



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 12, 2014

Mr. Jaime J. Muñoz
Counsel for the La Joya Independent School District
Law Office of Jaime J. Muñoz
P.O. Box 47
San Juan, Texas 78589

OR2014-10115

Dear Mr. Muñoz:

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# 525753.

The La Joya Independent School District (the "district"), which you represent, received two requests for information pertaining to a specified bus accident, including associated police reports, communications, photographs, and videos, as well as all paperwork pertaining to a specified bus driver, including discipline, hiring, and termination records. You state a portion of the information responsive to the second request has been released to the second requestor. You also state some of the information responsive to the second request does not exist.¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.114, 552.117, 552.130, and 552.147 of the

¹We note the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

Government Code.² We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the United States Department of Education Family Policy Compliance Office (the “DOE”) has informed this office that the Family Educational Rights and Privacy Act (“FERPA”), 20 U.S.C. § 1232g, 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.³ 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 you have withheld the requested video and audio recording. Because our office is prohibited from reviewing these records to determine the applicability of FERPA, we will not address its applicability to the information you have withheld. Such determinations under FERPA must be made by the educational authority in possession of such records. However, you have also submitted an Incident Event Report generated by the district’s police department. 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. We understand this information is maintained by the district’s police department for law enforcement purposes. Accordingly, the Incident Event Report at issue is not subject to FERPA, and may not be withheld by the district on that basis. Likewise, we do not address your argument under section 552.114 of the Government Code. *See* Gov’t Code §§ 552.026 (incorporating FERPA into Act), .114 (excepting from disclosure “student records”); Open Records Decision No. 539 (1990) (determining same analysis applies under section 552.114 of Government Code and FERPA). However, we will address your arguments against disclosure for the remaining requested information.

Next, we must address the district’s obligations under section 552.301 of the Government Code. Section 552.301 of the Government Code prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. *See* Gov’t Code § 552.301(e). Under section 552.301(e), a governmental body receiving an open records request for information that it wishes to withhold pursuant to one of the exceptions to public disclosure is required to submit to this office within fifteen business days of receiving the request (1) general written comments

²Although you also claim section 552.026 of the Government Code, 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 FERPA. Gov’t Code § 552.026.

³A 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>.

stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See id.* § 552.301(e). The district states it received a request for information from the first requestor for four categories of information on March 25, 2014, and from the second requestor for fourteen categories of information on April 4, 2014. Thus, the district was required to submit the documentation required by section 552.301(e) by April 8, 2014, and April 25, 2014 respectively. However, the district has not submitted the responsive bus maintenance records you reference in response to the first request, or the request letter from the second requestor dated April 4, 2014.⁴ Consequently, the district did not comply with section 552.301 with respect to the bus maintenance records or the remaining information responsive to the second request.

Although the district asserts the information at issue is excepted under sections 552.103 and 552.108 of the Government Code, these exceptions are discretionary and serve only to protect a governmental body's interests, and may be waived. As such, these sections do not constitute compelling reasons to withhold information for purposes of section 552.302. *See* Open Records Decision Nos. 665 at 2 n.5, 663 at 5, 177 at 3 (1997) (statutory predecessor to section 552.108 subject to waiver). Thus, in failing to comply with section 552.301 in regard to the referenced bus maintenance records, the district has waived its claims under sections 552.103 and 552.108 for such information, and these records must be released.

In addition, by failing to comply with section 552.301 with respect to the remaining information responsive to the second request, the district has also waived its claims under sections 552.103 and 552.108 for such information. Thus, the district may not withhold any remaining information responsive to the second request under sections 552.103 or 552.108. Additionally, we note in waiving sections 552.103 and 552.108 for the information responsive to the second request, the district also waived its claims for this same information with respect to the first request for information. *See* Gov't Code § 552.007 (prohibiting selective disclosure of information); Open Records Decision No. 463 at 1-2 (1987). Accordingly, the district may not withhold the submitted incident report under sections 552.103 or 552.108. We note, however, the submitted incident report contains information subject to section 552.130 of the Government Code, which is a mandatory exception to disclosure and can provide a compelling reason to overcome the presumption of openness. As such, we will address the applicability of that section to the submitted

⁴We note because you did not submit the second requestor's request for information, we have no way to determine whether the information you submitted in response to the first request, with the exception of the submitted incident report, is also responsive to the second request. Accordingly, any portion of the information you submitted in response to the first request that is also responsive to the second request must be withheld from or released to the second requestor in accordance with this ruling.

incident report. Additionally, we note the district complied with its obligations under section 552.301 with respect to the remaining information submitted in response to the first request. As such, we will address your arguments for the remaining information responsive to the first request.

You assert the remaining responsive information is subject to section 552.108 of the Government Code. Section 552.108(a)(2) of the Government Code excepts from disclosure information concerning an investigation that concluded in a result other than conviction or deferred adjudication. Gov't Code § 552.108(a)(2). A governmental body claiming section 552.108(a)(2) must demonstrate the requested information relates to a criminal investigation that concluded in a final result other than a conviction or deferred adjudication. *See id.* § 552.301(e)(1)(A); Open Records Decision No. 434 at 2–3 (1986). However, upon review, we find you have not demonstrated how any of the remaining information at issue relates to a concluded criminal investigation that did not result in a conviction or deferred adjudication. Accordingly, we find the district may not withhold any of the remaining information under section 552.108(a)(2).

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 a current or former employee or official of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code, except as provided by section 552.024(a-1). *See* Gov't Code §§ 552.117(a)(1), .024. Section 552.024(a-1) of the Government Code provides, "A school district may not require an employee or former employee of the district to choose whether to allow public access to the employee's or former employee's social security number." *Id.* § 552.024(a-1). Thus, the district may only withhold under section 552.117 the home address and telephone number, emergency contact information, and family member information of a current or former employee or official of the district who requests this information be kept confidential under section 552.024. 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 be withheld under section 552.117(a)(1) only on behalf of a current or former employee or official 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. We note the employee whose information is at issue timely elected under section 552.024 to keep his information confidential. However, section 552.117 protects personal privacy and the second requestor is the authorized representative of the employee whose information is at issue. Therefore, the second requestor has a right of access to his client's own private information, and that information may not be withheld from him under section 552.117(a)(1). *See* Gov't Code § 552.023 (person or person's authorized representative has special right of access to information held by governmental body that relates to person and that is protected from public disclosure by laws intended to protect person's privacy interests); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests

information concerning himself). Nevertheless, the first requestor has no such right of access. As such, the district must withhold the information we have marked under section 552.117(a)(1) of the Government Code from the first requestor. However, the district must withhold the cellular telephone number we marked only if a governmental body does not pay for the cellular telephone service.

Section 552.147(a-1) of the Government Code provides, "The social security number of an employee of a school district in the custody of the district is confidential." Gov't Code § 552.147(a-1). The Eighty-third Texas Legislature amended section 552.147 to make the social security numbers of school district employees confidential, without such employees being required to first make a confidentiality election under section 552.024 of the Government Code. *See id.* § 552.024(a-1) (a school district may not require an employee or former employee of the district to choose whether to allow public access to the employee's or former employee's social security number). We note the second requestor has a special right of access to his client's social security number. *See* Gov't Code § 552.023(a); ORD 481. Therefore, the district must withhold the social security numbers we have marked under section 552.147(a-1) of the Government Code from the first requestor.

Section 552.130 excepts from disclosure information relating to a motor vehicle operator's or driver's license or permit or a motor vehicle title or registration issued by an agency of this state or another state or country. *See* Gov't Code § 552.130(a)(1)-(2). We note the second requestor has a right of access to his client's motor vehicle record information. *See id.* § 552.023(a); ORD 481. Accordingly, the district must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code from both requestors; however, the district must release to the second requestor the motor vehicle record information pertaining to the second requestor's client.

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 other statutes, such as 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. 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). In Open Records Decision No. 643, we 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 or a school district teaching permit under section 21.055, and who is engaged in the process of teaching, as that term is commonly defined, at the time of the evaluation. *See* ORD 643 at 4. We further determined that "teacher interns, teacher trainees, librarians, educational aids and counselors cannot be teachers or administrators for purposes of section 21.355." *See id.* at 5.

You assert the completed bus driver evaluations are confidential under section 21.355 of the Education Code. However, the evaluations at issue pertain to the performance of the individual at issue as a bus driver and not as a teacher engaged in the process of teaching. Consequently, the district may not withhold the bus driver evaluations at issue under section 552.101 of the Government in conjunction with section 21.355 of the Education Code.

Section 552.101 also encompasses information protected by other statutes, including section 1324a of title 8 of the United States Code. Section 1324a governs I-9 forms and their related documents. This section provides an I-9 form and “any information contained in or appended to such form, may not be used for purposes other than for enforcement of this chapter” and for enforcement of other federal statutes governing crime and criminal investigations. *See* 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). Release of the submitted I-9 form in this instance would be “for purposes other than enforcement” of the referenced federal statutes. Accordingly, we conclude the submitted I-9 forms are confidential pursuant to section 1324a of title 8 of the United States Code and must be withheld in their entirety under section 552.101 of the Government Code.

Section 552.101 also encompasses the Medical Practice Act (the “MPA”), subtitle B of title 3 of the Occupations Code.⁵ *See* Occ. Code § 151.001. Section 159.002 of the MPA provides, in part:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient’s behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Id. § 159.002(a)-(c). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004; Open Records

⁵The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body but ordinarily will not raise other exceptions. *See* ORD 481, 480 (1987), 470 (1987).

Decision No. 598 (1991). This office has concluded the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Medical records must be released upon the patient's signed, written consent, provided the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Occ. Code §§ 159.004, .005. Upon review, we find the information we have marked consists of records created by either a physician or someone under the supervision of a physician. Thus, the information we marked under the MPA is confidential and must be withheld under section 552.101 of the Government Code.

Section 552.101 also encompasses section 40.321 of title 49 of the Code of Federal Regulations. Section 40.321 relates to the confidentiality of workplace drug and alcohol testing and provides:

Except as otherwise provided in this subpart, as a service agent or employer participating in the [United States Department of Transportation] drug or alcohol testing process, you are prohibited from releasing individual test results or medical information about an employee to third parties without the employee's specific written consent.

49 C.F.R § 40.321. We note the submitted information contains drug and alcohol test results of a district employee. We further note the documents reflect the drug and alcohol tests were performed in accordance with part 40 of title 49 of the Code of Federal Regulations. You do not indicate that any written consent has been given with respect to disclosure of the information in question. *See id.* § 40.321(b). Based upon your representations and our review, we conclude the district must withhold the information we have marked under section 552.101 in conjunction with section 40.321 of title 49 of the Code of Federal Regulations.⁶

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."⁷ 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). We note the second requestor has a

⁶As our ruling is dispositive for this information, we need not address your remaining argument against its disclosure.

⁷The 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).

right of access to his client's birth date. *See* Gov't Code § 552.023(a); ORD 481. As such, the district may not withhold the birth date at issue from the second requestor, but must withhold the date of birth we have marked under section 552.102(a) of the Government Code from the first requestor.

Section 552.137 of the Government Code 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). The e-mail addresses we have marked are not excluded by subsection (c). We note the requestor has a right of access to his client's e-mail address pursuant to section 552.137(b) of the Government Code. *See id.* § 552.137(b). Therefore, the district must withhold the personal e-mail address we have marked under section 552.137 of the Government Code from the first requestor, unless the owner affirmatively consents to its public disclosure.

In summary, the district must withhold the personal information we marked under section 552.117(a)(1) of the Government Code from the first requestor. However, the district must withhold the cellular telephone number we marked only if a governmental body does not pay for the cellular telephone service. The district must withhold the social security numbers we have marked under section 552.147(a-1) of the Government Code from the first requestor.

The district must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code; however, the district must release to the second requestor the motor vehicle record information pertaining to the second requestor's client. The district must withhold the submitted I-9 forms from both requestors under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code. The district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the MPA from both requestors. The district must withhold the information we have marked under section 552.101 in conjunction with section 40.321 of title 49 of the Code of Federal Regulations from both requestors. The district must withhold the date of birth we have marked under section 552.102(a) of the Government Code from the first requestor. The district must withhold the personal e-mail address we have marked under section 552.137 of the Government Code from the first requestor, unless the owner affirmatively consents to its public disclosure.. 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.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,



Joseph Behnke
Assistant Attorney General
Open Records Division

JB/som

Ref: ID# 525753

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)