authority. *See id.* §§ 552.301(e)(1)(D), .302. Failure to comply with section 552.301 may result in the information being presumed public under section 552.302 of the Government Code. *See id.* § 552.302.

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 information protected by Section 21.355 of the Education Code. Section 21.355 provides, in relevant part, “[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 (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. 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.).

You contend Exhibits C and D consist of confidential evaluations of the named teacher by the district. We understand the information at issue pertains to an individual who was employed as a teacher when his performance was evaluated. You do not inform us, however, whether the individual at issue held the appropriate certificate under chapter 21 of the Education Code when the information at issue was created. Therefore, we must rule conditionally. The district must withhold the information we have marked in Exhibits C and D under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code to the extent the individual at issue held the appropriate certificate under chapter 21 of the Education Code at the time the information at issue was created. However, to the extent the individual at issue did not hold the appropriate certificate under chapter 21 at the time the information at issue was created, the information we have marked

is not confidential under section 21.355 and may not be withheld under section 552.101 on that basis. Further, we find the remaining information in Exhibit C consists of notices of administrative rules violations that do not evaluate a teacher for purposes of section 21.355. Additionally, we note the remaining information in Exhibit D consists of observation waiver forms and self-evaluation forms that were completed by the individual at issue. Thus, we find you have failed to demonstrate how any of the remaining information in Exhibits C and D consists of documents evaluating the performance of a teacher for purposes of section 21.355 of the Education Code. Therefore, the district may not withhold any of the remaining information in Exhibits C and D under section 552.101 in conjunction with section 21.355 of the Education Code.

Section 552.101 also 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 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 assert Exhibit G consists of teacher certification exam results for the educator at issue. Upon review, we agree some of the information in Exhibit G consists of teacher certification examination results. You state that neither subsection 21.048(c-1)(1) or subsection (2) is applicable in this instance. Therefore, we find the information we have marked must be withheld under section 552.101 of the Government Code in conjunction with section 21.048 of the Education Code. However, we find none of the remaining information in Exhibit G consists of teacher certification results for the purposes of section 21.048. Therefore, the district may not withhold any of the remaining information under section 552.101 on this basis.

Section 552.108(a)(2) excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]” Gov’t Code § 552.108(a)(2). By its terms, section 552.108 applies only to a law enforcement agency or a prosecutor. A school district is not a law enforcement agency. This office has concluded, however, that section 552.108 may be invoked by any proper custodian of information that relates to the underlying incident. See Open Records Decision Nos. 474 (1987), 372 (1983). Where a non-law enforcement agency has custody of information related to a concluded criminal case of a law enforcement agency, the custodian

of the records may withhold the information if it provides this office with a demonstration that the information is related to a criminal case that has reached a conclusion other than a conviction or a deferred adjudication and a representation from a law enforcement entity that it wishes to have the information withheld. Although you raise section 552.108(a)(2) for the information in Exhibit E, you have not provided our office with a representation from any law enforcement agency that wishes the information to be withheld. Accordingly, the district has failed to demonstrate section 552.108(a)(2) of the Government Code is applicable to Exhibit E, and the district may not withhold any of portion of it under that exception.

Section 552.101 also encompasses the doctrines of common-law and constitutional privacy. Common-law privacy protects information if the information (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 and embarrassing by the Texas Supreme Court in *Industrial Foundation* includes 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 additionally determined that other types of information are private under section 552.101. *See generally* Open Records Decision No. 659 at 4-5 (1999) (summarizing information attorney general has held to be private).

Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected under constitutional privacy is narrower than that under the common-law doctrine of privacy. The information must concern the "most intimate aspects of human affairs." *Id.* at 5; *see Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985).

You claim the information in Exhibit E is excepted pursuant to section 552.101 in conjunction with common-law and constitutional privacy. Upon review, we find the information in Exhibit E is not highly intimate or embarrassing information of no legitimate public interest nor does it fall within the zones of privacy or implicate an individual's privacy interests for purposes of constitutional privacy. Accordingly, the district may not withhold any of the information in Exhibit E under section 552.101 of the Government Code in conjunction with common-law or constitutional 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). Upon review, we find the district must withhold the date of birth we have marked in Exhibit E under section 552.102(a) of the Government Code. However, we find none of the remaining information is subject to section 552.102(a) of the Government Code and none of it may be withheld on that basis.

Section 552.102(b) of the Government Code excepts from public 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, that “the degree obtained or the curriculum on a transcript in the personnel file of the employee” are not excepted from disclosure. *Id.*; see also Open Records Decision No. 526 (1989). Thus, with the exception of the employee’s name, courses taken, and degrees obtained, the district must withhold the submitted college transcripts in Exhibit F pursuant to section 552.102(b) 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). Gov’t Code § 552.137(a)-(c). Section 552.137 is not applicable to an e-mail address provided to a governmental body on a letterhead or an e-mail address maintained by a governmental entity for one of its officials or employees. You claim portions of the submitted information are excepted from disclosure under section 552.137 of the Government Code. However, we note the e-mail addresses you have marked are provided to the district on letterheads. Thus, no portion of the responsive information may be withheld under section 552.137.

In summary, the district must withhold the documents we have marked in Exhibits C and D under section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code to the extent the individual at issue held the appropriate certificate under chapter 21 of the Education Code at the time the information at issue was created. The district must withhold the information we have marked in Exhibit G 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 date of birth we have marked in Exhibit E under section 552.102(a) 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.texasattorneygeneral.gov/open/>

[orl_ruling_info.shtml](#), 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Tim Neal
Assistant Attorney General
Open Records Division

TN/dls

Ref: ID# 488988

Enc. Submitted documents

c: Requestor
(w/o enclosures)