



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 5, 2013

Ms. Chris G. Elizalde
Counsel for the Mart Independent School District
Walsh, Anderson, Gallegos, Green, and Trevino, P.C.
P.O. Box 2156
Austin, Texas 78768

OR2013-19318

Dear Ms. Elizalde:

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# 504889.

The Mart Independent School District (the "district"), which you represent, received a request for (1) information related to two named individuals and alleged testing violations, including the results of the district's investigation and the report made to the Texas Education Agency (the "TEA"); (2) information related to a third individual related to a report to the TEA "and who was appointed to do the investigations"; and (3) a specified e-mail pertaining to the requestor. You state the district has provided some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.102 of the Government Code. We have considered the exceptions you claim and reviewed 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 exception encompasses information protected by other statutes. You raise section 552.101 in conjunction with section 39.0302 of the Education Code, which provides, in relevant part, the following:

(a) During [a TEA] investigation or audit of a school district under Section 39.0301(e) or (f), an accreditation investigation under Section 39.057(a)(8) or (13), or an investigation by the State Board for Educator Certification of an educator for an alleged violation of an assessment instrument security procedure established under Section 39.0301(a), the commissioner [of education] may issue a subpoena to compel the attendance of a relevant witness or the production, for inspection or copying, of relevant evidence that is located in this state.

...

(d) All information and materials subpoenaed or compiled in connection with an investigation or audit described by Subsection (a):

(1) are confidential and not subject to disclosure under Chapter 552, Government Code; and

(2) are not subject to disclosure, discovery, subpoena, or other means of legal compulsion for release to any person other than:

(A) the commissioner [of education] or the State Board for Educator Certification, as applicable;

(B) agency employees or agents involved in the investigation, as applicable; and

(C) the office of the attorney general, the state auditor's office, and law enforcement agencies.

Educ. Code § 39.0302(a), (d). This section makes confidential all information subpoenaed or compiled in connection with a TEA investigation of a school district for potential violation of assessment instrument security. *Id.* § 39.0302; *see also id.* § 39.0301(e). You inform us the submitted information was compiled by the district in connection with its own internal investigation into potential violations of test assessment instrument security. Although you inform us the district provided its information to the TEA, you have failed to demonstrate the submitted information was subpoenaed or compiled in connection with the TEA's investigation into the matter under section 39.0301(e). Accordingly, section 39.0302 is not applicable to the submitted information and the district may not withhold any of the information at issue under section 552.101 of the Government Code on that basis.

Section 552.101 also encompasses the doctrine of 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 satisfied. *Id.* at 681-82.

Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Information pertaining to the work product and job performance of public employees is subject to a legitimate public interest and is, therefore, generally not protected from public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (public employee's job performance does not generally constitute employee's private affairs), 455 (1987) (public employee's job performance or abilities generally not protected by privacy), 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employee), 423 at 2 (1984) (scope of public employee privacy is narrow). Upon review, we find you have not demonstrated how any portion of the submitted information is highly intimate or embarrassing and not of legitimate public concern. Thus, no portion of the submitted information may be withheld under section 552.101 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). You 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.

Having carefully reviewed the information at issue, we find no portion of the submitted information is subject to section 552.102(a) of the Government Code, and the district may not withhold any of the submitted information on that basis. As you raise no other exception to disclosure, the district must release the submitted information.

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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/bhf

Ref: ID# 504889

Enc. Submitted documents

c: Requestor
(w/o enclosures)