



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 16, 2014

Ms. Cynthia L. Benavides
Jones, Galligan, Key & Lozano, L.L.P.
P.O. Box 1247
Weslaco, Texas 78599-1247

OR2014-18618

Dear Ms. Benavides:

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# 540538.

The Sharyland Independent School District (the "district"), which you represent, received a request for (1) the personnel file of a named district employee, (2) a letter of suspension pertaining to the same employee, and (3) "[a]ll formal complaints filed against [the district's] superintendent, assistant superintendents, or campus principals within the last year as well as formal responses to complaints[.]"¹ You state the district has released some responsive information. We understand the district redacted an employee's social security number pursuant to section 552.147(a-1) of the Government Code.² You claim some of the submitted information is excepted from disclosure under sections 552.101 and 552.102 of the Government Code. You inform us you have notified the individuals whose personal information is at issue pursuant to section 552.304 of the Government Code. *See Gov't Code*

¹You state the district sought and received clarification of the request. *See Gov't Code* § 552.222(b) (providing that if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when governmental entity, acting in good faith, requests clarification or narrowing of unclear or overbroad request for public information, ten-day period to request attorney general ruling is measured from date request is clarified or narrowed).

²Section 552.147(a-1) provides, "[t]he 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) (school district may not require employee or former employee of district to choose whether to allow public access to employee's or former employee's social security number).

§ 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the claimed exceptions and reviewed the submitted information.

Initially, we note some of the requested information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2014-17923 (2014). In that ruling, we determined, in part, the administrative leave letter of the named employee was responsive to the request for the employee's letter of suspension and the district must release it. We have no indication the law, facts, or circumstances on which the prior ruling was based have changed. Accordingly, the district must continue to rely on Open Records Letter No. 2014-17923 as a previous determination and release the administrative leave letter, submitted as Exhibits F and G, in accordance with that ruling. *See* Open Records Decision No. 673 at 6-7 (2001) (discussing criteria for first type of previous determination). We will address the district's arguments against release of the submitted information that is not encompassed by Open Records Letter No. 2014-17923.

Next, we note the United States Department of Education Family Policy Compliance Office has informed this office the Family Educational Rights and Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code, 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.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 have submitted for our review unredacted records containing personally identifiable information of a student. 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. *See* 20 U.S.C. § 1232g(a)(1)(A). Such determinations under FERPA must be made by the educational authority in possession of the education records. However, we will consider your arguments against disclosure of the submitted information.

You assert the employee's address and telephone number are excepted from disclosure under section 552.101 of the Government Code in conjunction with section 22.08391 of the Education Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision[.]" and encompasses information protected by other statutes, such as section 22.08391 of the Education Code. Gov't Code § 552.101. Subchapter C of chapter 22 of the Education Code

³A 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>.

addresses criminal history records of school district employees and volunteers. Section 22.08391 provides in part:

(a) Information collected about a person to comply with this subchapter, including the person's name, address, phone number, social security number, driver's license number, other identification number, and fingerprint records:

(1) may not be released except:

(A) to comply with this subchapter;

(B) by court order; or

(C) with the consent of the person who is the subject of the information;

(2) is not subject to disclosure as provided by [the Act]; and

(3) shall be destroyed by the requestor or any subsequent holder of the information not later than the first anniversary of the date the information is received.

Educ. Code § 22.08391(a). Thus, except in the specified circumstances, section 22.08391 prohibits the release of information about a person collected in order to conduct a criminal history record search.

Upon review, we find the district has failed to demonstrate the address and telephone number at issue were collected about an employment applicant for purposes of conducting a criminal history record search. Accordingly, we conclude the information at issue is not confidential under section 22.08391 of the Education Code and the district may not withhold it under section 552.101 of the Government Code on that basis.

Section 552.101 of the Government Code also encompasses information protected by 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. Additionally, this office has concluded personal financial information not relating to the financial transaction between an individual and a governmental body is protected under common-law privacy. *See* Open Records

Decision No. 600 (1992) (public employee's withholding allowance certificate, designation of beneficiary of employee's retirement benefits, direct deposit authorization, and employee's decisions regarding voluntary benefits programs, among others, protected under common-law privacy). However, this office has noted the public has a legitimate interest in information that relates to public employees and their conduct in the workplace. *See, e.g.*, Open Records Decision Nos. 562 at 10 (1990) (personnel file information does not involve most intimate aspects of human affairs but in fact touches on matters of legitimate public concern), 470 at 4 (job performance does not generally constitute public employee's private affairs), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of government employees), 405 at 2 (1983) (manner in which public employee's job was performed cannot be said to be of minimal public interest).

Upon review, we find some of the submitted information satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find the district failed to demonstrate how any portion of the remaining information is highly intimate or embarrassing, or it is of legitimate public concern. Thus, none of the remaining information may be withheld under section 552.101 of the Government Code 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). 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. Upon review, we find the district must withhold the employee's date of birth in the submitted records under section 552.102(a) of the Government Code. However, none of the remaining information may be withheld on that basis.

Section 552.102(b) of the Government Code excepts from disclosure higher education transcripts of professional public school employees, but does not except the employee's name, the courses taken, and the degree obtained from disclosure. Gov't Code § 552.102(b); *see also* Open Records Decision No. 526 (1989). Accordingly, with the exception of the

employee's name, courses taken, and degrees obtained, the district must withhold the submitted college transcript pursuant to section 552.102(b) of the Government Code.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, social security numbers, emergency contact information, 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, except as provided by section 552.024(a-1). *See* Gov't Code §§ 552.117(a)(1), .024. As noted above, 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 withhold under section 552.117 only 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 piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Consequently, information may only be withheld under section 552.117(a)(1) on behalf of a current or former district 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 or official who did not timely request under section 552.024 the information be kept confidential.

If the employee whose personal information is at issue timely requested confidentiality under section 552.024 of the Government Code, the district must withhold the information we have marked under section 552.117(a)(1) of the Government Code. Conversely, if the employee whose information is at issue did not timely request confidentiality under section 552.024, the district may not withhold the marked information under section 552.117(a)(1).

We note the remaining information contains information subject to section 552.130 of the Government Code.⁴ Section 552.130 of the Government Code provides information relating to a motor vehicle operator's or driver's license issued by a Texas agency or an agency of another state or country is excepted from public release. Gov't Code § 552.130(a)(1). Upon review, we find the district must withhold the information we have marked under section 552.130 of the Government Code.

To summarize: The district must continue to rely on Open Records Letter No. 2014-17923 as a previous determination and release the administrative leave letter, submitted as

⁴The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Exhibits F and G, in accordance with that ruling. We do not address the applicability of FERPA to any of the submitted records. The district must withhold (1) the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy; (2) the employee's date of birth under section 552.102(a) of the Government Code; (3) the submitted college transcript pursuant to section 552.102(b) of the Government Code, with the exception of the employee's name, courses taken, and degrees obtained; (4) the information we have marked under section 552.117(a)(1) of the Government Code, provided the employee whose personal information is at issue timely requested confidentiality under section 552.024 of the Government Code; and (5) the information we have marked under section 552.130 of the Government Code. The district must release the remaining responsive information.⁵

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/dls

Ref: ID# 540538

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁵We note the Public Information Handbook is available on the resources page of the Office of the Attorney General's website at https://www.oag.state.tx.us/open/og_resources.shtml#pia_hb.